

## Independent Assessment Process Oversight Committee

Meeting of May 5, 2015

Toronto, ON

### 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

Brian Gover	Court Counsel <i>present for items 1 to 5 only</i>
Daniel Shapiro	Chief Adjudicator
Shelley Trevethan	Executive Director, IRSAS
John Trueman	Senior Policy and Strategic Advisor, IRSAS (recorder)

#### 1. Report of the Technical Subcommittee

Karen Cuddy reported on the meeting of the Technical Subcommittee held by teleconference on April 14, 2015.

The student on student admissions project is on track, but there are concerns that some claimant counsel are not attending the mandatory pre-hearing conference calls. The Technical Subcommittee agreed that all 'priority 1' and 'priority 2' student-on-student cases should be scheduled for hearings immediately through the Accelerated Hearing Process.

The subcommittee also discussed the adjournment of student-on-student claims before final submissions in cases where no admission is available. Presently, these cases are deferred for one year, but can be further deferred. A question was raised as to whether there should be an end date, but DCA Kaye Dunlop was of the view that this was premature. The question will be revisited at a future meeting.

Adjudicators are preparing to move forward with implementation of Step Two of the Incomplete File Resolution procedure. The Chief Adjudicator has approved a roster of adjudicators for Step Two, and training is scheduled for June 19. Work is expected to start in summer 2015.

Canada is continuing its analysis of missing quarterly returns to determine if any of the quarterly returns newly discovered by the Truth and Reconciliation Commission's researchers might potentially have an impact on CEP claimants or decided IAP claims. Canada has not completed its analysis yet but an answer is expected soon.

In response to a question, Karen Cuddy said that this had happened only once before, in the Spring of 2014. At that time, Canada reviewed potentially affected cases and did not find any impacted by the absence of quarterly returns. She pointed out that there are other ways for the adjudicator to determine the claimant's attendance.

Mitch Holash asked if there was any opportunity to challenge Canada's findings, or if the process might be more transparent with claimant counsel participation. Karen Cuddy said that she did not feel a need if the absence of quarterly returns did not have an impact on the decision.

The Chief Adjudicator provided an update to adjudicators on March 27 describing Canada's decision to cease providing student attendance records on non-claimants in situations where claimant attendance is an issue. In some cases, although the practice was inconsistent, a claimant who did not appear in attendance records would name fellow students, and Canada would research those individuals and confirm their attendance to the adjudicator.

The Chief Adjudicator's update asked adjudicators to consider other kinds of collateral evidence where claimant attendance is an issue, such as calling witnesses, obtaining other evidence from the claimant, or receiving information from other sources. The Technical Subcommittee will have a further discussion at its July meeting, to look at other ways that Canada could comment without breaching student privacy.

Dan Shapiro said that one helpful avenue would be if the adjudicator could receive the claimant's permanent school record, covering both elementary and secondary schools. Diane Soroka pointed out that such records do not necessarily say where students were residing. She suggested that Canada might consider advising the adjudicator in cases where it has "no problem with attendance."

The Technical Subcommittee recommended a number of changes to Chief Adjudicator's Directive 7, the Transcript Distribution Policy, which were distributed in advance to committee members.

In response to a question, Karen Cuddy said that transcripts are redacted to remove the names of alleged perpetrators when provided to claimants, but they are not redacted when provided to counsel.

Mitch Holash asked about the appropriateness in all cases of the proposed 'general principle' that when a transcript is provided to one party, it will be provided to all parties. He pointed out that this would not be appropriate in cases where the claimant requested their own transcript for memorialisation.

David Paterson said this was often necessary to avoid problems where, for example, claimant counsel might make reference in submissions to a transcript that Canada does not have.

Mitch Holash cautioned against unnecessary distribution of transcripts, and suggested that parties might have a right of access to transcripts but they should not be automatically provided.

The Oversight Committee referred the proposed changes back to the Technical Subcommittee for further consideration.

The Technical Subcommittee had been working on a policy on postponement of assessments. When it proved difficult to reconcile and find common ground between comments of Canada and claimant counsel, the Secretariat decided not to proceed with a policy, but rather encourage adjudicators to deal with this issue as part of their general responsibility to manage the hearing.

However, Canada felt it would be advantageous to have a policy to encourage hearings to be resolved in a timely way, and offered to try to revise the policy to reconcile Canada and claimant counsel differences. The Technical Subcommittee will discuss it further at its next meeting.

The Adjudication Secretariat has been struggling with claimant failure to attend jurisdictional pre-hearing teleconferences, and has expanded its scope to work on a general policy on attendance at teleconferences. This was to be discussed at the Deputy Chief Adjudicators' meeting the previous day and will be ready for the next meeting of the Technical Subcommittee.

## **2. Approval of minutes**

The committee approved the minutes of the March 3, 2015 meeting with minor amendments.

### 3. Key performance indicators

Shelley Trevethan discussed significant performance indicators since the previous meeting:

- 33,625 applications have been admitted to date. The non-admit rate is 10.4%.
- 417 applications remain in the admissions stage, but only 109 are active. The 308 inactive claims includes a large number of deceased and lost claimants.
- About 2,000 claims are awaiting mandatory documents, down from about 6,000 a year ago.
- 883 cases are being dealt with by the Secretariat's Case Analysis and Resolution unit. Over 500 of these are deceased claimants, and a large number are lost claimants.
- Only 98 cases are in the scheduling queue - the lowest number ever.
- 24,395 hearings have been held since implementation, including 3,533 held in the 2014-15 fiscal year. This is below target, due to the shortage of hearing-ready files that began emerging partway through the year.
- The postponement rate is 15%, which is up slightly. About 20% of postponements are due to negotiated settlements, and generally occur about a month before the hearing, resulting in some cost savings. However, one-third of postponements occur the day of the hearing, and over half are within one week before the hearing. The postponement policy is deterring some postponements, but about 96% of all postponement requests are granted by adjudicators.
- About 2,100 post-hearing claims are awaiting decisions. The mean adjudicator writing time is 77 days, an improvement over the last six months.
- 31,505 claims have been resolved, about 83% of all claims received.
- 6,457 claims remain in progress, of which only 4,362 are unheard. However, many of these will not make it to a hearing for various reasons. The Secretariat estimates that about 2,200 hearings remain, of which 822 have already been scheduled.
- \$2.2 billion in compensation has been paid, including legal fees and disbursements.
- There are presently 1,200 self-represented claimants, or 19% of the active caseload. However, only 300 are active, participating claimants. There are

numerous lost or non-responsive claimants and estate claims without lawyers. The Secretariat is working with each active self-representative claimant to determine what is required to move their claim along.

Brian Gover noted that it has now been sixty days since the BC Court of Appeal decision on the application deadline. There are several other requests for direction involving late applications, which may not proceed.

Shelley Trevethan said that the issue of people who missed the deadline has arisen in several visits with claimant counsel. Brian Gover said that in some cases, the remedy will be a solicitor's negligence claim. Dan Shapiro also mentioned the provision in the Settlement Agreement that allows for legal action where an IAP claim has not been filed. He pointed out, however, that the Settlement Agreement's benefits are not available in such cases, and plaintiffs would have to argue limitation periods, vicarious liability, and causation.

Dave Iverson noted that the data do not include claims resolved in the ADR process before September 19, 2007. In total, 4,902 claims were decided in the ADR process, of which 2,617 were decided before implementation of the IAP and 2,285 were still active in September 2007.

#### **4. Executive Director's report**

Shelley Trevethan reported on visits to claimant counsel that she and senior Secretariat staff have completed over the past several months. The meetings were an opportunity to discuss each firm's caseload, the timelines for completion of the IAP, and the various initiatives underway to resolve claims. Generally the meetings were positive and educational.

Where the Secretariat had concerns about a firm's ability to complete first claimant hearings by March 2016, the firm was asked to submit a business plan. To date, 14 business plans have been received which demonstrate how the firm will meet the timelines. At this point, 15 firms are in danger of not meeting the March 2016 deadline - although some would only be a month or two out.

Flowing from the meetings is the Secretariat's proposal to set down all remaining hearings to be heard as Accelerated Hearing Process claims. This would allow claimant counsel and adjudicators to plan their remaining workload. A few categories of claims, including lost claimants and estate claims, would be excluded.

Line Paré said that Canada supports this proposal. With the low rate of hearings, Canada has an overcapacity of resolution managers and needs to start winding down its organization. If hearings are postponed until the last possible moment, there may not be enough people to attend.

In response to a question, Shelley Trevethan said that self-represented claimants would be included in this approach. In a small number of cases where the claimant does not feel ready to attend a hearing, staff are working to put the right supports in place. Setting down the remaining hearings provides a date for the claimant to plan towards.

Members indicated their support for the proposal, including the need to act with sensitivity in cases where the claimant does not yet feel ready to proceed.

Shelley Trevethan reported on a number of targeted approaches underway to help move claims forward:

- The estate claims process restarted in January. Many estates have not responded, and a second set of letters are now being sent.
- Thus far, 447 claims are set for hearing in the Accelerated Hearing Process, with another 31 to be scheduled. This number will increase as all remaining claims are set for hearing.
- 341 claimants are confirmed 'lost' and another 300 are suspected lost. As part of implementation of the lost claimant protocol, the Secretariat will be distributing radio public service announcements this month, and will distribute postcards at the upcoming Truth and Reconciliation Commission event.
- The Secretariat has received questions from legal counsel about whether represented claimants can participate in the 'claimants who struggle to self-represent' project to assist claimants with mental health issues. No decision has been made yet.
- There are a number of self-represented claimants who have attempted to retain legal counsel but have been refused by multiple law firms. These are moving forward in the Accelerated Hearing Process.
- So far, 130 claims have moved to Step One of the Incomplete File Resolution process. Of these, 87 have moved back into the regular hearing stream, and 29 have moved into one of the targeted approaches. No files have yet moved to Step Two, but procedures are in place and adjudicator training is scheduled for June.

Dave Iverson asked if self-represented claimants who are nervous about moving forward might benefit from proceeding as a group. It was noted that IAP claims don't move forward as a group. However, Shelley Trevethan said that a group information session was a possibility, including utilizing Health Canada to provide health supports. Dan Shapiro suggested that an adjudicator could meet

with the group and explain the hearing process. Line Paré said that Canada could assign a seasoned representative to assist. Shelley Trevethan said she would take the idea back to staff to work on the idea of a group information session for self-represented claimants who weren't ready to move to a hearing.

Shelley Trevethan distributed a one-page summary of the Secretariat's Completion Action Plan, which outlines the work being done to wind up the Secretariat. The major timelines are derived from the Completion Strategy: holding final first claimant hearings by spring 2016, releasing the final decisions by spring 2018, and closing the Secretariat by spring 2020. The themes of the plan are governance, people, caseload resolution, information, and corporate services, all arranged around a claimant-centred process with wellness and communication as overarching themes. The Secretariat is developing action plans for each theme.

Line Paré said that Canada is going through a similar exercise with its organization, which includes the Common Experience Payment and Personal Credits in addition to the IAP.

Shelley Trevethan met with Health Canada on April 16. The Secretariat will send a notice to claimant counsel with information on the supports that are available to claimants after the hearing. A document about health supports is also being prepared.

The Truth and Reconciliation Commission's final event will be held in Ottawa May 31 to June 3. A walk for reconciliation is planned for May 31, followed by an education day on June 1, the release of the TRC's final report on June 2, and a closing event at Rideau Hall on June 3. The Adjudication Secretariat will be present with a booth and support officers to provide information to claimants.

## **5. Chief Adjudicator's report**

Dan Shapiro reported on several developments in the records disposition case:

- The Ontario Court of Appeal has granted a stay of the destruction and transfer components of Justice Perell's order while the appeal is underway, but the confidentiality aspect will remain in force.
- The Privacy Commissioner of Canada has applied for and been granted leave to intervene in the appeal.

- The hearing is scheduled for October 27-28 at the Ontario Court of Appeal in Toronto.

A third request for directions relating to St. Anne's IRS will be heard in June. The primary issues are the organization and redaction of Canada's disclosure pursuant to Justice Perell's January 2014 order. The Chief Adjudicator is not participating in the RFD because the issues are squarely between the applicants and Canada.

Dan Shapiro referred members to the factum and amended request for direction in the Bishop Horden case, which is scheduled for hearing before Justice Perell on May 20.

The Alberta Court of Queen's Bench ruled on April 8 in the Grouard IRS years of operation case. The appeal period is still underway. Dan Shapiro said that if no appeal is filed, it is an administrative issue that can be managed quite effectively. However, if an appeal is filed there is the issue of what to do with cases still in progress. He noted that the decision of Chief Adjudicator Ish giving rise to this case was issued in August 2012.

Karen Cuddy suggested that if there is an appeal, things should continue on hold. Dan Shapiro expressed concern about continuing without an evidentiary record, and the risk that no evidence will have been gathered if a claimant dies while an appeal is underway.

David Paterson pointed out that while the present RFD addressed directly the question of adjudicators' jurisdiction, there are numerous factual issues involving other schools that are quite distinct.

*Brian Gover left the meeting.*

Dan Shapiro reported on several other issues:

- New features have been added to the decision database. School narratives are now available on the database and will no longer be distributed in evidentiary packages. The Secretariat is looking at making previous versions available on the database as well. A module has been added for school yearbooks. The student on student admissions module has been changed to become more user-friendly.
- Adjudicators Michael Bay and Anne Bolton have written a paper on assisting claimants with mental health issues, which will be distributed to parties once it has been translated.

- Mayo Moran, Dan Shapiro, Shelley Trevethan, and John Trueman will attend a meeting of the National Administration Committee scheduled for the next day.
- A national adjudicator meeting is scheduled for June 8-10 in Winnipeg. Chief Adjudicator Hughes will speak at a dinner for adjudicators. Prior to the main meeting, special meetings for Aboriginal and Francophone adjudicators will be held, along with a reception at the Canadian Museum of Human Rights where former National Chief Phil Fontaine will speak. Based on advice from Aboriginal adjudicators, elder support will be available throughout the entire meeting. Sessions include cultural awareness, Aboriginal perspectives on healing, and supporting self-represented claimants.

## **6. Future meeting dates**

The Oversight Committee agreed to change the date and location of the October 2015 meeting, in order to avoid conflict with the Ontario Court of Appeal hearing in the records disposition case. Instead of October 27 in Vancouver, the meeting will be held on October 29, 2015 in Toronto.

John Trueman distributed a schedule of proposed meeting dates for 2015-17 and asked members to contact him in the event of any anticipated problems.

## **7. Next meeting**

The next Oversight Committee meeting is scheduled for Tuesday, July 7, 2015, in Yellowknife.