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Report by the Québec Ombudsman (summary)

**Compensation of crime victims: for effective and prompt
management of vulnerable people**

Québec City, September 15, 2016

Summary

Every year in Québec, many tens of thousands of citizens are the victims of crime. In 2014 alone, 75,063 offences against the person were reported.

The victims of some of these criminal offences committed in Québec qualify for the public compensation system pursuant to the *Crime Victims Compensation Act*. This public system was established in 1972, in particular to remedy the fact that in the vast majority of cases, the victims were unable to obtain reparation through private avenues of recourse.

The administration of the compensation system is entrusted to the Direction de l'indemnisation des victimes d'actes criminels (IVAC), which is part of the Commission des normes, de l'équité, de la santé et de la sécurité du travail. When the Act was established nearly 45 years ago, the legislator chose to pair the crime victims compensation system with the system already provided for in the *Workers' Compensation Act*. The *Crime Victims Compensation Act* therefore provides that a crime victim is eligible for the services and indemnities stipulated in the *Workers' Compensation Act*.

Since then, workers' compensation has been revised more than once, but the system for crime victims has remained practically unchanged, a matter that the Québec Ombudsman has not failed to speak out against in recent years.

Management that could stand improving

However, apart from the question of legislative modernization, the growing number of complaints received and deemed substantiated by the Québec Ombudsman prompted it to conduct a special investigation on the administration of the system in effect, considering that these complaints stem from problems having to do specifically with IVAC's administrative handling of applications for benefits.

Alongside its analysis of individual complaints, the Québec Ombudsman held interviews with some 30 IVAC employees and analyzed 94 randomly selected files concerning certain targeted practices.

At the end of the investigation, the Québec Ombudsman identified several flaws in the system's management, all of which point to failings regarding the fundamental obligations written into the *Act respecting administrative justice* in terms of service quality, celerity and accessibility, or regarding the principles underpinning the spirit of the *Crime Victims Compensation Act*, which calls for a broad and liberal interpretation because of its social and reparatory intent. The system's current approach to administrative management is even more worrisome to the Québec Ombudsman because it appears to be ill-adapted to the needs (assistance, support, information, consideration and prompt intervention) of victims and their families thrust into situations in which they are particularly vulnerable due to the events they experienced.

More particularly, the investigation by the Québec Ombudsman brought several problem areas into focus which the report exposes based on the chronological order of the steps in processing a compensation application, but which are grouped into seven themes for the purpose of this summary:

- ▶ Quality of information to victims;
- ▶ Wait times at the various stages of application processing;
- ▶ Access to the system or to certain services or indemnities;
- ▶ Communication with certain victims for needs assessment purposes;

- ▶ Rigour of the decisional process;
- ▶ Explanations for decisions in the first instance;
- ▶ IVAC's openness to correcting its errors.

With a view to having IVAC rectify the problems the Québec Ombudsman noted, it made 33 recommendations to IVAC. These recommendations can be implemented immediately by means of simple adjustments to administrative practices or by an interpretation or application of the system's legal provisions that is more closely aligned with the goals of the *Crime Victims Compensation Act* and with certain obligations provided for in particular in the *Act respecting administrative justice*. The Québec Ombudsman's opinion is that if all the recommendations are implemented, IVAC will be able to significantly improve the support and services it offers to victims by favouring an approach better adapted to their needs.

Here is a summary of the main findings and corrective actions for each of the seven themes.

Quality of information to victims

IVAC does not make sufficiently detailed or complete information available to victims, especially concerning the different care, services and compensation under the system, the stages in the handling of an application for benefits, and the requirements for each of these steps. This hampers proper understanding of how the system works and adds hurdles to a process that is often difficult to begin with for victims who sometimes have trouble even talking about the events they experienced. Because of these information gaps, applications are more apt to be incomplete, especially concerning eligibility requirements, which means even longer processing delays.

The Québec Ombudsman made recommendations (R-1 to R-4) to IVAC aimed at making the process easier for victims: improve the information on its website; correct the identified deficiencies in its forms and appendices; produce an explanatory guide that would be included with the application for benefits; and produce a specifically adapted medical report. These improvements would enable victims to fill out the form more easily and correctly and to provide the right supporting documents and information.

Wait times at the various stages of application processing

The Québec Ombudsman observed long wait times at several stages of benefit application processing, in violation of the obligation to act promptly stipulated in the *Act respecting administrative justice*. Even though frequently the various processing stages are assigned to distinct sections of IVAC, the delays add up for victims awaiting services and compensation to which they are entitled under the system.

Eligibility: In 2014, despite the fact that roughly half of applications were processed quickly at the eligibility stage, nearly 40% of them required extra information. In such cases, the average wait time before an application was deemed admissible was 45 days. A certain proportion of these (nearly 7%) required more in-depth information, bringing the average wait time for determining eligibility to 128 days.

Needs assessment: Once the case is deemed admissible, an assessment of the victim's needs is carried out by IVAC to determine the care, services and compensation victims may be eligible for. The less time it takes for needs to be identified and managed after eligibility is established, the more likely it is that recovery will be optimal. Despite the internal targets IVAC has set (7 days for applications with indemnities for temporary total disability and 4 to 6 weeks for other applications), IVAC does not calculate the average delays for needs assessment. The analysis by the Québec Ombudsman of a 39-file sample showed that the average wait time was 78.8 days as of receipt of the application and 59.9 days as of eligibility.

Issuance of indemnities for temporary total disability: In approximately 20% of admissible cases, IVAC grants victims indemnities for temporary total incapacity to carry out their work or usual activities. The average wait time before the first payment is issued is 135 days as of the date the file was opened.

Opinion of the Bureau médical: When medical evidence is contradictory and does not make it possible to decide whether a victim qualifies for a service or an indemnity, the indemnity agent may consult IVAC's Bureau médical for an opinion and advice in order to continue processing the application. The time before these opinions are rendered is often long because of the professionals' tight schedules and the high number of opinions sought by the agents.

Decisions under review or reconsideration: Wait times for victims to receive a Bureau de la révision administrative decision when they contest a decision at the first level denying them access to the system or to certain services and indemnities are also long. Despite the performance in 2014 (83 days in review and 80 days in reconsideration), below the 90-day deadline prescribed in the *Workers' Compensation Act*, the Québec Ombudsman has observed a marked increase in the average wait time for the Bureau de la révision administrative to render its decisions (150 days in the summer of 2015).

In order to speed up victims' access to the system's services and indemnities, the Québec Ombudsman recommended (R-13 to R-15) that IVAC produce an action plan providing for ways of reducing the delays at the different stages of processing indicated above, for example, agreements with police forces or the Ministère de la Santé et des Services sociaux for prompt transmission of the documents needed for eligibility decisions. The Québec Ombudsman also asked (R-23, R-27, R-29 and R-33) that IVAC implement action plans for reducing delays.

Access to the system or to certain services or indemnities

When the investigation was completed, the Québec Ombudsman saw that IVAC leans towards restrictive interpretation or rigid application of the legal framework of the system it administers. In several cases, it adopts policies that add conditions that are not in the Act, thereby limiting access to the system or to certain services or indemnities.

Eligibility for the plan

Occurrence of the crime: Pursuant to the *Crime Victims Compensation Act*, in order to qualify for the plan, crime victims must demonstrate that the crime occurred. Regarding this condition, IVAC sometimes requires not only that they provide proof on a balance of probabilities, but that they also prove the exact circumstances, including motive. In so doing, IVAC introduces conditions that are not found in the Act.

Notion of "direct victim": IVAC uses a restrictive interpretation of the notion of "direct victim" by requiring that the victim be at the scene of the crime when the crime was committed. This unduly constricts the notion of victim within the meaning of the *Crime Victims Compensation Act*, notably given the Tribunal administratif du Québec's recent interpretation in certain cases.

Two-year deadline for submitting an application: The Québec Ombudsman noted IVAC's lack of flexibility in applying the *Crime Victims Compensation Act*, which provides that victims have two years between the moment the victim becomes aware of the damage suffered and of its probable connection with the criminal offence to file an application for benefits. However, victims do not lose their right to file an application simply because time has elapsed. After this deadline has expired, they can still prove on any valid grounds that they have not renounced the right to avail themselves of the benefits of the plan.

In applying this rule, IVAC uses various harmful practices that restrict the admissibility of late applications:

- ▶ IVAC automatically determines that the clock starts ticking with victims' first serious physical injury, even if victims say that they became aware recently of a psychological injury stemming from the violence sustained. This practice restricts access to the system, especially for victims whose psychological injuries emerge later or who become aware of them after the fact;
- ▶ When victims claim more recent awareness of the correlation of their injuries with the criminal offence, IVAC automatically determines that the clock starts ticking on the date when victims report the violence to a health professional, or when the first psychotherapy session occurs according to the information on file. The first reporting of abuse to a professional or the beginning of therapy does not necessarily mean that victims are truly aware of the connection;
- ▶ IVAC generally accepts late applications only if victims can demonstrate that it was impossible for them to act sooner. However, the phrase "among other things" appears in the relevant section of the *Crime Victims Compensation Act*, and case law clearly indicates that other valid reasons may be evoked to demonstrate that victims have not renounced their right to avail themselves of the system and that the legislator does not wish to limit victims' options in this regard;
- ▶ When victims say that one of the reasons why they were late to file is because they did not know that the system existed, applications are almost always turned down without analysis of the other circumstances described by the victims. Yet, according to case law, when ignorance of the law is not the only reason for late filing, IVAC must assess all other valid grounds that may account for filing after the deadline has expired;
- ▶ When IVAC determines a date of awareness prior to the one indicated by victims in the application form, it does not give them the opportunity to complete their file and explain their lateness before turning down the application, as required by the *Act respecting administrative justice*.

Gross fault: IVAC turns down certain applications on the grounds of "gross fault" stipulated in the *Crime Victims Compensation Act*, without examining victims' behaviour at the time of the assault or the reasonable foreseeability of the response. Within the meaning of the Tribunal administratif du Québec, gross fault refers to victims' behaviour pointing to gross and complete indifference to the consequences at the time of the event which suggests that they accepted, in advance it could be argued, possible injury. Determination of gross fault requires case-by-case consideration which takes into account, among other things, the victim's experience and real knowledge by the victim of the risks associated with his or her conduct.

Eligibility for services and indemnities

"Administrative" date of the event: When victims are declared eligible, the right to indemnities and services is assessed based on the determined date of the event. An IVAC policy provides for cases in which agents must establish an administrative date distinct from that of the events that victims were subjected to. This administrative policy is inconsistent with the goal of the system because the consequences of the criminal offence prior to the established date are not taken into account in determining services and indemnities, which deprives victims of the full range of benefits to which they may be entitled.

Assessment of the connection between the criminal offence and the injury when there is a "pre-existing personal condition": To qualify for the system's services or indemnities, victims must provide preponderant proof that their injury is directly related to the criminal offence. However, when several factors could have contributed to the injury, IVAC requires not only that the

criminal offence contributed to the injury, but also that it contributed more significantly than the other factors or was the predominant factor. This additional burden of proof is not found in the *Crime Victims Compensation Act*. Furthermore, this extra burden is imposed on and affects in particular crime victims who, because of other events, are fragile to begin with, thereby restricting the most vulnerable citizens' access to services and indemnities.

Assessment of temporary total disability of unemployed victims: IVAC assesses the temporary total disability of unemployed victims (who account for more than half of the people deemed eligible each year) based on their inability to carry out most activities of daily living and instrumental activities of daily living. IVAC uses a restrictive list of these activities (eating, getting dressed, bathing and getting from point A to point B on one's own). The Tribunal administratif du Québec uses much broader lists in ruling on similar matters. In practice, this very narrow definition means that only unemployed victims who were hospitalized because of crime-related injuries are granted benefits for temporary total disability.

Automatic capitalization: If permanent disability indemnities are granted, IVAC capitalizes the life annuity when the monthly amount issued is less than the maximum determined annually in its policies. This capitalized amount, calculated according to the actuarial factor provided for in the *Crime Victims Compensation Act*, is much lower than the total amount victims would obtain if the annuity continued to be issued throughout their life. Contrary to what is stipulated in the *Workers' Compensation Act*, the person's interest is not assessed before capitalization occurs.

In all these cases, the Québec Ombudsman recommended (R-5 to R-12, R-18, R-21, R-22 and R-25) that IVAC modify its practices so that its application of the relevant sections of the Act is aligned with the legislator's intention and recent developments in case law. The purpose of these recommendations is to ensure complete access to the system, as well as to its services and indemnities, to every victim who can legally benefit from it.

Communication with certain victims for needs assessment purposes

Needs assessment is a crucial step in processing an application once it has been approved. It makes it possible to determine in concrete fashion the services and indemnities to which victims are entitled. Once eligibility is established, IVAC does not contact all eligible victims the same way. Those categorized as without risk for chronicity and without children and declared as being on work stoppage are phoned to arrange for a needs assessment appointment. However, victims declared unemployed or employed without work stoppage only receive a letter offering needs assessment asking them to contact IVAC. If they do not respond to this letter, their file is closed without further action, even if they indicated specific needs in the form (psychological or other help).

This differential treatment based on victims' occupational situations seems to indicate that IVAC is more attentive to victims on work stoppage. Yet unemployed victims, or employed victims who are not on work stoppage, may have needs that are more necessary and urgent than mere income replacement (among others, medical or psychological follow-up and reimbursement for the cost of medication). Even if this additional requirement is likely to deter certain victims from continuing to seek compensation, IVAC has never gauged the impact.

So that this disparity in processing is corrected, the Québec Ombudsman recommended (R-16 and R-17) that IVAC contact each eligible victim verbally to ensure that his or her needs are assessed and that victims are provided with the timely services and indemnities to which they are entitled.

Rigour of the decisional process

The quality of a decisional process hinges on what the decision-maker does to complete the evidence on file, on rigorous and objective assessment of this proof, and, if necessary, on conferral with an independent expert.

Opinion of the Bureau médical: Certain advisory opinions by the Bureau médical, aimed at enabling the agent to determine whether victims are entitled to services or indemnities, contradict the preponderant evidence on file without any medical fact supporting the position and without the Bureau médical contacting an independent expert or the professionals who saw the victim. The Bureau médical professional is not bound by the opinion of the physician or expert whom the victim saw. However, the Bureau cannot simply substitute its opinion without saying why. It must base its conclusions on objective medical facts from the file, on scientific literature or on an external expert opinion, for example. Otherwise, the lingering impression is that the opinion is subjective and arbitrary and is motivated by IVAC's interests (to restrict decisions in victims' favour).

The Québec Ombudsman recommended (R-26) that IVAC ensure that Bureau médical professionals who intend to issue an opinion contrary to that of the professional who saw the victim contact this professional beforehand and, if necessary, seek an external medical opinion.

Decision by the Bureau de la révision administrative: In cases in which decisions are contested, under the *Workers' Compensation Act*, the reviewers are empowered to require that extra supporting documents be provided or to request any expert opinion if they feel it is relevant to do so. However, the investigation by the Québec Ombudsman revealed that reviewers had been instructed not to ask for additional proof and had always rendered a decision solely on the merits of the case, apart from input from the Bureau médical.

In order to ensure correction of this practice that violates not only the *Workers' Compensation Act*, but also the principle of decisional rigour incumbent on every administrative body, the Québec Ombudsman recommended (R-30) that IVAC see that reviewers fully exercise the powers conferred by this Act.

Explanations for decisions in the first instance

When reasons are given for a decision, citizens understand the legal basis as well as the logic that the administrative decision-maker used to arrive at his or her conclusion, in accordance with the requirements of the *Act respecting administrative justice*.

The unfavorable decisions transmitted by IVAC are generally poorly documented. Often, only the applicable standard is indicated and there is no explanation as to why the standard does not apply to the elements submitted or the victim's specific situation. This lack of information about the basis for the decision may create a feeling of injustice and lead to contestation that could have been avoided had adequate explanation occurred, or complicated such contestation, as the case may be. Furthermore, when there are several grounds for refusal, frequently IVAC only mentions one or a few. The result is that victims may, when a decision is under review, find themselves up against a reason that they had not been informed about prior to review, in disregard of the principles of procedural fairness.

The Québec Ombudsman recommended (R-28) that IVAC provide in writing clear and sufficient reasons for its decisions so that victims understand the basis for decisions and adequately exercise possible recourse.

IVAC's openness to correcting its errors

The *Workers' Compensation Act* provides that IVAC may reconsider its decisions at all times for any reason that is not frivolous or arbitrary, except with respect to matters subject to review, notably, the right to an indemnity and the amount thereof. The opinion of the Québec Ombudsman is that in these matters as well, IVAC implicitly has the power to reconsider decisions marred by an error so serious as to invalidate them.

Even when IVAC acknowledges having made such errors, it is loath to reconsider its decisions, in particular when they were rendered by the Bureau de la révision administrative.

The Québec Ombudsman feels that this formalistic stance forces citizens in vulnerable positions at the time to turn to the courts to resolve situations that could have been taken care of before that stage was reached. In order to prevent any unnecessary reliance on the courts and to spare the parties long and costly litigation, the Québec Ombudsman therefore recommended (R-31 and R-32) that IVAC agree to reconsider its decisions that are so flawed as to be invalid, when the conditions provided for in the Act or by the Supreme Court exist.

In concluding, the Québec Ombudsman feels that implementation of the recommendations in the report will foster administration of the compensation system that is more aligned with victims' needs and mindful of the context that made the victims require assistance.

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