

APPENDIX XVI: 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 XVI. The Model, including Appendices I-XIV, was published on November 6, 2003, and governs eligibility for, and the procedures and standards to determine awards of, compensation for IRS abuse claims being advanced within it.

In the course of providing training to the adjudicators in November, 2003, a small number of issues arose which required clarification in the form of supplementary instructions. Appendix XV, published as of December 22, 2003, set out the required clarifications of the mandate. It governs all hearings after that date.

Over the course of the implementation of the Model, a number of issues have been raised in the decisions rendered by the independent adjudicators. In order to provide guidance for future hearings, and promote timeliness and consistency among the decisions rendered by adjudicators, this Appendix provides additional supplementary instructions.

This Appendix, except item 15, applies to all hearings held after November 14, 2005, provided that any applicant who had applied before that date has been advised in writing of its contents at least two weeks before their hearing. The standards in item 15 may be applied to hearings in progress as of November 14 if all parties agree.

Additional Instructions as of November 14, 2005

1. Attendance and Participation at Hearings

The Claimant may attend a hearing where the alleged perpetrator gives evidence without that individual's consent. This is based on the Claimant being a party, and needing to be aware of all evidence to raise possible lines of questioning and make submissions if unrepresented, or to instruct counsel if represented.

Given the non-adversarial nature of the DR Model and the neutral, inquisitorial role played by the adjudicators under it, as well as the need to respect the safety of the Claimant, neither an alleged perpetrator nor counsel for an alleged perpetrator may attend while the Claimant gives evidence, without the Claimant's advance consent [see DR Papers, page 6, bullet 7]. Where counsel for a church entity also acts for an alleged perpetrator, this means that they may not attend the hearing while the Claimant gives evidence without the Claimant's advance consent. Government representatives may always attend this part of the hearing, as may representatives of churches who are cooperating in the resolution of claims except their counsel if he or she is also acting for an alleged perpetrator in the case.

Where an alleged perpetrator has agreed to give evidence, but the testimony of the claimant at a hearing differs materially from the account provided in the application which was shared with the alleged perpetrator, the adjudicator may prepare a summary of the new allegations and provide it to the alleged perpetrator before he or she gives evidence.

Support persons attend hearings to help ensure the health and safety of the Claimant during a stressful event. Their focus needs to be on how the Claimant is handling the stress they face. Accordingly support persons should not become distracted from that goal by seeking to become a participant in the proceedings, for example, by attempting to give evidence. If it becomes necessary for a support person to give evidence, they should be sworn (or affirmed) as a witness, but only after the adjudicator is satisfied that appropriate arrangements for the safety of the claimant are in place.

Finally, since the central purpose of the hearing is an assessment of credibility, counsel or representatives of any party must refrain from speaking to a witness about the evidence in the case once that witness begins giving evidence and until their evidence is complete. An adjudicator may authorize an exception to this where he or she is of the view that the discussion is necessary to elicit evidence from the witness in a timely manner.

2. Definition of Employee

For greater certainty, an employee of the school (see Page 18, above) includes any employee of the government or the church which operated the school, whether or not they had a contract of employment at the school, provided that the Claimant proves that the abuse arose from or was connected to the operation of the school. Persons in this category (employees) need not have been permitted on the premises for the specific purpose of contact with children, but they must have been invited onto the premises by a staff member.

3. The Threshold for Physical Abuse

Compensation for physical abuse may be awarded in the DR Model only where physical force is applied to the person of the Claimant by an employee, or an adult permitted on the premises for the purpose of contact with children. Based on decisions to date, this test may be deemed to have been met where:

- the Claimant is hit by a fellow student on the direct and contemporaneous order, and in the presence of, an employee; or
- the Claimant is required by an employee to strike a hard object such as a wall or post, such that the effect of the force to the Claimant's person is the same as if they had been struck by a staff member;

and in either instance where the remaining standards for compensation within the Model have been met.

4. Interpretation of the Compensation Framework

The Compensation Framework was expressly designed to avoid a mechanistic approach to compensation by recognizing that a relatively less serious act can have severe consequences, and vice versa. It accomplishes this goal by requiring both an objective assessment of the severity of the abusive act, and then a distinct and highly subjective assessment of how that act affected the individual claimant (DR Model, page 37). Accordingly, the categories defining acts and harms must be assessed separately, and the words in each category must be read purposively within their respective contexts.

In particular, in determining the level of harm suffered by a Claimant, adjudicators are to consider each of the five categories as a whole, and in relation to the other categories, rather than focussing on isolated words within a given category. The Model calls for a contextual consideration, having particular regard to the headings for each category, in order to determine which of the categories best reflects the Claimant's proven level of harms resulting from compensable abuse. [See the DR Model at page 38: "points for consequential harms are assessed...at the highest proven level of harm." (Emphasis added)].

5. Process B Standards in Process A

Processes A and B were designed to operate on a stand-alone basis, with each containing its own distinct standards for compensation. Some DR decisions have recognized this, while others have imported Process B standards into the adjudication of Process A cases. To ensure consistency in the future:

- i) Where sufficient force was applied that a lasting injury, as defined in Process A, resulted, no further inquiry into the nature of the force or the reason for the discipline is required. The injury alone is sufficient to make the act compensable, whether or not the act itself would have been beyond the standards of the day had there been no injury.
- ii) Where an adjudicator is determining whether there was one or more than one assault for the purposes of Process A, only assaults constituting a Process A assault may be considered.

For greater certainty, the foregoing applies only to the assessment of the compensability of proven acts. As noted immediately below, once acts within Process A have been proven, all harms flowing from any compensable abuse, whether at the Process A level or the Process B level, may be considered. This is because it is not practical or efficient in a DR hearing to attempt to allocate effects among different compensable harms.

6. Application of the Harms Category

Harms from all compensable acts should be taken into account in assessing points within the Consequential Harms and Consequential Loss of Opportunity categories of the

Compensation Framework. Thus, compensable acts which have been subsumed within more serious abuse for the purpose of assigning points for the acts themselves, and harms flowing from a proven Process B assault, may be considered in a proven Process A claim.

A Claimant must lead evidence to prove each asserted harm on the balance of probabilities. Once a compensable act and a compensable harm have each been established on the evidence according to a balance of probabilities, only a plausible link between them need be established in order for compensation to be awarded for them. A finding of a plausible link does not require the negation of other potential causes of harms, but it must be based on, or inferred from, the evidence led in the case, and not on assumptions or speculation as to possible links. In this regard, adjudicators shall have regard to their powers under Appendix X, above.

Harms not proven to be linked to acts constituting compensable abuse may not be taken into account in assessing points in the harms categories (see the DR Model at pages 8, 37 and 38).

7. Application of Aggravating Factors

Only the specific aggravating factors listed for Process A or B, whichever is applicable, may be taken into account in assessing this category. Provided such factors are specifically proven, and are proven to have made the compensable abuse worse, they may be taken into account whether or not they were coincident in time and place with such abuse.

8. Interpretation of Improper Purpose

As set out at page 17 of the DR Model, school staff were permitted to discipline students for breaches of the conduct norms of the school, provided that the level of discipline did not exceed the standards of the day. Where a Claimant seeks to be compensated for discipline which was within the standards of the day, they have the burden to prove that they had not breached a conduct norm. This is an affirmative burden, and a lack of recollection on the issue does not constitute proof that there was no breach. Only where the Claimant affirmatively proves that there was no such breach can the issue of improper purpose arise for consideration by an adjudicator.

9. Aggravating Factors Compared to Improper Purposes under Process B

Care must be taken to distinguish those factors which make the application of force wrongful, from those factors which provide a basis to increase the compensation once a wrongful act has been proven. In this regard, please see Schedule 1 to this Appendix, which sets out the two sets of factors in order to help clarify that, for example, where discipline is imposed because of a breach of a conduct norm of the school, the fact that it may have been delivered in anger does not make it compensable unless the anger caused the staff member to impose excessive discipline. Similarly, the fact that a punishment

was intimidating does not make it compensable; instead, intimidation only enters into the assessment of compensation where the punishment was excessive or was for one of the specified improper purposes.

10. Evidence in Process A Hearings

At a hearing, the application form is a basis for questioning, and can also be used by the Claimant to assist their own recall. While the Claimant may refer to their application at the hearing, it is not evidence (other than of a prior inconsistent statement).

This reflects the rules of evidence used by the courts which provide that in general, prior statements of a party can be used as admissions against interest, but not otherwise as evidence of their truth. They can also be used to demonstrate a prior inconsistent statement, although in DR it is specifically recognized that progressive disclosure is a possible explanation for inconsistencies [see DR Model at page 10, bullet 1].

Where an alleged perpetrator has given an interview or submitted a witness statement, but thereafter does not appear at a hearing to give evidence, neither the interview notes nor the statement (whether or not in the form of an affidavit) is admissible in evidence at the hearing except to the extent it contains an admission, as provided for in the normal rules of evidence.

12. Expert Evidence

Where an expert is retained to provide an assessment of the degree of harm suffered by a Claimant, the following principles apply:

The adjudicator will provide the expert with the transcript of the hearing, and any records filed at the hearing that are relevant to the proposed assessment, all on a confidential basis. The parties shall be advised of which documents are given to the expert.

The adjudicator is to brief the expert on his or her preliminary findings, so that the assessment may be conducted on the basis of the facts likely to be found.

The expert may express an opinion on the issues of credibility and plausible link, and where they do so, such opinions are admissible in the hearing. It is within the discretion of the adjudicator to decide how much weight to give to such opinions, since the ultimate assessment of credibility and plausible link is for the adjudicator.

The adjudicator shall give significant regard to the expert's opinion on the level of harm as described in the Model.

13. Standard for a Review

The following standards are to govern adjudicators acting in a review capacity:

To constitute a palpable and overriding error of fact, the error must both be plain and obvious, and must have affected the outcome of the decision.

Deference is to be paid to the privileged position of the original adjudicator, who had the benefit of observing the witnesses, participating in conferences with counsel, and putting questions to the witnesses as he or she felt appropriate. This deference is not limited to, but has particular relevance to, findings of credibility.

14. Specifying the Date of the Most Serious Abuse

Where abuse in a Process A case is proven both before and after April 1, 1969, adjudicators must make an express finding as to the date of the most serious abuse. This is because Canada will pay 70% of the award where the most serious proven abuse occurred before April 1, 1969, and 100% where it occurred on or after that date. This follows the rule that the adjudicators are to subsume all acts of proven abuse into the most serious for the purpose of assessing compensation.

In Process B, Canada will pay 100% of the award provided that any compensable abuse occurred after April 1, 1969. This is because it is not practical to attempt to assess the relative gravity of the acts described in Process B.

15. Procedure Where Evidence of a Process A Claim Emerges in a Hearing Conducted by a Process B Adjudicator

Where evidence of a Process A claim emerges for the first time at a hearing presided over by an adjudicator whose jurisdiction is limited to Process B claims, the adjudicator may retain jurisdiction in the following circumstances and for the following purposes:

If the allegations are such that no new alleged perpetrators are involved, the adjudicator may, at the request of the Claimant, make findings of, and award compensation for, any of the acts described in Process A, and any of the harms for which the Model does not prescribe any mandatory document production by the Claimant.

If the allegations involve new alleged perpetrators, or harms for which the Model prescribes mandatory document production by the Claimant, the adjudicator may, at the request of the Claimant, hear and record all of the Claimant's evidence concerning the new acts. Such evidence is admissible in continued proceedings before a Process A adjudicator, subject to that adjudicator's right to ask questions of the Claimant to better understand or to test the allegations.

If the allegations involve new alleged perpetrators, and a representative of the Government is in attendance and is of the view, having regard to the alleged perpetrator's likely age or any previous contact with them, that they are unlikely to be located or to attend a reconvened hearing, the Government representative

may consent to the hearing continuing on the same basis as if no new alleged perpetrator had been named.

SCHEDULE I TO APPENDIX XVI

PROCESS B: IMPROPER PURPOSES AND AGGRAVATING FACTORS

IMPROPER PURPOSES

Arbitrariness

Uncontrolled anger

Bullying

Retaliation for complaints

Attempted coercion into sexual activity.

AGGRAVATING FACTORS

Age in relation to acts

Pervasiveness of wrongs over extended time period.

Wrongs accompanied by threats, intimidation, racism, humiliation, degradation, or verbal abuse.

NOTES

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. [DR Model, page 17]

Aggravating factors do not make discipline wrongful; they come into consideration only after discipline in excess of the standards of the day set out in the Model, or given for a prescribed improper purpose, has been found by the adjudicator. [DR Model at page 15].

WITHIN MANDATE CHANGES TO THE TEXT OF THE DR MODEL

1. Reductions in Mandatory Document Production by Claimants

The requirement to produce treatment records where claims are made for the higher levels of consequential harms and consequential loss of opportunity will be modified by adding the words: “relevant to the harms claimed”.

The requirement to produce Workers’ Compensation Records where claims are made for the higher levels of consequential harms and consequential loss of opportunity will be modified as follows:

For consequential harms levels 3, 4 and 5, the requirement will be deleted, except for level 4 claims based in whole or in part on a physical injury.

For consequential loss of opportunity levels 2 and 3, the requirement will be modified by adding the words: “if the claim is based in whole or in part on a physical injury”.

2. Priorities for Processing Applications

The priorities for processing applications, as set out at page 45 of the DR Model, are amended by deleting the references to the dates in 2004 and then consolidating the five categories into one list. The criterion in category (a) is amended to read “70 or over” and a new category (f) is added, described as “persons who are 60 years of age or older”.

3. Review Timelines

Reviews must be initiated within 30 days of the receipt of the adjudicator’s decision by a party or by counsel or other representative of the party, or within such further time as the adjudicator may have allowed for the Claimant to consider whether to accept the decision.

Provided notice of the review is given within the above timeline, the Chief Adjudicator may authorize up to a further 21 days for the submission of the written argument of the party seeking the review.

Such written argument shall be forthwith submitted to the other parties, who must provide their written response within 30 days of their receipt thereof.

4. Legal Fees on Reviews

Where a review is sought by counsel for a claimant who was unrepresented at the initial hearing, and the review is successful, Canada will pay to the Claimant an amount equal to 15% of the increased compensation obtained on the review as a contribution towards the claimant’s legal fees for the review. Reasonable and necessary disbursements for the

review will be paid, with the review adjudicator having jurisdiction to resolve any dispute as to disbursements.