

**DISPUTE RESOLUTION MODEL FOR INDIAN RESIDENTIAL SCHOOL  
ABUSE CLAIMS**

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## **CONSOLIDATED DR MODEL FOR CERTAIN IRS ABUSE CLAIMS**

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### **1. THE APPLICATION**

- ◆ There are two DR Processes: Process A is for claims of physical abuse causing a lasting injury and/or sexual abuse, and Process B is for claims of physical abuse which did not cause a lasting injury and for claims of wrongful confinement, all as defined for DR purposes. In applying to these processes, the claimant is asked to:
  - ◆ List points of claim: indicate by reference to the standards for this DR process (see Appendix I and section 6, below) each alleged wrong with dates, places, times and information about the alleged perpetrator for each incident sufficient to identify or permit the identification of the individual or their role at the school.
  - ◆ Provide a narrative as part of the application. The narrative must be signed by the claimant and can be both a basis for and a subject of questioning at a hearing.
  - ◆ Indicate by reference to the compensation rules established for this DR process (see Appendix II and section 6, below) the categories under which damages will be sought and, where appropriate, indicate for Process A claims that damages will be sought for consequential harm above level 3.
  - ◆ Indicate which treatment records they will be submitting to assist in proving either the abuse or the harm suffered or both (see appendix VII).
  - ◆ Include authorizations so research can begin, but to be used only if case accepted.
- ◆ A certificate of independent legal advice (ILA) is required at the point where a release is sought, but not on application.
- ◆ A guide is available to assist those who want to file on their own or with the help of a community organization.
- ◆ Safety mechanisms will be provided in consultation with Health Canada. Where claimants are proceeding as a group, they may negotiate to have the group administer the available safety resources.
- ◆ Group claims: Where claimants desire to proceed through DR as a group, the individual applications of the group members must be submitted together or within a short interval, and each of the claimants must indicate their desire to proceed as a group member. The applications must show commonality among group members (school, community, issues) and a representative of the group must submit an application addressing the issues set out in the bullet headed “Group Claims” on page 4 of this document.

## **2. ACCEPTANCE OF APPLICATION AND THE MUTUAL COMMITMENTS**

- ◆ It is not intended that this DR model will deal with all currently recognized causes of action; as experience with DR is gained, and the law evolves on other claims, the ambit of DR may be expanded
- ◆ Claims will be admitted to DR as of right where the application is complete and sets out allegations which are within the definitions in Appendix 1 and the Compensation Rules, and where the claimant has signed the Declaration set out in the application form. In addition to confirming the claimant's understanding of the DR process, the Declaration will contain a specific commitment to the confidentiality of the hearing (see Section 5 o. below) and agreement to the claimant's evidence being used by the defendants in any subsequent proceedings if the claim is not resolved in the DR process.
- ◆ If the case is not admitted into DR, the claimant will be advised why and given a chance to provide additional information. The initial and any subsequent applications, or supplementary information, will be given to the adjudicator.
- ◆ All cases not admitted to DR retain litigation as an option.
- ◆ Where claims are accepted into DR, the defendants will countersign the claimant's Declaration to confirm that any compensation ordered by an adjudicator in accordance with the Compensation Rules will be paid upon the claimant signing a legal release, and will return a copy of the countersigned Declaration to the claimant.
- ◆ Claimants will be advised at that time that the documents they must produce are required before hearing date will be set, unless a good reason is shown for an inability to produce them (see section 4, above).
- ◆ Claimants must put their litigation in abeyance while they are in DR, and discontinue it if they accept an award.
- ◆ Once case is accepted, in appropriate cases counsel may meet (not necessarily in person) to attempt to agree on certain facts to reduce research needs.
- ◆ **Group claims:** Where it is desired to proceed as a group (see Appendix V), the application will be accepted if it demonstrates that the group is an established one with evident viability and decision-making capacity; that its members are already providing each other with support in connection with their IRS experiences or have a clear plan and realistic capacity to do so; that the issues raised by the individuals within the group are broadly similar; and that the group has a clear plan and intention to manage safety resources, where they desire to do so, and to achieve healthy and lasting resolution of their claims.
- ◆ Where a group DR has been accepted, negotiations will take place at this point on possible alterations to the standard DR process. Such alterations could include any of the following:
  - ◆ Agreement on joint experts where expert evidence required.
  - ◆ More extensive questioning of witnesses by counsel.
  - ◆ All cases to be heard by one or more agreed-upon adjudicators.
  - ◆ A negotiated resolution rather than binding decisions by the adjudicator.
  - ◆ A collective offer rather than individual offers

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- ◆ Negotiations backstopped by mediation, and/or by a subsequent binding determination by the adjudicator.
- ◆ Where a binding decision is called for, either as the only option or as a backstop, whether or not to allow for a review.
- ◆ A collective closing ceremony and memorialization initiative.
- ◆ Where a proposal to proceed as a group is not accepted, the individuals will be advised of their right to continue as individuals if their applications otherwise meet the criteria for DR.

### **3, INVOLVEMENT OF ALLEGED PERPETRATORS**

- ◆ Defendants will attempt to locate the alleged perpetrator to invite them to the hearing. If the alleged perpetrator is dead, cannot be located, or declines to attend, the hearing can still occur.
- ◆ The alleged perpetrator will be provided with extracts from the application, to be returned at the conclusion of the process, in order to help them recall the student/incident and to determine their response. Information on the claimant's current address or the addresses of other potential witnesses will be deleted from this material, as will information on the impacts of the alleged abuse, unless the claimant asks that it be provided to the alleged perpetrator.
- ◆ Notice of alleged perpetrator's desire to respond to allegations will be given to counsel for claimant at earliest opportunity.
- ◆ All parties can request an interview with the alleged perpetrator. This would not be the equivalent of an examination for discovery.
- ◆ A witness statement will be requested from the alleged perpetrator. If he or she declines to provide one, the interview notes of what he or she said must be shared among the parties. The statement, or the notes, must be shared with all parties two weeks before the hearing.
- ◆ The interviews, or failing that, a witness statement, are a condition of the alleged perpetrator being heard by the adjudicator.
- ◆ Counsel and a support person for the alleged perpetrator are permitted at a hearing while the alleged perpetrator gives evidence, but the alleged perpetrator or their counsel cannot attend at same time and place as the claimant without the advance consent of the parties. Canada will pay up to \$2500 for the alleged perpetrator to receive legal advice about the implications of giving evidence, plus the reasonable costs of the alleged perpetrator's attendance, and of the attendance of a support person (to a maximum to be determined).
- ◆ Generally, the claimant will give evidence before the alleged perpetrator does so. Neither the claimant nor the alleged perpetrator will have access to the other's testimony before testifying themselves.
- ◆ The alleged perpetrator is a witness, not a party.
- ◆ The alleged perpetrator is entitled to know the results of the hearing with respect to the allegations against them, but not the amount of any compensation awarded.

**4. INFORMATION COLLECTION; SETTING HEARING DATE**

- ◆ Defendants will complete their research.
- ◆ Claimants will collect and submit their documents and the treatment reports they want to rely on, or, where they cannot obtain records or a report, will indicate the steps taken to attempt to do so.
- ◆ Witness statements are to be prepared and submitted by the party adducing the witness.
- ◆ No date to be set until the defendants are satisfied that exchange of documents and reports is as complete as reasonably possible.
- ◆ Hearing date will be set based on availability of parties, counsel and adjudicator, and on cost effectiveness having regard to the location and the number of hearings to be held in any one place in a given time frame.

## **5. VALIDATION PROCESS OUTLINE**

### **a. Core Assumptions as to Legal and Compensation Standards**

- ◆ This outline assumes that the parties have legal representation. See Appendix XIV for procedural modifications where claimants represent themselves; the defendants may be represented by their employees on the same basis as by counsel.
- ◆ Standards for compensable wrongs have been defined for DR. (see Appendices I and II, and section 6, below). The adjudicator is bound by those standards.
- ◆ Where the allegation is of physical abuse going beyond the disciplinary standards of the day, but not causing a physical injury as defined in the compensation rules, a streamlined procedural stream within the DR model is to be used: see section 6, below.
- ◆ Compensation rules (see Appendix II and section 6, below) will set the ranges of compensation to be paid having regard to the seriousness of the proven act(s) and any proven aggravating factors. Where physical abuse causing a lasting injury or sexual abuse is proven, then provided a plausible link to the abuse suffered has been demonstrated to the satisfaction of the adjudicator, compensation will be paid for specific impacts such as consequential harm or loss of opportunity, and an award can also be made to assist with future care.
- ◆ Claimants seeking to prove actual income losses, as opposed to an economic opportunity loss, would have to proceed through the courts given the evidentiary complexity inherent in such claims.
- ◆ Adjudicators---see Appendix IV for qualifications--- will, subject to rights of review, be empowered to make binding findings on credibility, liability and compensation within the standards set for the DR.
- ◆ Where the first incident of proven abuse occurred after April 1, 1969, the claimant will receive 100% of the amount determined by the adjudicator. Where the first incident of proven abuse occurred before April 1, 1969, Canada will pay 70% of the amount determined by the adjudicator, and the balance may be paid by a church with which liability is shared. This will always occur in cases involving the Anglican or Presbyterian churches; the Catholic and United church entities exercise discretion in individual cases.
- ◆ Where compensation is awarded, a further 15% of the amount paid will be added as a contribution towards legal fees, plus reasonable disbursements. Adjudicators may resolve disputes about the disbursements to be paid.

### **b. Safety and Support**

- ◆ Reasonable costs for support persons for claimants to travel to hearings will be paid (to a maximum to be established).
- ◆ Counsellors, or at least ready access to counselling services, will be available for the hearing process.
- ◆ Cultural ceremonies such as an opening prayer or smudge will be incorporated at request of claimant to the extent possible.



### **c. Procedure: Overview**

- ◆ Unless varied in a group DR, the DR model uses a uniform inquisitorial process for all claims to assess credibility, determine which allegations are proven and result in compensation, and set damages according to the compensation rules.
- ◆ In a group DR, the parties may agree to seek a negotiated outcome, with or without the backstop of mediation or a binding decision.
- ◆ Reports from treating doctors or counsellors are admissible without the requirement of defence medicals, but the defendants can require the treatment professional to testify. If the treatment professional is not available, the report remains admissible, but the adjudicator can give it less weight. In some circumstances (see section g, below), the adjudicator can ask the claimant to submit to an examination by a treatment professional.
- ◆ Treatment reports are admissible to prove that the treatment was given and observations were made, but not as proof of diagnoses or the opinion leading to them. The treatment reports may also be used by the adjudicator as the basis for lines of questions, the answers to which could provide the basis for findings of consequential harms at levels 1-3. In limited circumstances (see section g, below), the treatment reports may also support a finding of consequential harms at levels 4 or 5.
- ◆ Except on consent (see section g, below) points within the compensation rules for consequential harms above level 3 can only be obtained on the basis of an expert's assessment of the extent and causation of these harms. Only the adjudicator may order such an assessment, and only after hearing the claim and making findings as to credibility, and determining that the assessment is justified by the evidence accepted and is necessary to assess damages fairly.

### **d. General Preparatory Steps**

- ◆ Before hearings are held, representatives of Canada, the churches (where participating) and claimants will agree on the following:
  - ◆ A roster of adjudicators for the province/region in question.
  - ◆ A roster of experts who can be retained by the adjudicator where necessary to determine a claim for consequential harm at level 4 or 5 of the compensation framework.
  - ◆ An orientation package for the adjudicators on residential schools and child abuse issues.
  - ◆ A standard set of questions to be used in each of the major categories of cases to guide adjudicators in their hearings.

### **e. Materials for Adjudicator for Individual Cases**

- ◆ The Adjudication Secretariat will provide the adjudicator with relevant documents and witness statements (as submitted by the parties), two weeks before hearings to facilitate structured questioning.

- ◆ Adjudicators will be instructed that the application and witness statements can be used as a basis for questioning at the hearing, and that material variations from them may be used in deciding the claim, unless those variations are explained to the adjudicator's satisfaction by progressive disclosure or otherwise.
- ◆ Counsel may agree on foundation and other facts and so advise the adjudicator. Such agreement binds the adjudicator. This would not prevent the whole narrative being told if the claimant so wished.
- ◆ Before a hearing counsel may identify particular areas of concern or issues that they believe require extra scrutiny and may provide additional suggested questions. The adjudicator retains discretion on what questions to put, but must explore the area proposed by counsel unless the adjudicator rules it to be irrelevant to credibility, liability or compensation in the DR process.

#### **f. Procedure ---General**

- ◆ Inquisitorial model: unless modified for a group DR, adjudicator responsible for managing hearing, questioning all witnesses (other than psychiatric experts) and preparing report with his or her conclusions and reasons. The adjudicator's questioning must both draw out the full story from witnesses (leading questions are permitted where required to do this), and test the evidence that is given (questioning in the form of cross examination is permitted where required to do this).
- ◆ The role is inquisitorial, not investigative. This means that while the adjudicator must bring out and test the evidence of witnesses, only the parties can call witnesses or produce evidence, other than expert evidence.
- ◆ Claimant and alleged perpetrator can give their evidence in their own words in narrative form and are subject to questioning by the adjudicator. Refusal to answer questions can result in finding that answer would have been detrimental to the witness' position.
- ◆ Claimant can read prepared statement, but this may impact credibility.
- ◆ Claimant can refer to their own notes as long as notes produced to counsel for the defendants two weeks in advance. Notes are not evidence.
- ◆ Claimant can refer to documents that are before the adjudicator.
- ◆ Counsel for the parties permitted to attend all hearings, but need not do so. Where counsel attend hearing, they may meet with adjudicator at intervals to suggest questions or lines of inquiry. The adjudicator must explore the proposed lines of inquiry unless he or she rules them to be irrelevant to credibility, liability or compensation in the DR process, but adjudicator retains discretion on the questions to put to a witness.
- ◆ Parties may require the adjudicator to hear any witness who is willing to appear and who has evidence relevant to credibility, liability or compensation within the DR process, other than an expert witness on the issue of consequential harms, provided notice and a witness statement are given two weeks before hearing. Criteria for the use of expert witnesses are set out in section (g) below. Since witnesses cannot be compelled to appear, no adverse

inference is to be drawn from the failure to produce a witness who may have relevant evidence, but the report of a treatment professional may be given less weight if they are available but refuse to testify.

- ◆ Alleged perpetrators may be heard as of right, provided the parties are advised in advance of what their evidence will be. (Section 3 above, and text below).
- ◆ Where counsel for a defendant does not attend a hearing, consideration will be given to having a client representative attend to hear the evidence.
- ◆ Hearings should be adjourned only in very exceptional cases, for example where the evidence of the claimant differs so substantially from the application that it amounts to a new application.
- ◆ At the conclusion of the evidence, counsel for the parties, if participating, may make brief oral submissions.
- ◆ Where compensable abuse is proven, damages are awarded for acts and, if the evidentiary threshold is crossed (see Section 5a above), impacts are assessed within the compensation rules. Unless the parties consent, expert evidence is required to establish consequential harms at levels 4 or 5. Such evidence may only be obtained where the adjudicator is satisfied that it is justified and necessary. (see below)

**g. Procedure ---Treatment Reports and Expert Evidence (see consolidation in Appendix IV)**

- ◆ Where the claimant has submitted treatment records and reports, the defendants may ask that the person who provided the treatment give oral evidence and that they be subject to questioning by the adjudicator.
- ◆ Where the adjudicator, having heard the claimant's evidence and considered the treatment reports, if any, is of the view that he or she cannot determine whether the alleged injury was suffered as claimed without an examination of the claimant by a professional, he or she may ask the claimant to submit to such examination. A refusal to do so may be taken into account in assessing the claimant's claim. The parties may require the professional to testify and to be subject to questioning by the adjudicator.
- ◆ Where the claimant is seeking damages based on level 4 or 5 of the consequential harms set out in the compensation framework:
  - ◆ Claimant so indicates in application
  - ◆ Adjudicator, at the hearing, has discretion to order an assessment by an expert. If he or she does not, then unless the parties consent, points may not be awarded at that level. Only the adjudicator may order such assessments, and only after hearing the claim and making findings as to credibility, and determining that the assessments are justified by the evidence accepted and are necessary to assess damages fairly. Where an assessment is ordered, the adjudicator retains an expert from a roster approved by counsel for all parties. The expert prepares a report which is tabled before the adjudicator.

- ◆ Counsel for the parties may require that the expert give oral evidence and that they be allowed to question the expert before the adjudicator and make submissions.
- ◆ Where there is clear evidence of harms at level 4 or 5 from the testimony of the claimant or of other witnesses, or in treatment reports or evidence about such reports, the parties may consent to the adjudicator considering the assignment of points within those ranges without the benefit of an expert assessment. Such consent does not eliminate the need for the adjudicator to be satisfied, on the civil burden of proof, that the claimant suffers from those harms, and that they are plausibly linked to proven abuses at the IRS.

#### **h. Procedure--Involvement of Alleged Perpetrator At Hearing**

- ◆ Alleged perpetrator to be heard as of right, provided the parties are advised in advance of what their evidence will be. They must submit a statement of their proposed evidence two weeks before the hearing; if they do not, counsel must share their notes, again two weeks before the hearing, of what the alleged perpetrator said when interviewed.
- ◆ Normally the alleged perpetrator will be heard after the claimant. Either can be recalled to resolve a credibility issue, but this should happen rarely.
- ◆ The alleged perpetrator does not have a role as a party.
- ◆ There is no right of confrontation.
- ◆ See Part 3 above for additional provisions concerning alleged perpetrators.

#### **i. Burden of Proof and Evidentiary Standards**

- ◆ Allegations and damages must be proven on the standard used by the civil courts for matters of like seriousness.
- ◆ The adjudicator may receive, and base a decision on, evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.
- ◆ Relevant findings in previous criminal or civil trials, where not subject to appeal, can be accepted without further proof.
- ◆ Evidence, other than the claimant's evidence, may be given by videoconference.
- ◆ Claimant may adopt prior videotaped statements, provided they remain subject to questioning by adjudicator, and provided that, without the consent of the defendants, a videotaped statement is not admissible if it was made for the purpose of seeking redress for the claimant's IRS experience.

#### **j. Report**

- ◆ Except where the report format is modified for group DR, the adjudicator will produce a report in a standard format outlining key factual findings and

providing a rationale for finding or not finding compensability within the DR model and for the damages assessed, if any.

- ◆ At the conclusion of the hearing, the adjudicator will advise the claimant that the decision will be provided in writing within 30 days, and will ask the claimant if they will need more than a further 30 days to consult with counsel or other advisors on whether to accept any compensation determined by the adjudicator. Such additional response time may be given by the adjudicator.
- ◆ The report will normally be delivered to the claimant via their counsel, who will be able to access health supports for the claimant at the time the decision is shared with them.
- ◆ Where the claimant is not represented by counsel, the adjudicator will also inquire at the end of the hearing into how the claimant would like to receive the decision, having regard to the desirability of health or family support being available at the time of receipt.
- ◆ Adjudicators may consult each other about the hearing and reporting processes. They will attempt to conduct consistent sessions and produce reports in a consistent fashion, and may discuss issues arising in individual cases provided they remain solely responsible for deciding the claims they have heard.

#### **k. Review**

- ◆ Except where modified in a group DR process, claimants may require that a second adjudicator review the decision on its merits.
- ◆ The defendants may ask the Chief Adjudicator to determine whether an adjudicator's, or reviewing adjudicator's, decision was within his or her jurisdiction, but may not challenge to correctness of a decision.
- ◆ All reviews are on the record (no new evidence permitted) and without oral submissions. Where both the claimant and a defendant seek a review of the original decision, the Chief Adjudicator shall hear both reviews together.
- ◆ The party seeking the review may provide a short written statement of their objections to the decision (not to exceed 1500 words) and the other parties may provide a brief reply (not to exceed 1000 words).
- ◆ On a claimant's review, the original decision will stand unless the second adjudicator finds a palpable and overriding error of fact.
- ◆ On a defendant's review, the original decision or the decision of a reviewing adjudicator will stand unless the Chief Adjudicator finds that:
  - i) Compensation was awarded for matters that are not compensable within DR, for example, language or culture claims.
  - ii) The compensation awarded exceeds the maximum for the jurisdiction as set out in the table at page 21.
  - iii) The decision is one that must be based on expert evidence, but such evidence was not adduced and consent to proceed without it was not given by the parties.
- ◆ If error is found, the reviewer or Chief shall substitute their own decision.

### **I. Acceptance of Compensation and Release of Defendants**

- ◆ On the expiry of the review period, or receipt of the last review decision, the defendants will prepare a release in the amount of the final decision and submit it to the claimant. The claimant will have 30 days from the mailing of the release to them, unless additional time was granted at the conclusion of their hearing, to accept the final decision by signing the release.
- ◆ A claimant must certify that they have had legal advice on the consequences of signing the release. Where a claimant has not been represented by counsel to this point, they will be required to consult a lawyer to receive this advice, for which the government will pay \$600 whether or not they sign the release. Counsel for a claimant who has been represented will be paid \$600 for this specific service, independent of the government's payment of 15% of any accepted award as a contribution to legal fees.
- ◆ The amount awarded by the adjudicator will not be the subject of negotiation, and a decision not to accept it within the relevant time period will leave litigation as the only recourse to resolve the claim in future.

### **m. Specialization of Adjudicators**

- ◆ Adjudicators will specialize in one or more schools and will be provided with a collection of relevant documents on each of those schools.

### **n. Setting**

- ◆ Relaxed and comfortable setting. Claimant to have choice of location, subject to hearings being scheduled to promote economy

### **o. Privacy**

- ◆ Hearings are closed to public. Parties, alleged perpetrator and other witnesses are required to sign agreements to keep confidential information disclosed at a hearing, except their own evidence, or as required within this process or otherwise by law. Claimants are free to discuss the outcome of their hearing, including the amount of any compensation they are awarded.
- ◆ Adjudicators may require a transcript to facilitate report writing, especially since they are conducting questioning. A transcript will also be needed for a review, if requested. Proceedings will be recorded and will be transcribed for these purposes, as well as if a claimant requests a copy of their own evidence for memorialization. Claimants will also be given the option of having the transcript deposited in an archive developed for the purpose.

### **p. Solemnity**

- ◆ Participant and other witnesses give evidence under oath, by affirmation or another way that binds their conscience.

**6. A PROCESS TO RESOLVE CLAIMS FOR PHYSICAL ABUSE WHERE THERE IS NO LASTING INJURY, OR WHERE WRONGFUL CONFINEMENT IS ALLEGED**

**DEFINITION:** This procedure is for claims:

1. That the application of physical force by employees of residential schools exceeded the disciplinary standards of the day, as set out in Appendix VI, for the nature of the force to be used, or was applied for an improper purpose (as defined), but in either event where no lasting physical mark or physical injury occurred, or
2. That the claimant was confined alone in a space where both the space and the duration were inappropriate for a child of their age.

**COMPENSATION:** Where claims are made through this process and are proven, compensation will be as follows:

One or more incidents of physical assaults or wrongful confinement as defined: up to \$1500

Where aggravating factors are present, or where a series of proven wrongs (as defined in points 1 and 2 above) had a lasting, negative impact on the former student, then, cumulatively up to \$3500

Aggravating factors in these cases are defined exclusively as the age of the student in relation to the acts in question, the pervasiveness of the wrongs over an extended time period, and where the wrongs were accompanied by threats, intimidation, racism, humiliation, degradation, or verbal abuse.

As well, an apology will be offered where claims are resolved through this process.

**PROCEDURE:** The following procedure would apply

1. Using the same intake system as for general DR, the former student submits a brief written application outlining the allegations, and confirming that the applicant is aware of the burden on them to prove their claim and of the level of compensation available where claims are proven. The application must describe each alleged wrong, provide identifying information about the alleged perpetrator, and, for physical assaults, state the applicant's understanding of the reason why force was applied each time.

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2. The defendants access their records to determine if the former student and alleged perpetrator(s) were at the school at the relevant time, and to seek any other relevant documents.
3. The defendants will notify the alleged perpetrator by letter of the allegations, and give them an opportunity to attend at the hearing.
4. The defendants submit their records, and any other written information or specific queries they may have, to the adjudicator and the former student.
5. The former student appears before the adjudicator who, using the application and the defendants' records and submissions if any, conducts an interview and assesses credibility. Counsel need not, but may, attend, and where they do their role is the same as in the general DR process where all questioning is done by the adjudicator.
6. A support person may accompany the former student (with out of pocket expenses to a maximum paid by the defendants), and on-call counselling will be available at the request of the adjudicator.
7. Where the claimant's evidence is found by the adjudicator to be credible and to establish one or more wrongs, the adjudicator will so find, and will assess compensation according to the above standards. The adjudicator will set out their findings and the rationale for the compensation being offered, if any, in a brief report.
8. The review procedures set out in section 6k above apply, except that where the defendants seek a review on jurisdictional grounds, the original decision or the decision of a reviewing adjudicator will stand unless the Chief Adjudicator finds that:
  - i) compensation was awarded for matters that are not compensable within the above standards, or
  - ii) the compensation awarded exceeds the \$3500 maximum for this category of claims.
9. The former student will receive the assessed compensation, and an apology, provided that within 30 days of the adjudicator's decision or the decision on any final review they submit the prescribed release, together with a certificate of independent legal advice, and agree to discontinue their litigation. Once an offer is made the defendants will pay \$600 for the certificate of ILA; a further counsel fee of 15% of the compensation ordered, or \$500, whichever is higher, will be paid if the compensation ordered is accepted.



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**STANDARDS FOR ASSAULTS:** The adjudicator will apply the defined standards of the day in determining whether the force used was excessive. Those standards will bind the adjudicator and the parties; they are givens, rather than something to be proven or challenged in individual cases.

Where the force applied is within the standards of the day, but the purpose of the discipline is alleged to be improper, a presumption of regularity will apply. The use of an appropriate level of force to require adherence to the norms of conduct of the school will not constitute an improper purpose, and those conduct norms of the school, whether or not formally expressed in written rules or approved by the Department, cannot be challenged in this process, but only through the courts. Improper purposes within this process are exclusively arbitrariness, uncontrolled anger, bullying, retaliation for complaints, or attempted coercion into sexual activity.

**BURDEN OF PROOF FOR ASSAULTS:** The adjudicator, using defined of standards of the day criteria for appropriate levels of force, will award compensation wherever the former student on a balance of probabilities establishes the application of force beyond those standards.

Where the force used does not exceed the disciplinary standards of the day, as defined for this process, the former student has the burden of proving that there was no reason, or an improper purpose (as defined above) for the application of force.

**APPENDIX I: COMPENSIBLE ABUSE IN DR**

As further defined at pages 19 (for Process A) and 15 and 29 (for Process B), the following categories of claims are compensible within DR. All other claims will be addressed through litigation, where possible through settlement discussions.

1. Sexual and physical assaults, arising from or connected to the operation of an IRS, whether or not occurring on the premises or during the school year, committed by adult employees of the IRS, or other adults permitted on the premises for the purpose of contact with children, where the claimant was a student or resident, or where the claimant was under the age of 18 and was permitted by an adult employee to be on the premises to take part in authorized school activities.
2. Sexual assaults committed by one student against another at an IRS where the claimant proves that they were the subject of a pattern of sexual assaults which continued after the staff of the IRS had actual knowledge the sexual assaults were occurring.
3. Wrongful confinement as defined in section 6, above: That the claimant was confined alone in a space where both the space and the duration were inappropriate for a child of their age (Process B only).

**APPENDIX II: COMPENSATION RULES**

	Acts Proven	Compensation Points
<b>SL5</b>	<ul style="list-style-type: none"> <li>Repeated, persistent, incidents of anal or vaginal intercourse.</li> </ul>	<b>45-60</b>
<b>SL4</b>	<ul style="list-style-type: none"> <li>One or more incidents of anal or vaginal intercourse</li> <li>Repeated, persistent incidents of oral intercourse</li> </ul>	<b>36-44</b>
<b>SL3</b>	<ul style="list-style-type: none"> <li>One or more incidents of oral intercourse</li> <li>One or more incidents of digital anal/vaginal penetration</li> <li>Repeated, persistent incidents of masturbation</li> </ul>	<b>26-35</b>
<b>PL3</b>	<ul style="list-style-type: none"> <li>More than one incident of physical assault, a minimum of one causing a physical injury that led to or should have led to hospitalization or serious medical treatment by a physician, permanent or demonstrated long-term physical injury, impairment or disfigurement, loss of consciousness, broken bones. Examples include severe beating, whipping, second-degree burning.</li> </ul>	<b>21-25</b>
<b>SL2</b>	<ul style="list-style-type: none"> <li>One or more incidents of simulated intercourse.</li> <li>One or more incidents of masturbation.</li> <li>Repeated, chronic, persistent fondling under clothing.</li> </ul>	<b>11-25</b>
<b>PL2</b>	<ul style="list-style-type: none"> <li>A single physical assault causing the same level of injury as in PL3.</li> </ul>	<b>11-20</b>
<b>SL1</b>	<ul style="list-style-type: none"> <li>One or more incidents of fondling or kissing.</li> <li>Nude photographs taken</li> <li>Exposure by a staff member</li> </ul>	<b>5-10</b>
<b>PL1</b>	<ul style="list-style-type: none"> <li>One or more incidents of physical abuse, a minimum of one causing scarring or a physical effect lasting more than 6 weeks.</li> </ul>	<b>1-10</b>

**\*Note:** An approach to physical abuse beyond the standards of the day but below PL1 is addressed through the process described in Section 7, above.

Level of Harm	Consequential Harm	Compensation Points
<b>H5</b>	<b>Continued harm resulting in serious dysfunction</b> Evidenced by: psychotic disorganization, loss of ego boundaries, personality disorders, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction or eating disorders.	<b>20-25</b>
<b>H4</b>	<b>Harm resulting in some dysfunction.</b> Evidenced by: frequent difficulties with interpersonal relationships, development of obsessive-compulsive and panic states, severe anxiety, occasional suicidal tendencies, permanent physical injury, overwhelming guilt, self-blame, lack of trust in others, severe post-traumatic stress disorder, some sexual dysfunction, or eating disorders.	<b>16-19</b>
<b>H3</b>	<b>Continued detrimental impact.</b> Evidenced by: difficulties with interpersonal relationships, occasional obsessive-compulsive and panic states, some post-traumatic stress disorder, occasional sexual dysfunction, addiction to drugs, alcohol or substances, and/or long-term physical injury, or extreme and consistent anxiety, guilt, self-blame, lack of trust in others, nightmares, bed-wetting, aggression, hyper-vigilance, anger, retaliatory rage and possibly self-inflicted injury.	<b>11-15</b>
<b>H2</b>	<b>Some detrimental impact:</b> Evidenced by: occasional difficulty with personal relationships, some mild post-traumatic stress disorder, self-blame, lack of trust in others, and low self-esteem; and/or several occasions and several symptoms of; anxiety, guilt, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	<b>6-10</b>
<b>H1</b>	<b>Modest Detrimental Impact:</b> Occasional short-term, one of: anxiety, nightmares, bedwetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	<b>1-5</b>

<b>Aggravating Factors</b> Add 5-15% of points for Act and Harm combined (rounded up to nearest whole number)	
Verbal abuse	Intimidation/inability to complain/oppression
Racist acts	
Threats	Humiliation
Sexual abuse accompanied by violence	Degradation
Failure to provide care or emotional support following abuse requiring such care.	Age of the Victim

<b>Future Care</b>	<b>Additional Compensation (Dollars)</b>
General – medical treatment, counselling	up to \$10,000
If psychiatric treatment required, cumulative total	up to \$15,000

<b>Consequential Loss of Opportunity</b>	<b>Additional Compensation (Points)</b>
Chronic inability to obtain or retain employment	<b>11-15</b>
Inability to undertake/complete education or training resulting in underemployment, and or unemployment	<b>6-10</b>
Diminished work capacity – physical strength, attention span	<b>1-5</b>

<b>Compensation Points</b>	<b>Compensation (\$) B.C.-Yukon -Ont.</b>	<b>Compensation (\$) Rest of Canada</b>
1-10	\$5,000-\$10,000	\$5,000-\$10,000
11-20	\$11,000-\$20,000	\$11,000-\$15,000
21-30	\$21,000-\$35,000	\$16,000-\$25,000
31-40	\$36,000-50,000	\$26,000-\$35,000
41-50	\$51,000-\$65,000	\$36,000-\$50,000
51-60	\$66,000-\$85,000	\$51,000-\$70,000
61-70	\$86,000-\$105,000	\$71,000-\$90,000
71-80	\$106,000-\$125,000	\$91,000-\$110,000
81-90	\$126,000-\$150,000	\$111,000-\$130,000
91-100	\$151,000-\$180,000	\$131,000-\$150,000
101-110	\$181,000-\$210,000	\$151,000-\$170,000
111+	up to \$245,000	up to \$195,000

**The location of the school where the abuse occurred determines the range of compensation. Where abuse occurred at schools in different jurisdictions, the compensation range for the jurisdiction with the higher level of compensation will be applied.**

### **APPENDIX III: CRITERIA FOR SENIOR ADJUDICATORS AND ADJUDICATORS**

#### **SENIOR ADJUDICATORS**

- \$ Law degree from recognized university. Consideration will also be given to candidates with a combination of related training and/or significant experience
- \$ Knowledge of and sensitivity to Aboriginal culture and history
- \$ Knowledge of and sensitivity to sexual and physical abuse issues
- \$ Knowledge of personal injury law
- \$ Knowledge of damages assessment
- \$ Ability to interview or examine witnesses
- \$ Ability to elicit useful evidence in a concise manner
- \$ Ability to act in an impartial manner
- \$ Respect for all parties involved
- \$ Demonstrated ability to assess credibility and reliability
- \$ The ability to work under pressure and to write clear, concise and well-reasoned decisions that take into account evidence, submissions, the law and policy, within required deadlines
- \$ The ability to work effectively with staff and participants from diverse backgrounds
- \$ Computer literacy and superior communication and writing skills
- \$ Personal suitability including an aptitude for adjudication, fairness, good listening skills, open-mindedness, sound judgment, tact, comfort with complex and/or sensitive issues
- \$ Willingness and ability to travel across Canada or within a designated region, including to First Nations communities, using various modes of transportation
- \$ Flexibility and availability to be called for hearings on an as required basis

#### **ADJUDICATORS**

- \$ Legal or related training
- \$ Knowledge of and sensitivity to Aboriginal culture and history
- \$ Knowledge of and sensitivity to physical abuse issues
- \$ Knowledge of personal injury law
- \$ Knowledge of damages assessment
- \$ Ability to interview or examine witnesses
- \$ Ability to elicit useful evidence in a concise manner
- \$ Ability to act in an impartial manner
- \$ Respect for all parties involved
- \$ Demonstrated ability to assess credibility and reliability
- \$ The ability to work under pressure and to write clear, concise and well-reasoned decisions that take into account evidence, submissions, the law and policy, within required deadlines
- \$ The ability to work effectively with staff and participants from diverse backgrounds

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- \$ Computer literacy and superior communication and writing skills
- \$ Personal suitability including an aptitude for adjudication, fairness, good listening skills, open-mindedness, sound judgment, tact, comfort with complex and/or sensitive issues
- \$ Willingness and ability to travel across Canada or within a designated region, including to First Nations communities, using various modes of transportation  
Flexibility and availability to be called for hearings on an as required basis

#### **APPENDIX IV: CONSOLIDATION OF PROVISIONS CONCERNING MEDICAL EVIDENCE**

This DR model seeks to confine the use of expert witnesses to matters where their evidence is essential, and to eliminate the prospect of competing reports from experts on the same issue. This will produce significant savings in cost and time.

Two categories of expert reports are contemplated: 1) treatment records and reports prepared in the normal course of the claimant dealing with their injuries, whether physical or psychological, and, 2) assessments of the claimant prepared specifically for litigation or DR.

Treatment records and reports are admissible as of right to help the claimant establish their case. They, or a medical examination, may also be important to the defence of the case where an injury (for example a broken arm) is in dispute.

Treatment reports are admissible to prove that the treatment was given and observations were made, but not as proof of diagnoses or the opinion leading to them. The treatment reports may also be used by the adjudicator as the basis for lines of questions, the answers to which could provide the basis for findings of consequential harms at levels 1-3. In limited circumstances (see below), the treatment reports may also support a finding of consequential harms at levels 4 or 5.

Assessments prepared for litigation purposes raise different issues. They are very dependant on the information given to the expert as the basis for the report. That information is generally limited to the claimant's version of events, and can differ from the evidence presented at a hearing, or found credible by the adjudicator. Where the claimant obtains such an assessment, normally the defendants would as well, quite often leading to a series of complex contradictions between the assessments.

As a result, the model proposes a more restrictive approach to assessments. Only the adjudicator may order such assessments, and only after hearing the claim and making findings as to credibility, and determining that ordering an assessment is justified by the evidence accepted and necessary to assess damages fairly. In such circumstances the adjudicator will retain an expert from a roster agreed to by representatives of claimants and defendants, and that expert's assessment will be relied upon in assessing damages. This can only be done where consequential harms at levels 4 or 5 are in issue.

Where there is clear evidence of harms at level 4 or 5 from the testimony of the claimant or of other witnesses, or in treatment reports or evidence about such reports, the parties may consent to the adjudicator considering the assignment of points within those ranges without the benefit of an expert assessment. Such consent does not eliminate the need for



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the adjudicator to be satisfied, on the civil burden of proof, that the claimant suffers from those harms, and that they are plausibly linked to proven abuses at the IRS.

The following summarizes the approach to expert evidence:

### 1, Treatment records and reports

- Claimant can introduce as of right, given notice and disclosure.
- Includes records of customary or traditional counsellors or healers
- Defence cannot require a defence medical, but can ask that the person who provided the treatment give evidence at the hearing.
- If the person who provided the treatment is dead or not available, then the records and reports may be admitted subject to the adjudicator being able to give them less weight
- Where the person who provided the treatment gives evidence, only the adjudicator may question them, and the questioning can explore the treatment professional's qualifications as well as the records and report.
- ◆ Treatment reports are admissible to prove that the treatment was given and observations were made, but not as proof of diagnoses or the opinion leading to them. The treatment reports may also be used by the adjudicator as the basis for a line of questions, the answers to which could provide the basis for findings of consequential harms at levels 1-3.

### 2. Adjudicator-ordered medicals to assess physical injuries

- ◆ Where the adjudicator, having heard the claimant's evidence and considered the treatment reports, if any, is of the view that he or she cannot determine whether the alleged injury was suffered as claimed without an examination of the claimant by a professional, he or she may ask the claimant to submit to such examination. A refusal to do so may be taken into account in assessing the claimant's claim.
- ◆ Where a report has been obtained, the parties may require that the examiner attend the hearing (or its resumption) and give evidence.
- The same standard for questioning will apply here as for treatment reports: the adjudicator does the questioning, and the questioning can explore the examiner's qualifications as well as the records and report.

### 3. Expert assessments

- These are only used to prove consequential harm level 4 or 5.
- Where the claimant seeks to prove such harm, they must so indicate in their application.
- Only the adjudicator may order such an assessment, and only after hearing the claim and making findings as to credibility, and determining that the

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assessment is justified by the evidence accepted and necessary to assess damages fairly.

- The adjudicator selects an expert from an agreed upon roster.
- After reviewing the expert's report, either party may require that the expert give evidence, and both parties can question them.
- ◆ Where there is clear evidence of harms at level 4 or 5 from the testimony of the claimant or of other witnesses, or in treatment reports or evidence about such reports, the parties may consent to the adjudicator considering the assignment of points within those ranges without the benefit of an expert assessment. Such consent does not eliminate the need for the adjudicator to be satisfied, on the civil burden of proof, that the claimant suffers from those harms, and that they are plausibly linked to proven abuses at the IRS.

## **APPENDIX V: CONSOLIDATION OF PROVISIONS CONCERNING GROUP DR**

Although the dispute resolution process is designed to be used primarily by individuals, it can be accessed by groups as well as individuals. Based on experience to date, the government will only accept a group into DR where it is clear at the outset that all group members have compensable claims, and that the group has a strong identity and a clear commitment to achieving lasting outcomes for its members. In proceeding with a group approach the defendants will want to be satisfied that there is a clear prospect that the outcome will be substantively different than if the members proceeded as individuals.

### **APPLICATION**

Where claimants desire to proceed through DR as a group:

- the individual applications of the group members must be submitted together or within a short interval
- each of the claimants must indicate their desire to proceed as a group member
- the applications must show commonality among group members (school, community, issues)
- the application must set out a plan for:
  - how the members will support each other throughout the process
  - specific steps they propose to take together and/or with their families or communities to achieve, through and after the process, a healthy and lasting resolution of their claims
  - a group decision-making process
  - managing the available safety resources, where they desire to do so

### **CRITERIA FOR ACCEPTANCE**

Where it is desired to proceed as a group, the application will be accepted if it demonstrates that:

- the group is an established one which has evident viability and decision-making capacity
- the issues raised in the members' claims are broadly similar such that there is sufficient commonality among the claims of the members to make proceeding together viable
- the members are already providing each other with support in connection with their IRS experiences or have a clear plan and realistic capacity to do so
- the group has a clear plan and intention to manage safety resources where they desire to do so
- the group has a clear plan to achieve a healthy and lasting resolution of their claims for themselves, and possibly also for their families and communities.

## **NEGOTIATED VARIATIONS IN PROCEDURE**

- ◆ Where a group DR has been accepted, negotiations will take place at this point on possible alterations to the standard DR process. Such alterations could include any of the following:
  - ◆ Agreement on specific joint experts where expert evidence required.
  - ◆ More extensive questioning of witnesses by counsel.
  - ◆ All cases to be heard by one or more agreed-upon adjudicators.
  - ◆ A negotiated resolution rather than binding decisions by the adjudicator.
  - ◆ A collective offer rather than individual offers
  - ◆ Negotiations backstopped by mediation, and/or by a subsequent binding determination by the adjudicator.
  - ◆ Where a binding decision is called for, either as the only option or as a backstop, whether or not to allow for a review.
  - ◆ A collective closing ceremony and memorialization initiative.

## **OTHER**

- ◆ In a group DR, if a negotiated outcome has been agreed to, then, as is the case in settlements outside DR, a release would not be required in advance of the negotiations. However, a release would be required before the hearing if the process contemplated a binding decision, whether at the outset or as a backstop to the negotiations.

## **KEY VARIATIONS FROM CURRENT GROUP DR**

The principal variations from the existing DR projects are the following:

- Each member must demonstrate, through the application, that their claim fits within the criteria for DR. The criteria will be the same as for individual DR, and hence more restrictive than at present.
- There is no mandatory set aside for culture or healing, but a clear plan to achieve lasting results must be submitted before the group application will be approved.
- A plan to manage safety resources must be submitted, where the group desires to manage those resources.
- Binding decisions will be possible if the group so desires.
- Generally, Canada will be more selective about which groups it accepts given that there will be an alternative DR process available to individuals.

## APPENDIX VI: CRITERIA TO GOVERN ADJUDICATORS IN DETERMINING WHETHER DISCIPLINE EXCEEDED THE STANDARDS OF THE DAY

The following standards were developed by reference to the relatively limited number of cases decided by Canadian courts over the relevant time periods. They represent standards on which there is sufficient guidance from decided cases to permit the defendants to accept a responsibility to pay compensation in this DR system. Areas where the law is less certain can be addressed by the courts, and as further guidance is given, these standards may be adjusted.

Adjudicators may not find that discipline exceeded the standards of the day, and constitutes a compensible wrong, except where

a) regardless of the time period

- medical treatment was required as a result of the punishment, unless medical treatment flowed from some unforeseen pre-existing mental or physical condition
- blood was drawn as a result of the punishment
- the punishment resulted in a long lasting mark
- punishment was administered to the student's head, and was more than a single slap or cuff

b) the discipline was administered after 1960 and

- the punishment resulted in any kind of physical injury, except for reddening of the skin
- there was excessive strapping to the hand having regard to the age of the student and the wrong committed (up to 10 strokes is deemed not excessive; beyond that, the adjudicator has discretion)
- an implement, other than a strap/ruler or something less severe<sup>1</sup> was used for punishment

c) the discipline was administered after 1970 and

- the punishment was administered to a part of the body other than the hand (i.e. buttocks are included)
- the student's clothing was removed to facilitate the corporal punishment
- punishment was a blow to the student's head, including a single slap or cuff

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<sup>1</sup> Items that are considered 'less severe' include ping-pong paddle, hairbrush, pointer. More severe items include an electrical cord, pitchfork.

## **APPENDIX VII: MANDATORY DOCUMENT PRODUCTION BY CLAIMANTS IN DR**

Following the receipt of a completed application form, and the acceptance of an individual into the DR model, relevant documents must be exchanged. This appendix outlines the documents a claimant must produce, or explain the absence of, as a condition of proceeding to a hearing with a claim seeking particular kinds of damages within the compensation framework.

This appendix does not outline other kinds of documents which could assist a claimant prove their claim. These will be admissible as provided for in the DR framework. The kinds of documents the defendants will produce are outlined in a separate appendix.

In terms of proving the abuse itself, no documents are required from claimants, although claimants are free to produce documents to support their claim.

### **1. TO PROVE CONSEQUENTIAL HARMS**

#### LEVELS 3, 4 AND 5

Treatment Records (including clinical, hospital, medical or other treatment records, but excluding records of counselling obtained to help ensure safety while pursuing an IRS claim)

Workers' Compensation Records (causes and assessments of injuries)

Corrections Records (causes and assessments of injuries)

#### LEVELS 1 AND 2

None required

### **2. TO PROVE CONSEQUENTIAL LOSS OF OPPORTUNITY**

#### LEVEL 3

Workers' Compensation

Income Tax (if not available, then EI and CPP records)

Treatment Records (including clinical, hospital, medical or other treatment records, but excluding records of counselling obtained to help ensure safety while pursuing an IRS claim)

Secondary (non-residential) school and post-secondary school records

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LEVEL 2

Workers' Compensation  
Income Tax, or at claimant's choice, EI and CPP records  
Secondary (non-residential) school and post-secondary school records

LEVEL 1

None required

**3. TO ESTABLISH NEED FOR FUTURE CARE**

None required

## APPENDIX VIII: CROWN DOCUMENT DISCLOSURE

### A. Documents to be Disclosed

The government will search for, collect and disclose documents that will confirm the dates a claimant attended a residential school. There are several kinds of documents that can confirm attendance at a residential school, and as soon as one or more are found which deal with the entire relevant period, further searches will not be undertaken.

The government will also search for, collect and disclose documents about the persons named in the *Application Form* as having abused the claimant, including information about those persons' jobs at the residential school and the dates they worked or were there, as well as any contemporaneous allegations of physical or sexual abuse committed by such persons.

The claimant or their lawyer will receive copies of the documents located by the government, but information about other students or other persons named in the documents (other than alleged perpetrators of abuse) will be blacked out to protect each person's personal information, as required by the *Privacy Act*.

The government will also gather documents about the residential school the claimant attended, and will write a report summarizing those documents. The report and the documents will be available for the claimant or their lawyer to review.

In researching various residential schools to date, some documents have been, and may continue to be, found that mention sexual abuse by individuals other than those named in an application as having abused the claimant. If these documents support the claim being advanced, the information from them will be added to the residential school report, and the background documents will be available for the claimant or their lawyer to review. Again, the names of other students or persons at the school (other than alleged perpetrators of abuse) will be blacked out to protect their personal information.

The following documents will be given to the decision-maker (senior adjudicator or adjudicator) who will assess a claim:

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- documents confirming the claimant's attendance at the school(s);
- documents about the person(s) named as abusers, including those persons' jobs at the residential school, the dates they worked or were there, and any sexual or physical abuse allegations concerning them;
- the report about the residential school(s) in question and the background documents and
- any documents mentioning sexual abuse at the residential school(s) in question.



## **B Records to be Researched to Confirm Attendance**

The following is a list of the kinds of documents that will be researched by the Government to confirm a claimant's attendance at a residential school. This list is for general information and may not be a complete list of all of the kinds of documents that will be searched in any given case.

### **Registered Indian Record**

The Registered Indian Record contains information about the claimant if they are registered as a status Indian. It gives information about their name, band, and band number when they were a child. This information helps to identify the claimant in school records. When the Registered Indian Record is not available to confirm attendance at a school, Treaty pay lists can be reviewed to confirm the identity of the claimant and their family members. Treaty pay lists show persons who were paid annuities by the government, and they sometimes show when a child attended a school.

### **Quarterly Returns**

Quarterly Returns are documents that list the students who lived at a residential school. These returns were completed by a residential school principal or by other staff every three months. Students were identified on Quarterly Returns by their names, student register number, band, and date of birth. Many of the returns before the 1960's showed when a student was learning a trade; for example sewing or farming. In the 1960s, the returns sometimes included a list of day students who received noon-day lunches at the residential school. Information about day school lunch students is usually limited to the student's name.

### **Daily Registers**

Daily Registers are documents that show the attendance of students who were in class at a residential school. Only the students' names are shown in the Daily Registers.

### **Student Lists**

Student lists are sometimes found which include some or all of the information found in Quarterly Returns, except for information related to trade learning.

### **Admission and Discharge Records**

The main document that shows the date when a student entered a residential school is called an "Application for Admission". When a student left the school, a "Discharge" form was filled out by school staff. There are also lists of "Admissions

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and Discharges” which can show the students who entered or left a school, their parents’ names, their band memberships, and the reasons why the student entered the school.

### **Principal’s Monthly Reports**

The Principal’s Monthly Reports were written by school principals (or residential school administrators) every month and contain lists of students and staff who were away from a school in that month.

### **Nominal Roll**

The Nominal Roll system lists students who attended schools after 1969.

### **Miscellaneous Documents**

Miscellaneous or loose documents can sometimes be found that give information about one or more students. An example includes school publications or yearbooks.

## **APPENDIX IX: INSTRUCTIONS FOR ADJUDICATORS IN PROCESS A.**

### **I. APPLICATION OF THE COMPENSIBLE CLAIMS CRITERIA**

In this DR system, the defendants accept responsibility to pay compensation for all proven abuse claims falling within the compensible case criteria, but not otherwise. Claims falling outside those criteria can be addressed through litigation, including, for recognized causes of action, through the normal processes for the settlement of claims. Over time, the compensible claims criteria may be amended to include additional classes of claims for recognized causes of action.

It is the senior adjudicator's responsibility to assess the credibility of each allegation, and, for those allegations which are proven on the civil standard, to determine whether what has been proven falls within the compensible claims criteria in force at the time the claim is heard.

These criteria flow from, but may differ from, established case law on vicarious liability and negligence. Senior adjudicators are not to have reference to case law on vicarious liability or negligence, since the compensible claims criteria stand on their own, and are the exclusive source of the defendants' ability to pay compensation for a claim in this DR system. The compensibility of proven sexual and physical abuse claims must be determined only by reference to these criteria, as further defined in the Compensation Framework, and any subsequent instructions.

If a claimant proceeds within Process A, and does not prove a claim which is compensible within that process, but does prove an act which is compensible within Process B, the senior adjudicator may award compensation within the criteria established for Process B claims.

The compensible claims criteria in Process A are:

1. Sexual and physical assaults, arising from or connected to the operation of an IRS, whether or not occurring on the premises or during the school year, committed by adult employees of the IRS, or other adults permitted on the premises for the purpose of contact with children, where the claimant was a student or resident, or where the claimant was under the age of 18 and was permitted by an adult employee to be on the premises to take part in school activities.
2. Sexual assaults committed by one student on another at an IRS where the claimant proves that they were the subject of a pattern of sexual assaults which continued after the staff of the IRS had actual knowledge the sexual assaults were occurring.

## **A. Physical or Sexual Abuse Committed by an Adult**

### 1. Where the victim was a student or resident

Where a proven incident of abuse was committed on a resident or student of an IRS by an adult, the following tests must be applied to determine if the claim is compensable within the DR system:

- a) Was the adult an employee of the IRS? If they were it does not matter whether they were employed by government, a church, or any other entity involved in the management of the school.
- b) If the adult was not an employee, were they expressly permitted on the premises for the purpose of contact with children? For non-employees, a potential for contact with children does not give rise to a compensable claim.
- c) Did the assault arise from, or was its commission connected to, the operation of an IRS? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse.

### 2. Where the victim was not a student or resident

Where a sexual or physical assault was committed by an adult on a non-student, the following tests must be met:

- a) Was the adult an employee of the IRS? If they were it does not matter whether they were employed by government, a church, or any other entity involved in the management of the school.
- b) If the adult was not an employee, were they expressly permitted on the premises for the purpose of contact with children? For non-employees, a potential for contact with children does not give rise to a compensable claim.
- c) Was the claimant under the age of 18 at the time of the assault?
- d) Did an identifiable adult employee give the child permission i) to be on the premises ii) for the purpose of taking part in school activities?
- e) Did the assault arise from, or was it connected to, the operation of the school? This test will be met where it is shown that a relationship was created at the school which led to or facilitated the abuse. If the test is met, the assault need not have been committed on the premises. The permission to be on the premises for an organized activity creates the circumstances in which an assault may be compensable if the other tests are met, but it does not also

circumscribe the location in which an assault must have been committed to qualify as one which arose from or was connected to an IRS.

### **B. Sexual Assault Committed by a Student**

Within this DR model, certain sexual, but not physical, assaults committed by students can be compensated. Where a proven incident of sexual abuse was committed by another student, the following tests must be applied:

- a) Did the assault take place on school premises?
- b) Was the assault part of a pattern of sexual abuse by students at the school, whether or not previously involving this victim or perpetrator?
- c) If so, were school staff actually aware of this pattern of sexual abuse at this school before the proven abuse took place? Actual and not constructive knowledge is required, but such knowledge by any employee is sufficient.

If all answers are yes, there is no need to address the standard of care issue that would need to be considered if a negligence action were being tried in a court.

## **II. APPLICATION OF THE COMPENSATION FRAMEWORK**

Compensation for proven claims falling within the compensable claims criteria is to be determined exclusively pursuant to the compensation framework. The framework is designed to ensure that compensation is assessed on an individualized basis. While the abuse suffered is an important indicator of the appropriate level of compensation, so too are the circumstances in which the abuse was suffered by the individual, and the particular impacts it had on him or her.

### **1. The Proven Acts**

The first step in applying the framework is to determine which acts of abuse have been proven on the civil burden of proof. The most serious act or acts of proven abuse, whether physical or sexual, determines the single range within which points for all abuse suffered over the course of attendance at one or more residential schools are to be assigned. Multiple acts of either physical or sexual abuse are recognized in the definitions of the categories of abuse; the impact of sexual abuse being accompanied by physical abuse is dealt with later as an aggravating circumstance.

Once the most serious category among the proven act categorizations has been determined, a point total will be assigned within that category's range. The adjudicator has the discretion to choose the point level within that range, having regard to the relative seriousness of the proven acts compared to the acts listed within that category. For example, in the category of nude photographs it is expected that a single photo of nude buttocks retained by the photographer would be assigned fewer points for the act itself

than a series of highly sexualized photos which had been put into wide distribution. The potential for an individual to suffer a high degree of trauma from an objectively less serious act is recognized, but is to be addressed in the harms categories within the framework, rather than by increasing the points otherwise appropriate for the act itself.

## 2. Consequential Harms

After the assignment of points for the proven acts has been determined, the next step is to assess any proven consequential harms which flowed from the proven acts. This is done by reference to the consequential harms categories. Harms must be demonstrated on the civil standard of proof, and the adjudicator must then find a plausible link between the abuse suffered at the IRS and the proven harm. Given a plausible link, points can be assigned whether or not other additional potential causes of the harms have been negated.

Harms up to and including H3 are not to be the subject of expert assessments, although treatment reports may be relied upon to supplement or contradict the claimant's evidence of harms suffered. Where a claimant's evidence credibly establishes the abuse plus apparent harms at levels 4 or 5, the adjudicator may order an expert assessment. Only where supported by such an assessment, or where the parties consent to points at these levels being considered without such an assessment, may the adjudicator find that harms at the two highest levels have been proven and were caused by the proven abuse.

Points for consequential harm are assessed only once, at the highest proven level of harm. Within the range for that level, the adjudicator has discretion to determine the points to be assigned. Again, the relative gravity of the harm within the appropriate category will determine where within the applicable range the points should be assigned.

## 3. Aggravating Circumstances

The adjudicator must then determine whether any of the listed aggravating factors have been proven on the civil standard of proof. Where they have, the adjudicator has the discretion to determine a percentage to be added for one or more proven aggravating factors collectively. This discretion is to be exercised having regard to the seriousness of the aggravating factor in the specific context in which it occurred, including the impact the factor actually had on the claimant. No other aggravating factors may be considered.

The percentage for aggravating factors is then applied to the total of the points assigned for the acts and the harms. The resulting number of points for aggravating factors is then rounded up to the nearest whole number .

## 4. Loss of Opportunity

Where the claimant has asserted that the abuse caused them to suffer a loss of opportunity, the adjudicator will then consider that part of the claim. Two aspects must be taken into account. First, the claimant must prove, on the civil standard of proof, one or more of the circumstances or experiences listed in this part of the framework. Second, he

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or she must convince the adjudicator that there is a plausible link between the abuse proven to have occurred at the IRS, and the proven subsequent experience.

Where this proof is established, the adjudicator will then select the range of points reflecting the most serious proven loss plausibly linked to the abuse and assign a point total within that range. Within the appropriate range the adjudicator will assign points based on the relative seriousness within the category of the proven experiences.

It is important to note that loss of opportunity within the compensation framework is not intended as a surrogate for a loss of income claim in the courts. Within this DR system, loss of opportunity is to be assessed by reference to only the specified factors. Evidence of potential career expectations, and an assessment of actuarially-proven losses based on proven IRS-abuse impacts on those expectations, play no role in this DR system. Claimants who have such claims must resolve them through the litigation process.

#### 5. Assessment of Compensation

All points assigned will now be totalled. This total determines the dollar range within which compensation can be awarded, but it does not determine where within that range the adjudicator will award compensation. While a higher number of points within a range will normally lead to a higher level of compensation, the adjudicator has the discretion to determine compensation within the applicable dollar range having regard to the totality of the proven facts and impacts.

#### 6. Future Care

Finally, where a claim has been made for future care, the adjudicator will consider whether to award additional damages within and according to the criteria in the framework. Relevant factors here will include the impacts of the proven abuse on the individual, any treatment already received for those impacts, the availability of treatment in the claimant's home community and the need for assistance with travel costs, and the individual's degree of commitment to obtaining future care.

#### 7. Conclusion

The compensation framework is designed to provide an individual assessment of abuse suffered and its impact. For the classes of cases dealt with in this DR model, it generates compensation levels consistent with court awards in each jurisdiction, using in a systematic and transparent way the factors applied by the courts. In the interests of fairness and consistency, all adjudicators must follow these instructions in applying the framework to the cases before them.

## **APPENDIX X: THE USE OF EXTRA-CURIAL KNOWLEDGE BY ADJUDICATORS**

### **INTRODUCTION**

A number of issues will arise concerning the ability of adjudicators to make use of information obtained or known beyond that that provided by the parties in each individual case. There are several aspects to this matter:

- use of background information and/or personal knowledge, for example on
  - schools
  - child abuse and its impacts
  - residential school system
- carry-forward of information from hearing to hearing, for example on
  - alleged perpetrators and modus operandi of proven perpetrators
  - conditions at a school
  - credibility findings
- use of precedents from other adjudicators
- ability of adjudicators to confer

The approach to be taken to these issues is set out below, by reference to the source of the information in question.

#### **1. Orientation Materials Provided to Adjudicators**

Adjudicators will be supplied with orientation materials on the residential school system and its operations, as well as on child abuse and its impacts. Although these materials will have been agreed to by representatives of all interests, some of the materials will reflect uncontested facts or opinions; others may contain useful, but not uncontested information.

It will be vital to distinguish between the two kinds of materials, and to clearly convey the distinction to the adjudicators, since each category should be subject to different standards for use by adjudicators.

Where orientation information falls into the first category (uncontested facts or opinions) it may be used as follows:

Adjudicators are expected to inform themselves from this material. They may use it to question witnesses, but also to make findings of fact and to support inferences from evidence they find credible, for example to



conclude that trauma of a certain kind can be expected to flow from a sexual assault on a child. These latter uses of this information are justified by the fact that representatives of all interests have agreed to its inclusion in the orientation materials for this use, and all participants in a hearing will have access to the orientation materials.

Wherever possible the adjudicator should use the information at the hearing to formulate questions to any witnesses who may be able to comment on it, or whose testimony it may contradict, support, or help explain. Where this is not possible, the proposed use in reaching a decision should be identified to the parties at the hearing to give them a chance to comment on it in their submissions, but so doing is not a condition precedent to the proposed use.

Where the material is used in coming to a finding of fact, or drawing an inference, it should be cited and its relevance and the rationale for its use set out in the decision.

Where orientation information provided to adjudicators does not represent uncontested facts or opinions, it may be used by adjudicators as follows:

Adjudicators may use this category of orientation materials as a basis for questioning witnesses, or testing the evidence, but may not rely on it as an independent basis for their conclusions of fact or their assessment of the actual impact of abuse on an individual.

## **2. Personal Knowledge of Abuse and its Impacts**

Some adjudicators may bring to the job an extensive background in dealing with child abuse, or may receive information on child abuse and its impacts at training sessions or continuing education programs, or through their own reading or research.

The approach to the use of this kind of information is as follows:

Adjudicators may use their personal knowledge, training they have received, or general educational materials, as a basis for questioning witnesses, or testing the evidence, but may not rely on them as an independent basis for their conclusions of fact or their assessment of the actual impact of abuse on an individual.

## **3. Document Collections**

Adjudicators will be provided with Canada's, and potentially a church's, document collection on each school for which they are holding hearings. This material will also be available to claimants and their counsel.

The approach to the use of this kind of information is as follows:

Adjudicators are expected to inform themselves from this material, which may be used as a basis for findings of fact or credibility. Where any of it is so used by adjudicator, it must be cited and its relevance and the rationale for use set out in the report.

Because this information is specific to the school in question and is provided in advance, it is expected that adjudicators will be familiar with it before starting a hearing to which it is relevant. Given this, before relying on specific documents to help decide a given case, the adjudicator should seek the consent of the parties, or put the relevant extracts to any witnesses who may be able to comment on them, or whose testimony they may contradict or support. Where there are no such witnesses, or where one or more parties contest the use of the documents, the adjudicator may still use them in his or her decision, but wherever possible should advise the parties of the proposed use of the document so that they may address it in their submissions.

#### **4. Previous findings**

Adjudicators will hear evidence about, and make findings of fact about, the operations of various schools, their layouts, the conditions that pertained in them, the acts and knowledge of employees, and where an individual is found to have committed a number of assaults in a particular way, their modus operandi.

The approach to the use of this kind of information is as follows:

Adjudicators must treat each individual's claim as a unique claim to be determined on the evidence presented, plus information expressly permitted to be used according to the guidelines agreed to for this process. They may not carry forward, much less be bound by, previous findings they have made, including findings of credibility.

They may, though, use information from previous hearings to inquire about possible admissions, or failing that, to question witnesses. This ability to bring forward information from previous hearings for these specific purposes flows from the fact that this DR process is not a party-controlled adversarial process. Instead, the inquisitorial model is being used to have adjudicators inquire into what happened, using their skills and judgement to question witnesses to determine the facts.

While it would not be fair to base a decision on evidence from a previous hearing, since some or all of the parties would not know its context, and would be unable to challenge its reliability, it is also not appropriate to

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insist that adjudicators act as if each case were their first one. Their job requires them to test evidence and determine what happened. While they cannot call witnesses, it is their duty to question them, and they must be free to pose questions and follow lines of inquiry they believe to be relevant. Whether that belief flows from common sense, instinct, or something heard at another hearing, it is appropriate as a basis of inquiry, although, in the absence of an admission, not as evidence.

#### **5. Consistency among adjudicators**

Each claimant is entitled to a timely and independent decision on the evidence heard and considered by the adjudicator. At the same time, a consistent approach to decision-making is required to ensure fairness to each individual and to support the credibility of the system as a whole. The Chief Adjudicator will be given the responsibility to develop and implement mechanisms to achieve these important objectives.

#### **6. Stare decisis**

Although reasons will be issued in each case, the DR system will not operate on the basis of binding precedent. All adjudicators are of equal authority, and should not consider themselves bound by each other's previous decisions. Through conferencing, adjudicators may come to a common interpretation of certain procedural issues, but each case must be determined on its own merits.

## **APPENDIX XI: TRANSITION FROM LITIGATION OR ADR PROJECTS, AND PRIORITIES FOR ACCESS TO NEW DR PROCESS**

All IRS claimants who meet the criteria for the new DR process may move to the new DR system for the validation of their claim except:

1. Claimants who have settled their IRS claim, whether in the litigation stream or an existing DR project.
2. Claimants whose claims have been dealt with at trial.
3. Claimants who have given evidence in a hearing in an existing ADR project.

For greater certainty, participation in unsuccessful resolution discussions with the Crown or a church in an attempt to settle litigation inside or outside the existing ADR projects does not preclude access to the new DR system. Only where one of the above conditions applies will an application to enter the new process be rejected.

In relation to the third condition above, if the parties are unable negotiate a resolution of the claim, the claimant may elect to have the quantum assessed under the compensation framework for the new DR system, provided their claim falls within the compensable claims addressed by the framework. There will be no new hearing; quantum will be assessed on the basis of the report of the fact finder at the hearing held under the existing DR system.

### **Rules for Pre-existing Evidence**

Where a claimant who has given evidence in a previous IRS proceeding, whether in the form of answers to interrogatories or participation in an examination for discovery, wants to and is eligible to enter the new DR system:

- (i) the record of the previous evidence must be provided to the adjudicator in the new DR system, who may use it as a basis to question the claimant;
- (ii) the claimant must appear before the adjudicator to give evidence;
- (iii) the claimant may adopt their previous evidence rather than provide a narrative account at the hearing;
- (iv) the claimant is subject to questioning by the adjudicator on the same basis as other claimants.

### **Potential for Expediting the Transfer**

To expedite transition to the new system, and reduce the burden of completing an application in circumstances where the claimant has already given evidence, counsel for

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the Crown and the claimant should endeavour to develop an agreed statement of fact on some or all of the issues based on the evidence given.

Phasing of Acceptance into the DR Process

To provide for an orderly resolution of claims within the DR Process, and to offer transparency and fairness to applicants, the following standards will govern the consideration of applications and the scheduling of hearings:

1. Until May 1, 2004

In considering applications to DR, first priority will be given to:

- a) Applications from persons over 70 years of age; and
- b) Applications from persons who submit a doctor's certificate indicating that they are in failing health such that further delay would impair their ability to participate in a hearing.

Next priority will be given to:

- c) Persons who elect to transfer to the DR Process from existing ADR Pilot Projects (see above) and if there is capacity within the resourcing available for hearings, persons in categories d and e, below.

For the considered and accepted applications, hearings will be scheduled when the documentation is complete, with priority being given to categories a and b above. Among persons in categories c above, the health of any alleged perpetrator who wishes to attend will be used to establish priority.

From May 1 to December 1, 2004

In considering applications, priority will be given to persons in categories a, b and c above and applications will also be considered from:

- d) Persons who have completed examinations for discovery, or who, as of December 1, 2003, had cancelled a scheduled examination for discovery for the express purpose of entering the DR Process;
- e) Persons who are applying as members of groups (these applications may be considered earlier for the purpose of negotiations with the group's coordinator).

For the considered and accepted applications, hearings will be scheduled when the documentation is complete, with priority being given to categories a and b above. Among persons in the other categories above, the health of any alleged perpetrator who wishes to attend will be used to establish priority.

Criteria for considering applications after December, 2004 remain to be determined, and the above dates may be adjusted depending on the volume of applications.

## APPENDIX XII: FORMAT FOR REPORTS BY SENIOR ADJUDICATORS

Senior adjudicators must produce a report outlining and supporting their findings in each case. To help ensure consistency, fairness and efficiency, these reports must be prepared in a standard format.

The reports are primarily to explain to the parties how the adjudicator's decision was reached, but they must also support and facilitate consultation among adjudicators, a review for error at the request of the claimant, and a judicial review application by any of the parties.

The format, which was approved by the Chief Adjudicator Reference Group on August 28, 2003, does not contemplate a narrative exposition of the evidence heard. Instead, it requires a focus on findings, and the rationale for those findings. A transcript of the evidence will be available for claimants who wish a record of their testimony; it is not the purpose of the report to provide such a record. Similarly, the transcript will be available for a review; the evidence need not be summarized in the report for those purposes.

While an arbitrary page limit will not be set, it is expected that most reports will be in the range of 6-10 pages. The approved format is as follows:

### A. Summary

1. Summary of allegations
2. Summary of conclusions

### B. Decision

Where the claim was proven in whole or in part state the damages awarded. Where the claim is not established, state that it is dismissed.

### C. Analysis

1. Outline each specific allegation or linked series of allegations, and set out the findings of fact pertinent to it. Do not outline the evidence as a whole.
2. In making findings for each abuse allegation or series of linked abuse allegations:
  - a. if the evidence was uncontradicted, indicate whether, and the basis on which, it was found credible or not credible, or
  - b. if there was conflicting evidence, indicate which evidence was found credible and why, and
  - c. having regard to the evidence found credible, outline whether, and the basis on which, the civil standard of proof was found to have been met, or not met.

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3. Having regard to the proven allegations as a whole, outline the harms, impacts and aggravating factors found, or not found, to have been established on the civil standard of proof, along with the basis for those findings. For the proven harms and impacts, indicate whether, and on what evidence, the claimant has established a plausible link between proven harms or impacts and the proven abuse.
4. In relation to the proven acts, and the proven and plausibly-linked harms and impacts, outline the calculation of damages by indicating:
  - a. The most serious proven acts, the applicable range, and the rationale for the points assessed within the applicable range
  - b. The most serious proven harms for which a plausible link to the proven acts was established, the applicable range, and the rationale for the points assessed within the applicable range.
  - c. The proven aggravating factors, and the rationale for the percentage found appropriate.
  - d. The most serious proven opportunity loss for which a plausible link to the proven acts was established, and the rationale for the points assessed within the relevant category.
  - e. Findings and rationale for any future care damages assessed.

D. Other

1. Summarize any non-monetary redress the claimant has sought.

## **APPENDIX XIII: FORMAT FOR REPORTS BY ADJUDICATORS**

Adjudicators deal only with the standards of the day physical abuse cases, and the wrongful confinement cases. Compensation is limited to \$3500. They interview the claimant and any other witnesses, review any documents that were produced, and then, using the standards set for this part of the model, determine what is proven and what compensation is appropriate. The claimant then has 30 days to obtain independent legal advice and decide whether to accept the amount in return for a full release.

To document this, the adjudicator must produce a report outlining and supporting their findings in each case. To help ensure consistency, fairness and efficiency, these reports must be prepared in a standard format.

The reports are primarily to explain to the parties how the adjudicator's decision was reached, but they must also support and facilitate consultation among adjudicators and a judicial review application by any of the parties.

The format, which was approved by the Chief Adjudicator Reference Group on August 28, 2003, does not contemplate a narrative exposition of the evidence heard. Instead, it requires a focus on findings, and the rationale for those findings. A transcript of the evidence will be available for claimants who wish a record of their testimony; it is not the purpose of the report to provide such a record. Similarly, the transcript will be available on a review; the evidence need not be summarized in the report for those purposes.

While an arbitrary page limit will not be set, it is expected that most reports will be in the range of 3-6 pages. The approved format is as follows:

### **A. Summary**

1. Summary of allegations
2. Summary of conclusions

### **B. Decision**

Where the claim was proven in whole or in part state what abuse was proven and the damages being proposed. Where the claim is not established, state that finding.

### **C. Analysis**

1. Outline the physical abuse allegations, and/or the wrongful confinement allegations, and set out the findings pertinent to them. Do not outline the evidence as a whole.
2. In making findings:



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- a. if the evidence was uncontradicted, indicate whether, and the basis on which, it was found credible or not credible, or
  - b. if there was conflicting evidence, indicate which evidence was found credible and why, and
  - c. having regard to the evidence found credible, outline whether, and the basis on which, the civil standard of proof was found to have been met, or not met.
3. For physical abuse allegations, once it is established that force was applied to the former student, outline for each incident or group of incidents whether the standards of the day for discipline, as defined for this project, were exceeded. Where they were not, outline whether the claimant has established that the discipline, while within the standards for the degree of force, was administered for an inappropriate reason, as defined in the framework.
4. For wrongful confinement allegations, outline whether the student was confined in a space which was too small given the age of the child, the size and conditions of the place, and the time spent in it.
5. Having regard to the proven allegations as a whole, outline whether one or more of the specified aggravating factors were present, and whether the proven wrongs had a lasting, negative impact on the claimant. Based on these determinations, assess damages within the appropriate range, and provide a rationale for that assessment.

D. Other

1. Summarize any non-monetary redress the claimant has sought.

**APPENDIX XIV: SELF-REPRESENTED CLAIMANTS**

1. Self-represented claimants (SRCs) will receive document production and witness statements on the same basis as if represented.
2. SRCs may not interview alleged perpetrators, but will receive notes of what was said at any interview and a witness statement, if provided.
3. SRCs may submit proposed areas for scrutiny and proposed lines of questioning to the adjudicator in advance of a hearing (this will particularly apply where the alleged perpetrator or a defence witness is to give evidence).
4. SRCs will receive the defendants' advance submissions to the adjudicator on areas/lines of questioning to be explored.
5. During a hearing, both the SRC and the defendants may suggest lines of questioning, but this will be done in the hearing room, on the record and in the presence of each other.
6. SRCs will be allowed to make brief closing submissions.

## **APPENDIX XV: SUPPLEMENTARY INSTRUCTIONS FOR ADJUDICATORS**

### **Introduction**

The mandate given to senior adjudicators and adjudicators to award compensation is provided exclusively through the document outlining the Dispute Resolution Model, of which this is Appendix XV. The document, including Appendices I-XIV, was published on November 6, 2003, and governs eligibility for, and the procedures and standards to govern awards of, compensation within the Model.

In the course of providing training to the adjudicators in November, a small number of issues arose which require clarification in the form of supplementary instructions.

This Appendix sets out the required clarifications of the mandate. It is published as of December 22, 2003, and governs all hearings after that date. The contents of this Appendix will be communicated to applicants at least two weeks before their hearing.

### **Additional Instructions as of December 22, 2003**

#### **1. Use of Treatment Reports in Process B:**

For greater certainty, this will confirm that treatment reports may be submitted by claimants and relied upon by adjudicators in Process B on the same basis as in Process A. This flows from the fact the Model provides for increased compensation where claimants in Process B prove that a series of proven, compensible wrongs had a lasting, negative impact on them. While this impact would normally be established by the evidence of the claimant, and perhaps family members or friends, treatment reports may be put forward and utilized where relevant.

#### **2. Inter-relationship between Process A and Process B**

##### Wrongful confinement

This is only compensible in Process B. Where it is alleged along with wrongs that are compensible in Process A, the case will be dealt with in Process A unless the claimant wishes to abandon all of their claim except the wrongful confinement allegations.

If proven in Process A, wrongful confinement will be subsumed in the points awarded for the assaults with which Process A deals. If it is the only wrong that ends up being proven in Process A, compensation can be awarded by the senior adjudicator, but only within Process B limits. This means there is no use of the point system, and hence no points can be awarded for consequential harms or opportunity loss. Process B itself provides for higher awards if a lasting, negative impact is shown. There is no award for future care in Process B.

Physical assaults which do not cause lasting physical injury

These are only compensable in Process B. Where they are alleged along with wrongs that are compensable in Process A, the case will be dealt with in Process A unless the claimant wishes to abandon all of their claim except the physical assaults.

If proven in Process A, the physical assaults where no lasting injury is caused will be subsumed in the points awarded for the more serious assaults. If they are the only wrong that ends up being proven in Process A, compensation can be awarded within Process B limits. This means there is no use of the point system, and hence no points can be awarded for consequential harms or opportunity loss. Process B itself provides for higher awards if a lasting, negative impact is shown. There is no award for future care in Process B.

**3. Representation by Agents**

Claimants may represent themselves, as set out in Appendix XIV, or may be represented by counsel. Agents, whether paid by the claimant or not, may not discharge the roles specifically established for counsel in the Model.

**4. Transfers from litigation**

Appendix XI sets out the procedure for transferring claims from litigation to the Dispute Resolution Model. It specifies the documents which must be brought into the DR process from litigation. Apart from those documents, the DR Model itself outlines the kinds of documents that may be adduced in proceedings under it. The fact that a case is transferred from litigation where documentary rules are different does not change the kinds of documents permitted in proceedings under the Model. For greater certainty, the only expert assessments permitted in DR are those conducted by an agreed-upon expert on the order of, and under the direction of, a senior adjudicator.

**5. Burden of Proof**

In relation to Process A, the Dispute Resolution Model states at page 12 that the burden of proof faced by a claimant is the same that a court would apply in matters of like seriousness. In relation to Process B, it states at page 17 that the burden is the balance of probabilities.

The Model is framed this way in order to establish that as allegations become more serious, adjudicators may require more cogent evidence before being satisfied that the claimant has met their burden of proof. Nonetheless, the burden of proof remains the balance of probabilities in all matters.