July 6, 2018

Independent Assessment Process (IAP)
2018 Update to the IAP Completion Strategy

Background

In late 2013, an IAP Completion Strategy was prepared entitled "*Bringing closure, enabling reconciliation: a plan for resolving the remaining IAP caseload*". The Chief Adjudicator shared the report with the Oversight Committee and the National Administration Committee (NAC), and then submitted it to the Supervising Courts in January 2014.[1] With the Completion Strategy, the Chief Adjudicator also submitted a Request for Direction (RFD) for two specific measures to help ensure the timely completion of the IAP (Lost Claimant Protocol (LCP) [2] and Incomplete File Resolution (IFR) procedure[3]).

The Completion Strategy provided an update on the progress of the IAP and described activities that had been put in place to improve the rate of claims resolution (e.g. reducing mandatory document collection delays, accelerated hearing process, short form decisions, etc.). Specifically, it was envisioned that first claimant hearings would be completed by the spring of 2016, all claims would be concluded by the spring of 2018, reviews/legal fee appeals during 2018-19, and the administrative closure would occur during 2019-20. It was also noted that a claimant-centred approach would be maintained throughout the IAP, including providing support to unrepresented claimants, providing funding to allow healing activities for groups of claimants, and engaging claimants, key partners, and stakeholders to foster a culturally sensitive approach to identify and address claimants' needs and build awareness of claimants' rights in the IAP. Finally, the report identified several factors that could put the completion timelines at risk, including availability of parties to attend hearings, capacity of the Adjudication Secretariat to hold hearings, a shortage of hearing-ready files, and files that were unable to proceed to hearing.

The Completion Strategy was last updated in March 2017 and submitted to the courts in May 2017.[4]

This Update reports on the initiatives undertaken to ensure timely resolution of claims, progress made in resolving IAP claims and challenges/risks to resources and to completion of the IAP.

Current Status

Caseload Update

Statistical update as of June 4, 2018:

- Of the 38,098 claims received, 37,772 (99%) have been resolved and 326 remain to be resolved.
- Of the 326 unresolved claims, 206 have had a hearing and are in the post-hearing stage, and 120 are unheard claims.
- It is estimated that approximately 14 of the unheard claims will get to a hearing and approximately 106 claims will be resolved without a hearing through the Negotiated Settlement Process (NSP) or the Estate Pre-Hearing Teleconference (EPHT) process.

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[1] http://www.iap-pei.ca/media/information/publication/pdf/pub/com-2013-12-10-eng.pdf

[2] *The Lost Claimant Protocol provided the Adjudication Secretariat with additional authorities to search for claimants who have lost contact with their lawyer or the Adjudication Secretariat.*

[3] *The Incomplete File Resolution Procedure allowed the Adjudication Secretariat to resolve claims that could not proceed to a hearing.*

[4] http://www.iap-pei.ca/pub-eng.php?act=iapmisc-comp-2017-eng.php

Initiatives to Resolve Current Caseload

Estate/Deceased Claims:

- In early 2015, Canada indicated that it may be in a conflict of interest in some cases given that Canada is a defendant party yet the Minister may have statutory jurisdiction in relation to an estate claim if the claimant has been ordinarily resident on reserve at the time of death. On March 2, 2016, the Chief Adjudicator agreed to put all deceased claimant files "with no administrator identified" on hold until April 29, 2016, to allow Canada time to identify an approach to deal with files where Canada may have statutory jurisdiction.
- If Canada has jurisdiction, it is responsible for appointing a third party administrator to manage the file, or for finding a family member to act as the administrator.
- Estate/deceased claims now make up 44% of the remaining caseload, with 105 files at the pre-hearing stage and 39 at the post hearing stage, for a total of 144 files.
- Canada has determined jurisdiction on all unresolved deceased claimant files. All remaining pre-hearing files and 16 of the remaining 39 post hearing files are under its jurisdiction.
- Of the remaining 105 claims in the pre-hearing caseload, 74 claims are progressing to resolution while 31 files continue to face delays as Canada has yet to appoint a family member or independent third party administrators to represent these claims through the EPHT process.
- In order to allow for enough time to schedule any potential estate witness hearings prior to the December 1, 2018 deadline for first claimant hearings, the Chief Adjudicator has instructed adjudicators to complete all EPHTs by September 30, 2018.

Lost Claimant Protocol

The Lost Claimant Protocol is complete, except for being available to assist in locating lost Blott DNQ claimants as summarized below and for the limited purpose of assisting in locating post decision claimants who have unresolved travel claims. Since its introduction, the Protocol has succeeded in re-establishing contact with claimants 569 times on 545 unique claimant files. 841 referrals for searches have been received by the Lost Claimant Protocol, affecting 771 unique claimant files. Searches have been exhausted without locating the claimant for 271 claims.

Incomplete File Resolution Procedure

The IAP Oversight Committee extended the IFR reconsideration deadline from August 1, 2017 to June 1, 2018. This was the last date by which a claimant may request the Chief Adjudicator reconsider a dismissal under the IFR. Of the 528 claims that were dismissed in IFR, 26 requests for reconsideration were received. Of these, 19 were granted, 2 were dismissed, 1 was considered abandoned as the required Estate Administrator Appointment documents were not forthcoming prior to the deadline, 2 were withdrawn and 2 were denied.

All claims in IFR have reached resolution prior to the June 1, 2018 reconsideration deadline. Since its implementation, a total of 705 claims were returned to the regular stream for a hearing or referred to another targeted approach (such as the LCP), and 528 claims were resolved through an IFR Resolution Direction dismissal.

Post-hearing and Student on Student (SOS) Claims

Most claims that have had a hearing are progressing toward a decision in a timely manner. The exceptions are claims that have been placed on hold pending SOS Admissions. Issues related to SOS Admissions are described in the 'SOS Claims' section below.

Progress towards Completion of the IAP

The following provides a brief summary of the progress achieved towards completion of the IAP since the submission of the Chief Adjudicator's Completion Strategy update to the Courts in May of 2017:

- The last claim[5] was admitted September 2017. This was a former Blott client covered by Justice Brown's June 2012 decision that all applications collected by David Blott's firm be deemed submitted.
- Initiatives to move unrepresented claimant files to resolution and to assist them in finding legal representation have proven successful. Aside from deceased claimant files, only 4 unrepresented claimant files remain unresolved.
- A review of files impacted by the administrative split of schools from Indian Residential Schools (IRS) was completed by Canada and the hold placed on these files has since been removed. All pre-decision files that were impacted have either progressed to resolution or are in progress towards resolution. Post decision files found to have been impacted have been offered a negotiated settlement external to the IAP.
- Barring the referral of new claims by the courts and potential Blott DNQ claims, excluding estate witness hearings, only 8 or 9 more first claimant hearings are expected to take place. All first hearings are expected to be concluded on or before December 1, 2018.

Completion Timeline

In the Completion Strategy update submitted to the courts in May 2017 the following milestones for completion were established:

- January 31, 2017: non-admit appeal deadline
- August 1, 2017: reconsideration deadline for IFR Resolution Directions dismissing a claim
- February 1, 2018: last possible first hearing
- Spring 2018: post-hearing work completed
- September 1, 2019: all claims resolved
- March 31, 2020: Secretariat closes

In the time since, it has become apparent that these timelines were not achievable due to factors outside the Secretariat's control. With the decision by the IAP Oversight Committee to extend the IFR Reconsideration Deadline to June 1, 2018, the following new targets have been approved:

- June 1, 2018: reconsideration deadline for IFR Resolution Directions dismissing a claim
- December 1, 2018: last possible first claimant hearing
- December 1, 2020: all post-hearing and decisions concluded
- March 31, 2021: Secretariat closes

[5] Again, subject to potential Blott DNQ claims that may come to the Admissions Unit, as noted below.

The closure date of the Secretariat, linked to the IAP Sunset date, has not yet been confirmed and will be set by the Courts following submissions by the Parties. However, based on existing assumptions, we are forecasting that decisions and post-decision activities will continue until December 1, 2020. Funding allocated for the current year is anticipated to be sufficient to meet needs. The Secretariat continues working with CIRNAC (formerly INAC) and Health Canada on a new Treasury Board submission to ensure funding continuity through to March 2021, in order to allow for administrative closure to occur by March 31, 2021. The Secretariat is investing significant time and effort to the process of planning and implementing the gradual wind-down of the organization with respect to resourcing, knowledge transfer, the disposition of residual work following the closure of the organization, and providing appropriate support to staff.

Challenges and Risks to Completion

The following sections outline the continuing issues that could impede the conclusion of the IAP.

Resource Risks

With over 99% of hearings resolved, the IRSAS is beginning a critical period of staff reductions, while ensuring sufficient resources are in place until the completion of the IAP. Meanwhile, needs are increasing in other areas of the organization, most particularly with respect to the implementation of the Supreme Court of Canada's October 2017 decision regarding the disposition of Claimant records and the related Notice Program to Claimants; responding to multiple and far-reaching legal and policy questions before the courts or under discussion with parties; building and maintenance of relationships with stakeholders; and administrative efforts necessary to the wind-down process, especially information management. Retention and appropriate alignment of skilled and experienced staff will be critical to a successful wind-down process.

The parties, courts, governing bodies, and others involved may impact our workload in ways beyond our ability to control. Increased turnover, use of assignments, and realignment of individuals to new functions, combined with uncertainties and anxieties surrounding completion may lessen stability in work units and teams; thus affecting interpersonal dynamics and making team building, wellness, and strong leadership vital.

Continuing legal issues that may impact the completion of the IAP

Unresolved Article 12 applications:

- Article 12 of the Settlement Agreement allowed additions to the schools list contained in Schedules E and F of the Agreement. Canada could agree to add the proposed institution, or the applicant was entitled to bring an application to the Supervising Courts to add a school. The deadline for bringing such applications has passed.
- Since the 2017 Update, Article 12 cases involving the Teulon Residence (Manitoba) and Fort William have been concluded, with neither institution being added.
- Kivalliq Hall (estimated 100 potential class members) was added to the list of schools in the Nunavut Court of Justice's (NUCJ) decision of December 14, 2016. The Nunavut Court of Appeal

(which is the Alberta Court of Appeal) heard Canada's appeal from this decision on February 13, 2018 and its decision is pending.

- The Timber Bay Residence (estimated 650 potential class members) appeal was denied by the Saskatchewan Court of Appeal in August 2017. The requestors have filed a request to the Supreme Court of Canada to extend the time within which an application for leave may be filed.
    - If Kivalliq Hall and/or Timber Bay are added to the IRS list, new applications under the IAP could possibly prolong the completion of the IAP. When schools have been added in the past, the courts have granted 6 months from the date of the issuance of the relevant order within which applications were to be filed. From the date of admission forward, files requiring all steps would require up to two years to reach completion.

In summary, since the May 2017 Update, two of the then pending Article 12 cases have been resolved, but two remain outstanding.

Blott Claims not covered by court order:

- On October 31, 2016, the Court directed that Blott claims in which claimants had provided no further information by that date could be barred from the IAP, with certain files given extensions to December 31, 2016. While many Blott claims were barred from the IAP by the terms of that court order, the order did not capture all potential former Blott claimants, whose claims were deemed, by a 2012 Court Order, to have been submitted but not admitted to the IAP. There were a number of former clients of Blott that were not barred from applying to the IAP. An RFD brought by the Blott Transition Coordinator regarding the disposition of these files was heard by the Western Administrative Judge on June 29, 2018. On June 29, 2018, the court issued an order allowing for the potential consideration for admission into the IAP, 147 files that Blott and Company had determined Did Not Qualify (DNQ) and 12 files that were omitted from the October 2016 court direction. The court approved a truncated admissions process for considering such claims to determine whether any may qualify for admission to the IAP. This process requires all submissions in support of the admission of an application to be provided by September 14, 2018 and a decision on admission by the Secretariat to be made by October 1, 2018, subject to the right appeal a decision of the Admissions Unit to the Chief Adjudicator by October 15, 2018. The intent is so allow any Blott files not otherwise barred that are admitted to the IAP within these truncated timelines to proceed to a hearing by December 1, 2018, without extending the overall IAP completion timetable. All remaining Blott claims were ordered barred from admission to the IAP. While the timelines for dealing with such claims are challenging, there is good reason for optimism that with the co-operation of all concerned, they will be met.

Disposition of Records / Notice Program:

- On October 6, 2017, the Supreme Court of Canada confirmed that the Chief Adjudicator must conduct the Notice Program without delay and with full cooperation from the parties. Two RFDs—one to establish the Notice Program and one to establish the Records Agent post-IAP were submitted to the Ontario Superior Court of Justice in January 2018.
- The first (Notice Program) RFD sought direction approving forms of consent, notice products, and a notice plan and budget for the Chief Adjudicator to notify IAP and Alternative Dispute

Resolution (ADR) claimants of their right to have their IAP Retained Documents preserved at the National Centre for Truth and Reconciliation (NCTR).

- The second (Records Disposition) RFD asked for orders:
    - Appointing Crawford Class Action Services as Records Agent.
    - Authorizing the IAP Oversight Committee to designate the date of the IAP sunset, on notice to Crawford, the NAC and the Court Approving a budget for disposition costs and requiring Canada to provide funding.
    - Requiring the records agent to report to the court as directed and with such independent oversight as the Court may direct, authorizing Court Counsel to resolve disputes.
    - Authorizing the Secretariat's database system, SADRE, (delinked from source documents) to be retained until IAP sunset, after which it will be destroyed.
    - Authorizing the key components of the IAP decisions database, including the SOS Master List to be maintained until IAP sunset, at which time they will be destroyed.
- Both RFDs were scheduled to be heard on April 23 and 24, 2018.
- The court adjourned the hearing until May 23, 2018 and in a Direction issued July 4, 2018 ordered the following:
    - The Retention Period for ADR and IAP retained documents shall be from September 19, 2012 until September 19, 2027;
    - The destruction component of the Interim Order is suspended for Canada until the IAP is sunset or until further order of the court, whichever occurs first;
    - Canada is authorized to transfer to the Secretariat the IAP and ADR documents and personal information recorded to give effect to the Interim Order, and;
    - The crisis line telephone number shall remain in place until September 19, 2027.
    - The consent form regarding the archiving of records for ADR/IAP claimants who choose to do so, was approved.
    - The Notice Program put forward by the Chief Adjudicator was approved.
    - The Records Disposition Order, approving a hand-off of retained records to Crawford following IAP sunset, was approved.
    - The date of IAP sunset is to be determined by the Court.
- The Secretariat has put in place a plan for the implementation of the Records Disposition Order. This will allow the preparation of a Retained Documents Collection (RDC) for eventual transfer of claimant retained documents to the Records Agent in electronic format and the disposition of retained and non-retained claimant records.
- With the court decision in hand, assuming no appeals, the delivery of the Notice Program is slated to occur within the completion timetable set out in this Update. With implementation of advertising starting on January 1, 2019 and the program concluding on December 31, 2020, this takes us close to the planned closure date of March 2021.

Other Cases Pending Before the Courts

A number of cases presently pending before the courts may have impacts on the wind-down of the IAP, including the potential for the re-consideration of decided cases.

Judicial Recourse Requests for Directions (RFDs)

R-11791 (New Persons of Interest (POI) Report after adjudicator's decision):

- Canada's POI report stated that the POI was not at the IRS at the time of the Claimant's abuse. This was corrected by Canada, but not considered on Re-Review. The RFD was brought over 18 months later.
- Justice Brown's British Columbia Supreme Court (BCSC) decision did not grant relief as she found that there were no exceptional circumstances permitting recourse to the Supervising Court. The new evidence did not rise to the level required to engage judicial recourse, having regard to the full circumstances, as it was at best inconclusive as to whether the POI was present at the IRS at the relevant time.
- The British Colombia Court of Appeal (BCCA) allowed the appeal in a 2-1 decision on March 20, 2018, stating that the case met the Schachter test, being a "very exceptional circumstance." This case is important as it is the first time that a closed case was granted reconsideration by an appeal court as meeting the "very exceptional circumstances" criteria. In this case, the majority ordered that the case be reconsidered by the Chief Adjudicator following the updated POI Report ("new evidence/new information"). This decision may have impacts on other cases presently before the appellate courts or on hold in the IAP pending court decisions.

Sexual Assault, Level 1.4 (SL1.4):

- An RFD was filed in February 2016 which challenged a decision at the SL1.4 level, alleging misapplication of the IAP model with regard to requiring the claimant to prove sexual intent.
- In his August 3, 2016 decision, Justice Edmond of the Manitoba Court of Queen's Bench (MBQB) granted the Claimant's RFD, sending the claim back to a first-level IAP adjudicator.
- On May 30, 2017, the Manitoba Court of Appeal reversed the Supervising Judge's decision. As a result, the Claimant's application for compensation under the IAP was dismissed, and the adjudicator's decision was reinstated.
- The Supreme Court of Canada granted the requestor leave to appeal the decision of the Manitoba Court of Appeal. The hearing is scheduled for October 10, 2018. Although the decision in this case is not expected until most IAP cases have been heard, it presents an opportunity for the Supreme Court of Canada to provide a clear statement of the circumstances in which judicial recourse may be available to parties dissatisfied with an IAP decision.

Procedural Fairness:

- Justice Brown (BCSC) rendered her decision on January 17, 2018, agreeing with Canada that:
    - The occurrence of new information cannot be enough to undermine the finality of a decision.
    - Adjudicators remitting concluded IAP claims for determination following subsequent SOS Admissions disclosure or any other progressive disclosure is an intrusion on the exclusive jurisdiction of the supervising courts. The Settlement Agreement is a contract and the initial goal of the parties to the contract is of finality. The courts and officers (such as the Chief Adjudicator and designates) must honour the intentions of the parties in the contract; adjudicators cannot hold in abeyance claims for possible progressive disclosure and/or for SOS Admissions since it would defeat the important goal of finality in the Indian Residential Schools Settlement Agreement (IRSSA).

    - The authority to re-open a concluded claim rests with the court and the right to seek judicial recourse is limited to very exceptional circumstances, only exercised in rare and exceptional cases.
    - The IAP Model's claims assessment process is *sui generis* (one of its own), a complete code, an adjudicative model that incorporates procedural rules, such as procedural protections, but none of which includes the rights of procedural fairness as it is found in administrative law. Allegations of "breach of procedural fairness" do not permit exception from any of the rules of the IAP.
- Three parties filed Notices of Appeal.
- At the date of writing, no date has been set for the hearing of this appeal.

Student on Student (SOS) Claims:

- In her Direction released on January 17, 2018, regarding Canada's Procedural Fairness RFD, Justice Brown wrote, at paragraph 100:

> [100] The goal of finality was contracted for and built into the IRSSA. ***Use by the Chief Adjudicator and his designates of procedural fairness as a means of re-opening IAP claims or holding them in abeyance pending the potential receipt of future relevant SOS Admissions would compromise or defeat that important goal….***[Emphasis added]

- However, the matter was referred back to the Oversight Committee, with Canada's support; the Committee reaffirmed its support for a targeted approach to all SOS claims remaining in progress in the IAP, meant to ensure that claims deemed to have the highest likelihood of providing evidence leading to an admission proceed to a decision before other claims which could benefit from that admission.
- While thousands of SOS claims have now been concluded, a total of 138 claims in the Student on Student project remain; 36 of which are adjourned pending potential admissions by Canada.
- The NAC filed an RFD on the interpretation of certain terms of the Settlement Agreement concerning SOS claims that had already exhausted all rights of re-review within the IAP, seeking direction from the Court as to whether claimants are entitled to have their SOS claims determined based on the complete record of admissions by Canada and, if so, how to address claims dismissed as a result of an incomplete record of admissions which would have succeeded based on a complete record. On March 12, 2018 Justice Brown issued a decision dismissing the RFD.
- The NAC filed a notice of appeal seeking to overturn Justice Brown's decision and has asked the British Columbia Court of Appeal to determine that Canada has failed to comply with the document disclosure obligations (Schedule D of the IRSSA) and for decisions to remain in abeyance until full disclosure by Canada. No date has been set for the hearing of the appeal.
- On March 13, 2018, Canada announced it will pursue settlements outside the IAP with claimants whose claims of SOS abuse were previously dismissed or under-compensated due to the lack of admissions of staff knowledge / failure to take reasonable steps to prevent abuse at the time of their hearings. This action could impact approximately 240 former IAP claimants. It is expected that this process will be similar to the process Canada used in order to negotiate settlements of administrative split cases that had already been decided with a result adverse to the claimant. As Canada's process for dealing with these claims is taking place outside of the IAP, there is no involvement of IAP adjudicators, for example in approving legal fees. As such, this process is not expected to impact on the winding down of the IAP.

Scout:

- The Scout RFD was filed in June 2016, seeking to overturn a decision denying admission to an IAP application received on September 20, 2012, one day after the September 19, 2012 IAP application deadline. The requestor alleged that the IAP implementation date was calculated incorrectly – the requestor asserted that the application deadline ought to have been September 20, 2012. The requestor sought admission to the IAP and requested that the IAP application deadline be broadly re-opened to all former students for a 24-hour window, to allow new applications to be filed.
- Justice Brown's decision dismissing the Scout RFD on the basis of the doctrine of *res judicata* was rendered on March 15, 2017: the matter was previously decided in a previous decision; the same claim cannot be made again under a different legal guise. The arguments of the requestor should have been raised in the earlier proceeding. The court did not rule on the correctness of September 19, 2012 as the application deadline.
- Scout has appealed Justice Brown's decision to the British Columbia Court of Appeal. The hearing was scheduled to be heard in April 2018 but has now been adjourned with no new hearing date having been set.

Summary

With many of the risks identified in the May 2017 Completion Strategy Update having since been addressed/removed, we are presently aiming for conclusion of all claimant hearings by December 1, 2018, the conclusion of all claims by December 1, 2020, and the closure of the Secretariat by March 31, 2021. However, this Update outlines a number of risks that remain. Should these or other risk factors outside of the control of the Chief Adjudicator and the Secretariat materialize, adjustments to this timetable may be required. For mitigation purposes these risks are being monitored closely by the Chief Adjudicator and Secretariat staff, and initiatives are being implemented as necessary in order to ensure targets are met. The Chief Adjudicator will provide regular progress updates to the Oversight Committee and Supervising Courts.