

Independent Assessment Process Oversight Committee

Meeting of February 28, 2012

Toronto, ON

Minutes

Members present

Mayo Moran	Chair
Mitch Holash	Church representative
David Iverson	Church representative
Kerry O'Shea	Claimant counsel representative
David Paterson	Claimant counsel representative
Marielle Doyon	Government of Canada representative
Alison Molloy	Government of Canada representative
Les Carpenter	Inuit representative
Paul Favel	Assembly of First Nations representative

Also present

Randy Bennett	Court counsel
Daniel Ish	Chief Adjudicator
Michael Mooney	Court monitor, Crawford Class Action Services
Akivah Starkman	Executive Director, IRSAS
John Trueman	Recorder, IRSAS

Guests present for item 1 only

Julian Falconer	Legal Counsel, Truth and Reconciliation Commission
Kim Murray	Executive Director, Truth and Reconciliation Commission
Murray Sinclair	Chair, Truth and Reconciliation Commission

1. Discussion with Truth and Reconciliation Commission

The Honourable Justice Murray Sinclair, Chair of the Truth and Reconciliation Commission (TRC), discussed the Commission's desire to put in place a plan of action for access to IAP documents. He suggested that the TRC and the OC put aside the question of long-term disposition of records for the time being, and focus on what kind of access could be provided to the TRC's research and writing team for the purpose of the TRC's report. He said that the TRC is looking for a general overview of the nature of claims and award amounts, and would like to highlight in its report some of the things that survivors have disclosed in their claims. The goal is to provide a full account of the nature of experiences in residential schools.

Justice Sinclair said that the IAP has the bulk of IRS survivors' stories of abuses that went on in the schools, and that it is virtually impossible for the Commission to ask survivors to go through the experience of telling those stories again. The Commission is concerned that if these stories are not reflected in its report, it will lack a full picture of what survivors are saying.

The Commission has raised, and the Oversight Committee has discussed, the issue of obtaining consent from IAP claimants for their records to be transferred to the Commission. This has not been done in cases to date, and might meet with little success at this juncture. The Commission would prefer to access information from these materials on an anonymous basis, without disclosing the claimant's identity. Justice Sinclair asked that for future hearings, the issue of giving the TRC access to the transcript be raised by the adjudicator, or discussed with the claimant after the hearing.

Justice Sinclair raised the TRC's concern that the assurances given to claimants by counsel or adjudicators – assurances that often imply absolute confidentiality or secrecy – may not be compatible with the Settlement Agreement or the legal environment.

Regarding the long-term disposition of IAP records, Justice Sinclair requested that once the Oversight Committee has a sense of what its obligations and ultimate objective may be, the TRC be included in discussions about whether those records can or must be part of the TRC's National Research Centre. However, this discussion does not need to take place today.

Justice Sinclair introduced the Commission's legal counsel, Julian Falconer, and explained that the TRC is bringing a request for directions on the document disclosure obligations of Canada and the churches to the courts. Justice Sinclair emphasized that the Commission does not intend to bring the issue of IAP records to the court, but hopes to work out those issues with the Oversight Committee. He did suggest, however, that if the Oversight Committee wished, the TRC could include a question about the IAP's obligations in its request for directions.

Justice Sinclair referenced an earlier discussion that raised the possibility that some IAP records may be destroyed. This would be, he said, a disaster for future generations of this country. If records did not exist to document the claims of survivors, it would be easy for people to deny that residential schools ever happened, and for future generations not to know about them.

In response to questions:

- Justice Sinclair explained that establishing a National Research Centre (NRC) is one of the TRC's obligations, subject to available resources. The TRC has issued a call for submissions, asking institutions to demonstrate how they would be capable of establishing the NRC to house the TRC's records and

gathered statements without any funding provided by the TRC. The deadline for proposal submissions was February 16.

- Justice Sinclair discussed the Commission's approach to consent and confidentiality. In the historical and interim report, the TRC referenced stories they heard, and identified the speaker where they had obtained consent. Some survivors are quite proud to have their name attached. In other cases, the TRC referenced the nature of a survivor's experience without naming the speaker. The TRC's consent form gives claimants the option to be identified, and the TRC will respect the terms on which the statement was provided. In the context of the IAP, even if claimants are not identified, the fact that claims of abuse have been validated by adjudicators means that the TRC can piece together the collective experience of students at the schools.
- Kim Murray explained that the Privacy Act applies to the TRC, and it is putting in place a process to review chapters of its final report as they are written to ensure they are in compliance with the Act and with the consents obtained from survivors.
- Justice Sinclair said that all privacy legislation has provisions regarding information provided on a confidential basis. This information is generally held in a restricted area with limited access. Although it is conceivable that some documents are barred from disclosure forever, even the most top secret document has some deadline by which it becomes available. However, if someone does not want their records ever disclosed to anyone, and they make that clear, then the Commission will have to determine how to protect that. He discussed his experience with court documents, where a judge will consider which records to destroy, which to return to the party that submitted them, and which might be retained in an archive.

Mayo Moran thanked Justice Sinclair and his colleagues for coming to the meeting, and indicated that Akivah Starkman and Kim Murray would meet to continue the discussion.

2. Report of the Technical Subcommittee

Alison Molloy reported on the meeting of the Technical Subcommittee held by teleconference on February 8, 2012.

Claimants' counsel had raised several issues related to the evidence produced by Canada for each claim. The concern was that all relevant evidence in Canada's possession should be provided to the parties. David Russell, Director of National Research and Analysis for the Resolution and Individual Affairs Sector of AANDC, participated in the subcommittee meeting.

Canada has confirmed that while staff lists do not exist for all schools in all time periods, they will be added to the school narratives where they exist.

Canada is working to obtain maps, plans, and surveys of residential school properties from Public Works and Government Services Canada for inclusion in the narratives. Where oversized plans cannot be digitized, this will be noted.

Canada will work to add school narratives to the decision database, rather than sending them with the evidentiary package in every case. Canada will also note when the narrative has been updated and documents added.

For some schools, Canada has copies of codexes maintained by the nuns. These are references in school narratives and POI reports where relevant. Canada has 38 documents where a codex was referenced. These will be added to the school narratives.

Some questions were raised about Canada's practices when redacting narratives for privacy purposes. Canada is still engaged in internal discussions in order to be able to provide its policy on redaction.

The subcommittee also discussed the pilot project for claimants over age 70. Canada reviewed a list of cases where the claimant was over age 70, and identified 193 cases with good prospects for a negotiated settlement, and a further 232 cases that could possibly be settled through negotiation. Canada determined that 213 cases were not suitable for a negotiated settlement, and 555 cases are completed, have had a hearing, or have a hearing set within eight weeks.

The subcommittee discussed a concept paper for the pilot project prepared by Deputy Chief Adjudicator Dan Shapiro, and a revised version was later sent to the subcommittee.

Dan Ish noted that the adjudicators for the pilot project have now been selected and a list will be sent out shortly.

3. Approval of minutes

The committee approved the minutes of the January 17, 2012 meeting with minor corrections.

4. Key performance indicators

Akivah Starkman gave an overview of key trends in the 'dashboard' report distributed before the meeting.

Over 25,000 applications have been received, including 'new IAP' applications as well as ADR transfers, re-openers, and continuing ADR. The rate of new applications is down from the peak in September/October 2011 but continues as projected.

The dashboard shows targets for hearings held of 4,000 in 2011-12 and 4,500 in 2012-13. Meeting these targets requires the availability of parties, but also staff within the Adjudication Secretariat to arrange the hearing logistics. Workload assessment shows that a Hearings Management Officer can typically handle 14 to 17 hearings per month. With current staff levels, that would allow for 200-240 hearings per month. In fact, about 365 hearings per month are being held. This is being felt in huge amounts of overtime, increasing long term sick leave, and threatened staff resignation.

In order to relieve this pressure and further increase capacity, the Secretariat ran a lengthy staffing process and was poised, by the end of December, to make offers to 14 qualified candidates. However, at the same time, Aboriginal Affairs and Northern Development Canada (AANDC) implemented a new process for approval of any staffing action, in anticipation of potential cuts or restrictions in the next federal budget. The new process meant that the Secretariat did not receive approval to hire until mid-February – a material seven-week delay. Because of that delay, not all of the 14 qualified candidates are available to hire. Three new staff will begin in mid-March, and nine by April. That will fill 12 of the 17 positions now vacant.

The Adjudication Secretariat narrowly avoided having to cancel hearings already scheduled for June. Staff were brought in from other areas to provide relief in the hearings logistics area. However, staffing shortages mean that the target of 470 hearings per month will not be achieved until July 2012. Realistically, the fiscal year target will be 4,350 to 4,400 – not 4,500.

Akivah Starkman mentioned that he continues to pursue methods of arranging hearing logistics more efficiently, although at present the Adjudication Secretariat is constrained by government policies on how travel is to be arranged and approved.

The Secretariat continues to not meet its service standard for issuing decisions. On average, short form decisions take 15 days instead of 7. The decisions unit is operating with less than half the required staff.

5. Executive Director's report

Akivah Starkman referred members to a paper distributed for information on administration of the application deadline. The overall objective is to be consistent with the Settlement Agreement and past practice. In some cases, the process will be administered more tightly. For example, at present a claimant

refused admission may submit more information at any time before the application deadline; this will change to 180 days.

The Adjudication Secretariat also prepared for information a preliminary report on implementation of the Guidance Paper on hearing postponements. While it is too early to draw conclusions, the first two months of implementation – December 2011 and January 2012 – showed a postponement rate of 15% compared to 26% in the same time frame the previous year. This decrease seems to be attributable to the need to ask the adjudicator for approval to postpone a hearing, and may lead parties to make more effort to avoid postponements.

Akivah Starkman spoke at the Assembly of First Nations' National Justice Forum on February 23. The third day of the forum was devoted to residential schools. His presentation focussed on the challenges facing the IAP and what the Adjudication Secretariat and the Chief Adjudicator are doing to meet them. Kathleen Mahoney and Paul Favel also spoke. It was a difficult day for all involved, and many participants made heartfelt statements about the effects of residential schools on their lives and the shortcomings of the Settlement Agreement.

6. Chief Adjudicator's report

Dan Ish reported that since the last Oversight Committee meeting on January 17, a series of regional adjudicator meetings was held. The meetings provided an opportunity to bring adjudicators up to date on the latest cases, discuss implementation of the postponement policy, and address issues that arose in hearings or were raised by the Oversight Committee.

Manitoba lawyer Howard Tennenhouse was disbarred on February 21 after entering a guilty plea to improperly charging fees above those approved by adjudicators, and unlawfully practicing law while under suspension.

Another form filling agency has appeared in Manitoba. The Chief Adjudicator is working to better understand the situation and what his authority might be in this area.

The Quebec Court of Appeal ruled on February 24 that the Charter challenge on rights of alleged perpetrators in the ADR process must be heard by the supervising judge, Justice Tingley of the Quebec Superior Court. The plaintiff has six months to obtain leave under the implementation orders from Justice Tingley to challenge the adjudicator's decision.

The Chief Adjudicator has received correspondence from the Chair of the National Administration Committee (NAC) regarding the Supplemental Hearing Report form implemented following the Order of Madam Justice Brown on November 17. He suggested that representatives of the NAC attend a meeting of

the Oversight Committee to discuss this and other measures necessary to protect the integrity of the IAP.

Committee members discussed the possibility of a joint meeting with the National Administration Committee. The court application on the completion strategy was suggested as another topic for discussion.

Dan Ish said that he expects to discuss with the Oversight Committee in the near future the need for another Deputy Chief Adjudicator. The IAP has operated with five DCAs almost since implementation, but the number of adjudicators has risen several times. He expects that a principal role of a new DCA would be to act as in-house legal counsel to advise and assist the Chief Adjudicator.

Dan Ish discussed a case where a claimant's lawyer had sent an articling student to a hearing, and the person's status became known to the adjudicator only after the legal fee review. Canada invoked its practice of not paying the 15% contribution towards legal fees in cases where the claimant's representative is not called to the bar. If the legal fee ruling stands, the effect of this decision is that the claimant would have to pay the law firm out of the award. The Chief Adjudicator will review the ruling.

Dan Ish distributed a draft Guidance Paper on Withdrawal of Claims and requested comments from committee members.

In response to discussion at the Oversight Committee's session on the completion strategy on January 16, the Chief Adjudicator considered the need for another request for proposals for new adjudicators. His view at the present time is that new adjudicators are not required; in fact, 92 of 108 adjudicators indicate they can take on more cases.

Akivah Starkman mentioned that staff, at the Adjudication Secretariat and with Canada, has always been more of a constraint on hearing capacity than adjudicators.

Kerry O'Shea indicated continued frustration with delays in issuing decisions, and questioned whether adjudicators have as much capacity as claimed. Dan Ish mentioned that the Chief Adjudicator's Office is working on a better system to provide information on a weekly basis on decisions.

7. Expert roster

John Trueman referred to a memo distributed in advance announcing the retirement of Dr. Charles Brasfield on August 1, 2012.

- *Decision: The Oversight Committee approved the removal of Dr. Charles Brasfield from the roster of experts, once he has completed any assessments in progress.*

8. Status of ADR cases

Marielle Doyon discussed a report circulated in advance on the eight cases that are still active in the ADR process. Of these, one case is being transferred to the IAP, one is awaiting an expert assessment report, two are awaiting final submissions, and four are waiting for decisions from adjudicators.

9. Next meeting

The next Oversight Committee meeting is scheduled for Tuesday, April 17, 2012, in Vancouver.