The Chief Adjudicator's Responsibility to Promote Consistency, Coherence and Quality in IAP Decisions

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June 2009

Introduction

The purpose of this document is to review the responsibility of the Chief Adjudicator to develop and implement mechanisms to promote coherence, consistency and quality in decisions rendered by adjudicators in the Independent Assessment Process. The IAP contemplates such a role for the Chief Adjudicator (CA) as do the principles of law applied to administrative tribunals, one of which the Settlement Agreement has created by providing for a cadre of adjudicators overseen by a Chief Adjudicator. As with other administrative tribunals, the IAP was "created to increase the efficiency of the administration of justice and …called upon to handle heavy caseloads". (*IWA v. Consolidated-Bathurst Packaging Ltd.*,1990 Can LII 132 (SCC)).

This document will first outline the need for internal mechanisms, including internal review mechanisms, and the practice that has evolved within the IAP. It will also review the general principles of administrative law that are applicable to administrative tribunals in implementing internal mechanisms and making allowance for consultation by individual adjudicators with colleagues, legal counsel and staff. The governing principles have been quite clearly established by the Supreme Court of Canada, the seminal case being *IWA v. Consolidated-Bathurst Packaging Ltd.* in 1990. There have been decisions following the *IWA* case which have expanded or applied the principles to particular situations, but have not deviated from the fundamental principles.

This document will also review the provisions of the IAP and make reference to the contracts that have been entered into with the Chief Adjudicator and the Deputy Chief Adjudicators that bear on the issue. And finally, it will outline the policy to be followed in the future, which respects the governing administrative law principles as well as the provisions of the IAP. The most fundamental principle is that adjudicator independence must not be fettered in any mechanisms put into place to foster quality, coherence and consistency.

Current Procedures and the Need for Oversight

The Oversight Committee contracted with one Chief Adjudicator and four Deputy Chief Adjudicators (soon to be five) to carry out the duties and responsibilities in the IAP. This group, for ease of reference, I will refer to collectively as the Chief Adjudicator's Office (CAO).

The CAO is organized with one of the DCAs working closely with the CA and who has specific responsibility for overseeing the continuation of the ADR process and its "winding up". The other three DCAs are assigned groups of adjudicators based on regional distributions. Each of the three has approximately an equal number of adjudicators to supervise.

The supervision of adjudicators involves significant communication between the respective DCA and adjudicators. This communication includes, but is not limited to, receiving telephone calls or e-mails prior to, during, or after hearings. Since many of these communications are of an "urgent" nature, particularly when they occur during a hearing, adjudicators are advised first to contact their assigned DCA but if that person is not available to contact the CA or another DCA. This overlapping or backing up seems to work well. The inquiries of adjudicators range from simple questions, such as policies with respect to adjournments, to quite complex and sophisticated issues that might arise during the course of the hearing, including potential conflicts of interest or hearing safety concerns.

When adjudicators are writing decisions, it is not uncommon to receive telephone calls or e-mails raising questions of interpretation of the IAP, past review (appeal) decisions, or sometimes general law. While these functions are now carried out by the DCAs, and the CA, they largely replicate what occurred in the DR process but were almost exclusively carried out by the then Chief Adjudicator, together with assistance from a senior adjudicator (now a DCA) and an administrative support person.

Once an adjudicator submits a decision, each one is read by a DCA. Normally, the specific supervising deputy will read the decision, but arrangements are in place to cover off each other during periods of absence. These preliminary reviews often reveal errors or mistakes that fall roughly into three categories. There are calculation errors, interpretation of the IAP errors, and simply poor drafting (coherence) in writing decisions. I will briefly give some examples of each.

There have been a number of errors made by adjudicators which can be characterized as calculation errors, or perhaps even as misapplication of the model errors. A group of four decisions recently arrived in the CAO, from different adjudicators, involving errors between $40,000 - $80,000. In two decisions, the compensation awarded was $40,000 under what the number of points would minimally dictate and in the other two the compensation was $40,000 and

$80,000 in excess of what the number of points would dictate as a maximum. These errors were noticed by the DCAs and returned to the adjudicators who immediately recognized the problems and corrected them. Without a review by a DCA, these decisions would have been released, but obviously would have been noticed by Claimant Counsel, where present, or Canada, and the decisions would have either been reviewed or at least revised. To do this, the decisions would have been subject to a formal review or returned to the original adjudicator to make the appropriate adjustments. While the errors in these cases did cause delays in the release of the decision, the delays were significantly less than what would have occurred had the decisions been released without the errors being rectified.

Another example involved a Loss of Opportunity finding. In the body of a decision, an adjudicator found that there was an OL2 Loss of Opportunity and awarded 8 points. However, it was not included on the last page of the decision, and thus it did not appear as part of the final compensation award. Again this was an error that was remedied but had it been released a significant delay would have been caused, if the error was recognized after release. If it had not been recognized, the claimant would have been “shorted” in excess of $12,000.00.

In one decision, a DCA commented on the Adjudicator’s finding involving a Future Care award. In her covering e-mail to the Adjudicator the DCA stated, “While I would never interfere with your discretion here, I just want to point out to you that the commitment to attend [counseling sessions] has been found by our former Chief Adjudicator to be an essential requirement to awarding Future Care”. This is an example of a DCA pointing out an obvious requirement that has been universally accepted in applying the provisions of the DR and now the IAP. It will be noted that the DCA still left the ultimate discretion with the adjudicator but pointed out a basic requirement which perhaps was not obvious to the relatively new adjudicator. Indeed, while the DCA made reference to a review decision of the former Chief Adjudicator, the requirement is in the IAP itself at page 37. This is an example of a DCA advising and directing an adjudicator on the proper implementation and interpretation of the IAP. This is precisely what the IAP contemplates in the provisions where it reposes supervisory authority with the Chief Adjudicator, and now delegated to the DCAs.

Another example of an interpretation of the Model error occurred in another decision where the adjudicator, in the body of the decision, accepted that the claimant’s evidence established digital penetration but concluded at the end of the decision that it was only an SL2 act (rather than an SL3) finding it to be “fondling”. This inconsistency was pointed out to the Adjudicator by the DCA. Clearly had this not been noticed by the DCA, an astute claimant counsel would have requested a review of the decision and without a doubt a reviewing adjudicator would have corrected it. However, a review would have taken several

weeks in total processing time whereas the preliminary review by the DCA involved mere days of delay in the release of the decision.

Other recent examples of errors discovered on internal reviews by DCAs included an award of a PL3 when the found facts only justified a PL2 and another where a PL1 was found when the facts justified a PL2. In both cases the adjudicators were thankful to receive the advice and changed their draft decisions. Most adjudicators appreciate a “second set of eyes” reading their decisions; however, a small group view DCA advice as interference rather than assistance.

Finally, DCAs discover errors that can only be referred to as poor drafting. Examples of this include using the wrong pronoun, i.e. referring to a man as a “her” or a woman as a “him”. Others include simply incoherent sentences or overly complicated sentences that are not written in language that can be called plain language. Other mistakes do occur such as simply getting names wrong, likely caused by use of templates.

The internal review or preliminary review of all decisions has been routinely done by the DCAs for all decisions but, importantly, adjudicators are made aware that notwithstanding the advice of a DCA or the CA, it is ultimately within their discretion to make suggested changes or not. To put it another way, the adjudicators have independence and even have “the right to be wrong”. This message is a continuing one that has been underscored in numerous training sessions and in various communications that we have had with all of the adjudicators.

The above examples are not intended to portray an overly critical view of our adjudicators. Many of the errors occurred with new adjudicators since it is expected that there will be a learning period for all new adjudicators and that mentoring will assist them considerably. The internal reviews conducted by the DCAs are an integral part of the mentoring process. Issues of interpretation and simple errors will continue to exist to some extent, hopefully not a great extent, with many adjudicators. To promote consistency, consultation among and with adjudicators (including the DCAs and the CA) is encouraged and desirable.

Administrative Law Principles Related to Internal Consultations

The leading decision with respect to the limits and controls on institutional procedures to ensure quality, coherence and consistency is the *IWA* decision (cited above) of the Supreme Court of Canada in 1990. The facts giving rise to that decision surfaced from the practice of the Ontario Labour Relations Board that involved individual members (adjudicators) discussing draft decisions in the

context of a full meeting of all the members of the Board. To be clear, the members of the board, which in total numbered some 48 individuals, had not heard the evidence or the arguments of the decision in question. Only the three board members who were present at the hearing actually were privy to the evidence and the arguments. The purpose of discussing a draft decision with colleagues on the Board was to obtain views and advice on the draft, particularly with respect to policy and interpretation issues.

The practice of the Ontario Labour Relations Board was challenged by one of the parties to the original hearing as being a breach of a rule of natural justice, appropriately referred to as “he who decides must hear”. The argument was that a decision maker must not be placed in a situation where he or she can be “influenced” by persons who have not heard the evidence or the arguments. The position was that adjudicators must be shielded from any discussion which may cause them to change their minds even if this change of opinion is honest, because the possibility of undue pressure by other adjudicators was too ominous to be compatible with the principles of natural justice. Essentially the argument was that consultation with other colleagues in a full board meeting could have an overbearing effect on the individual members’ capacity to decide the issues at hand in accordance with their individual opinion.

In the Divisional Court of Ontario, a three-judge panel, by a two to one majority, held that the consultation process implemented by the Ontario Labour Relations Board was improper as a breach of natural justice. However, in a dissenting opinion Osler, J. stated:

> …there is no authority prohibiting decision makers acting in a judicial capacity to engage in either formal or informal discussions with their colleagues concerning policy issues at stake in a case standing for judgment. Full board meetings are merely a formalized method of seeking the opinion of colleagues on policy issues. In fact, this practice is desirable given the importance of achieving a high degree of coherence in Board decisions. (At page 41 of *IWA*).

The Ontario Court of Appeal unanimously allowed an appeal for the reasons set out in Osler, J.’s dissent. ((1986), 56 O.R. (2d) 513).

The Supreme Court of Canada, in a five to two decision, upheld the ruling of the Ontario Court of Appeal. The decision of the Supreme Court of Canada is worthy of being read in its entirety. I will set out below some select quotes from the decision which I believe indicate its full tenor.

The Court made clear that obtaining advice from adjudicator colleagues is entirely appropriate provided that the individual adjudicator in no way delegates his or her responsibility to make the decision. Moreover, any consultation process must be voluntary on the part of the individual adjudicator both as a *de jure* and as a *de facto* matter; thus, the practices of a tribunal must not require adjudicators to consult and adjudicators must not be pressured to change their

decisions. Consultations should be with respect to policy and interpretation matters and not for the purpose of revisiting factual matters, although it is acknowledged by the Supreme Court of Canada that policy and interpretation matters can only be discussed within a certain factual context. Also, and obviously, new evidence cannot be introduced in the consultation process without giving the parties full opportunity to address the evidence.

The decision of the majority in *IWA* was delivered by Mr. Justice Gonthier. The following extensive quotations from the decision are selective but representative:

- I agree with the respondent union that the rules of natural justice must take into account the institutional constraints faced by an administrative tribunal. These tribunals are created to increase the efficiency of the administration of justice and are often called upon to handle heavy caseloads. It is unrealistic to expect an administrative tribunal such as the Board to abide strictly by the rules applicable to the courts of law. In fact, it has long been recognized that the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces. This principle was reiterated by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

  > 2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said, [*Ridge v. Baldwin*, at p. 850) is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk*, at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument. [Emphasis added.]

  The main issue is whether, given the importance of the policy issue at stake in this case and the necessity of maintaining a high degree of quality and coherence in Board decisions, the rules of natural justice allow a full board meeting to take place subject to the conditions outlined by the Court of Appeal and, if not, whether a procedure which allows the parties to be present, such as a full board hearing, is the only acceptable alternative. The advantages of the practice of holding full board meetings must be weighed against the disadvantages involved in holding discussions in the absence of the parties. (pp. 43-44)

- The immensity of the task entrusted to the Board should not be underestimated. As Chairman Adams wrote in the reconsideration decision, the Board had a caseload of 3189 cases to handle in 1982-83 and employed 12 full-time chairman and vice-chairmen, 4 part-time vice chairmen, 10 full-time Board members representing labour and management as well as another 22 part-time Board members to hear and decide those cases. The Board's full-time chairman and vice-chairmen have an average caseload of 266 cases per year. (p. 45)

- The first rationale behind the need to hold full board meetings on important policy issues is the importance of benefiting from the acquired experience of all the members, chairman and vice-chairmen of the Board. (p. 46)

- The rules of natural justice should not discourage administrative bodies from taking advantage of the accumulated experience of its members. On the contrary, the rules of natural justice should in their application reconcile the characteristics and exigencies of decision making by specialized tribunals with the procedural rights of the parties. (p. 47)

- It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "[TRANSLATION] difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one": Morissette, *Le contrôle de la competence*…(p. 47)

- …the Board is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases. (p. 47)

- At the same time, the decision of one panel cannot bind another panel and the measures taken by the Board to foster coherence in its decision making must not compromise any panel member's capacity to decide in accordance with his conscience and opinions. (p. 48)

- …as is correctly pointed out by Professors Blache and Comtois in "La décision institutionnelle" (1986), 16 *R.D.U.S.* 645, at pp. 707-8:

  > [TRANSLATION] There are advantages and disadvantages to institutionalizing the decision-making process. The main advantages with which it is credited are increasing the efficiency of the organization as well as the quality and consistency of decisions. It is felt that institutional decisions tend to promote the equal treatment of individuals in similar circumstances, increase the likelihood of better quality decisions and lead to a better allocation of resources. Against this it is feared that institutionalization creates a danger of the introduction, without the parties' knowledge of evidence and ideas obtained extraneously and reduces the decision maker's personal responsibility for the decision to be made. (p. 48)

- I am unable to agree with the proposition that any discussion with a person who has not heard the evidence necessarily vitiates the resulting decision because this discussion might "influence" the decision maker. In this respect, I adopt Meredith C.J.C.P.'s words in *Re Toronto and Hamilton Highway Commission and Crabb* (1916), 37 O.L.R. 656 (C.A.), at p. 659:

> The Board is composed of persons occupying positions analogous to those of judges rather than of arbitrators merely; and it is not suggested that they heard any evidence behind the back of either party; the most that can be said is that they -- that is, those members of the Board who heard the evidence and made the award -- allowed another member of the Board, who had not heard the evidence, or taken part in the inquiry before, to read the evidence and to express some of his views regarding the case to them . . . [B]ut it is only fair to add that if every Judge's judgment were vitiated because he discussed the case with some other Judge a good many judgments existing as valid and unimpeachable ought to fall: and that if such discussions were prohibited many more judgments might fall in an appellate Court because of a defect which must have been detected if the subject had been so discussed. [Emphasis added]. (p. 51)

- In *Beauregard v. Canada*, [1986] 2 S.C.R. 56, Dickson C.J. described the "accepted core of the principle of judicial independence" as a complete liberty to decide a given case in accordance with one's conscience and opinions without interference from other persons, including judges, at p. 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider -- be it government, pressure group, individual or even another judge -- should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. (p. 51-52)

- It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision. It also goes without saying that a formalized consultation process could not be used to force or induce decision makers to adopt positions with which they do not agree. Nevertheless, discussions with colleagues do not constitute, in and of themselves, infringements on the panel members' capacity to decide the issues at stake independently. A discussion does not prevent a decision maker from adjudicating in accordance with his own conscience and opinions nor does it constitute an obstacle to this freedom. Whatever discussion may take place, the ultimate decision will be that of the decision maker for which he assumes full responsibility. (p. 52)

- However, decision makers are entitled to change their minds whether this change of mind is the result of discussions with colleagues or the result of their own reflection on the matter. A decision maker may also be swayed by the opinion of the majority of his colleagues in the interest of adjudicative coherence since this is a relevant criterion to be taken into consideration even when the decision maker is not bound by any *stare decisis* rule. (p. 52)

- However, the criteria for independence are not absence of influence but rather the freedom to decide according to one's own conscience and opinions. (p. 54)

- Full board meetings held on an *ex parte* basis do entail some disadvantages from the point of view of the *audi alteram partem* rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence. (p. 54)

- The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. (p. 55)

- The benefits to be derived from the proper use of this consultation process must not be denied because of the mere concern that this established practice might be disregarded, in the absence of any evidence that this has occurred. (p. 55)

- With respect, I must disagree with Rosenberg J. if he suggests that it is not practical to discuss policy issues against the factual background provided by the panel.(p. 56)

- However, it is possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. (p. 56)

- The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.(p. 57)

- Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. (p. 57)

- However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case. For obvious practical reasons, superior courts, in particular courts of appeal, do not have to call back the parties every time an argument is discredited by a member of the panel and it would be anomalous to require more of administrative tribunals through the rules of natural justice. Indeed, a reason for their very

existence is the specialized knowledge and expertise which they are expected to apply. (p. 58)

- Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances. An institutionalized consultation process will not necessarily lead Board members to reach a consensus but it provides a forum where such a consensus can be reached freely as a result of thoughtful discussion on the issues at hand. (p. 59)

- The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by modern administrative tribunals as well as the risks inherent in such a practice. In this respect, I adopt the words of Professors Blache and Comtois in "La décision institutionnelle", op. cit., at p. 708:

> [TRANSLATION] The institutionalizing of decisions exists in our law and appears to be there to stay. The problem is thus not whether institutional decisions should be sanctioned, but to organize the process in such a way as to limit its dangers. There is nothing revolutionary in this approach: it falls naturally into the tradition of English and Canadian jurisprudence that the rules of natural justice should be flexibly interpreted. (p. 59-60)

The requirements of the *IWA* decision were re-visited in another Supreme Court of Canada decision in 1992. In *Tremblay v. Quebec*, 1992 CanLII 1135 (S.C.C.) the Court focused on the requirement that any consultation or advice cannot be compulsory. Again in a strongly worded judgment, the Court made clear that unless the governing statute or governing document (such as the Settlement Agreement) provides otherwise, individual adjudicators cannot be required to participate in any consultation process. Since the statute in question clearly provided that it is the primary adjudicators who must decide a matter, they must retain the right to initiate consultation; if they do not wish to consult, they must be free not to do so. Compulsory consultation creates an appearance of a lack of independence, if not actual constraint. Moreover, the Court indicated that mechanisms should not be implemented that exert undue pressure on decision makers. The Court found that in the case before it there were certain aspects of the system established by the tribunal which created an appearance of "systemic pressure", which included the use of a "consensus table" that appeared to require adjudicators to explain their decisions if they fell outside of the range or parameters set out in the consensus table.

The upshot of the Supreme Court of Canada's decisions is that "institutionalizing of decisions", as it is referred to in the *IWA* case, is completely acceptable for administrative tribunals subject to safeguards being in place to protect the

independence of the adjudicators. Consultation by individual adjudicators with other adjudicators, either on an individual basis or on a collective basis, is appropriate for members of a tribunal, and it is permissible and expected that the consultations may influence the primary adjudicator; indeed, in *IWA* the Court says that it is appropriate for judges as well. Such consultation is not seen as being different from reading periodical journals which may express strong points of view leaning one way or the other on matters of policy or interpretation.

The ability to broadly consult and not run afoul of the principles of natural justice is, however, subject to certain safeguards, unless the governing statute or agreement states otherwise. Those safeguards include:

(1) The ultimate independence of the adjudicator must always be protected;
(2) Any consultation or advice process must be voluntary and not compulsory;
(3) The chair of a tribunal, individuals in a full meeting, or individual colleagues cannot impose undue pressure on decision makers.
(4) Factual matters should not be revisited but policy and interpretation matters can be discussed within the particular factual context in which they arise;
(5) New evidence cannot be introduced in the consultation process without giving the parties full opportunity to address the evidence.

A cursory review of the practices of other tribunals in Canada revealed that most involve some institutional responsibility for decisions to promote quality, coherence and consistency but follow the parameters and limits on the role of the institution or the collective as set out by the courts.

The IAP and the Contractual Provisions

The Independent Assessment Process, set out in Schedule “D” of the Settlement Agreement, contains provisions aimed at ensuring consistency, contemplates consultations among adjudicators and contemplates that the Chief Adjudicator will implement measures to ensure consistency.

The IAP provides, at page 14:

> **m. Consistency**
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> i. Adjudicators may consult each other about the hearing and decision-making processes. They will attempt to conduct consistent sessions and produce decisions in a consistent fashion, and may discuss issues arising in individual cases provided they remain solely responsible for deciding the claims they have heard.

> ii. The Chief Adjudicator shall implement training programs and administrative measures designed to ensure consistency among the decisions of adjudicators in the interpretation and application of the IAP.

The Chief Adjudicator's duties, which are set out on page 17 of the IAP, include the following:

- Implement training programs and administrative measures designed to ensure consistency among the decisions of adjudicators in the interpretation and application of the IAP.
- Provide advice to adjudicators on compliance with this IAP.

There is little doubt it was intended that the review of all decisions, a practice developed in the ADR process, was meant to be continued in the IAP since, in addition to the CA, a total of four DCAs were initially retained and their contracts envision a very "hands-on" approach in overseeing adjudicators. The provisions of the contract that are relevant to the CA's supervisory responsibility can be found on page 29 of the contract under the heading tasks and deliverables. The following are pertinent to the present discussion:

> 2. Implement training programs and administrative measures designed to ensure consistency among the decisions of Adjudicators in the interpretation and application of the IAP;
>
> 4. Assess, on an ongoing basis, the training and mentoring needs of Deputy Adjudicators and Adjudicators and develop appropriate programs;
>
> 6. Provide advice to Adjudicators on compliance with the IAP;
>
> 8. Receive complaints about the performance of Adjudicators and as appropriate meet with adjudicators to discuss concerns and develop remedial actions to resolve same;
>
> 9. Conduct reviews to determine whether an Adjudicator's or reviewing Adjudicator's decision properly applied the IAP criteria to the facts as found by the adjudicator, and if not, to correct the decision;
>
> 11. Oversee the management and ongoing evaluation of all adjudicators, this may include procurement issues.

An additional list of "Duties and Responsibilities" to be carried out by the Chief Adjudicator are listed on page 30. They include:

> 3. Set the policies and standards for the office established to support the Deputy Chief Adjudicators and Adjudicators;

6. Address issues and questions arising from Deputy Chief Adjudicators and Adjudicators;

8. Ensure that Deputy Chief Adjudicators and Adjudicators participate in decision-review mechanisms and caucusing as provided for in the framework; and attend regional caucuses;

10. Provide advice and guidance to Adjudicators on issues that confront them from day to day, such as, but not limited to:

a) Interpretation of provisions of the Model;
b) Procedural requirements at a hearing;
c) Acceptable standards of writing decisions both with respect to their findings and the application of them to the requirements of the model.

The supervisory responsibilities of the Chief Adjudicator as set out in the IAP, and further refined in the contract, anticipate an active role for the Chief Adjudicator in working with adjudicators to ensure that decisions are of quality, are consistent, and comply with the IAP.

It was clear that the amount of work associated with the supervisory function of the Chief Adjudicator could not be carried out by one person. Thus, contracts were put in place with Deputy Chief Adjudicators to assist the Chief Adjudicator. There are four deputies currently in place all of whom were selected by the Oversight Committee, and whose contracts contain the following provisions pertinent to the present discussion:

1. Manage and supervise the work of 25-30 adjudicators depending on the case load of his/her region;

4. Assist in the implementation of training programs and administrative measures designed to ensure consistency among the decisions of adjudicators in the interpretation and application of the IAP;

6. Advise the Chief Adjudicator on an ongoing basis the training and mentoring needs of adjudicators and assist in developing appropriate programs;

7. Assist adjudicators with settlement discussions;

9. Provide advice to adjudicators on compliance with the IAP;

10. Prepare for consideration by the Chief Adjudicator and propose instructions to effectively implement the IAP;

11. Receive complaints about the performance of adjudicators and as appropriate meet with adjudicators to discuss concerns and develop remedial actions;

12. Reviews Adjudicator's decision to ensure that they properly applied the model to the facts as found by the adjudicator, and if not, correct the decision;

The following additional "Duties and Responsibilities, are contained in the contracts of the Deputy Chief Adjudicators:

2. Provide advice and guidance to adjudicators on issues that confront them from day to day such as:
    a) Interpretation of provisions of the Model,
    b) Procedural requirements at a hearing,
    c) Acceptable standards of writing decisions both with respect to their findings and the application of them to the requirements of the Model."

The provisions of the IAP, and the duties and responsibilities of the Chief Adjudicator and Deputy Chief Adjudicators as set out in the respective contracts, contemplate that both are intended to work closely with adjudicators in carrying out the adjudicators' function of conducting hearings and writing decisions. Express reference is made to ensuring consistency among the decisions "in the interpretation and application of the IAP and to provide advice with respect to acceptable standards of writing and interpretation of the provisions of the IAP."

Analysis and Conclusion

The issue of adjudicator independence has been raised by claimant counsel representatives with the CAO, the Oversight Committee and the National Administration Committee over a period of months. The "concerns" continued after Court Counsel reviewed numerous files involving routine informal reviews conducted by DCAs. He reported to the Oversight Committee that nothing untoward was unearthed in the "audit" that would suggest an infringement upon adjudicator independence.

The jurisprudence demonstrates that even without specific provisions in governing legislation or the governing agreement, tribunals have considerable latitude to institutionalize decision making primarily through consultation among adjudicators. Most tribunals are governed by statutes that are completely silent with respect to internal processes to promote consistency and consultation. Subject to necessary safeguards that must be in place, this latitude does not breach the rule of natural justice that "he who decides must hear". The court decisions referred to above deal with statutory tribunals whereas the IAP is the

result of an agreement between plaintiffs and defendants, and approved and supervised by the Courts.

The CAO practices, which largely parallel those implemented by the Chief Adjudicator in the ADR process, have complied with the principles of independence as articulated by the courts. One aspect, however, requires particular attention. It is the practice of reviewing all decisions and providing advice and comments to adjudicators without specifically being asked to do so by adjudicators – routine informal reviews. As previously indicated, the process is that every decision is reviewed by a DCA and comments are provided to adjudicators for their consideration. The question that arises is whether this practice amounts to "undue influence" as used in the context of the *Tremblay* decision.

After considerable research, reflection, and consultation with the DCAs and others, it is my conclusion that the routine review of decisions does not impinge on the independence of adjudicators and does not fall within the same category of measures that were utilized by the tribunal which was under scrutiny in the *Tremblay* case. The CAO practice of reviewing decisions as a routine matter is followed by a communication, usually by email, setting out the thoughts and advice of the DCA. It has always been made clear that these observations and advice can be rejected, in whole or in part. Indeed, a simple stroke of the keyboard by an adjudicator can remove the observations from his or her contemplation completely. In short, it is entirely at the option of the particular adjudicator whether to take into account the observations and advice of a deputy, the CA or any other adjudicator colleague.

In addition, the language of the IAP expressly clothes the CA with authority to implement measures to ensure consistency. This provision in the governing agreement that the established the IAP in itself distinguishes the IAP from virtually all other tribunals. When it is considered that this language was put in place against the backdrop of the past practice employed in the ADR program, and further with the enhanced language in the contracts of the CA and DCA, it is difficult to conclude that the routine review of decisions is in any way improper, again always keeping in mind that the adjudicator has the final say.

There are several reasons why the CAO should concern itself with issues of quality, coherence and consistency in decisions issued under the IAP. They include:

(1) If errors, such as those outlined in the early pages of this paper, are not corrected before release of decisions, extended delays will occur. While routine informal reviews add days to the release of a decision, formal reviews or revisions post-release will add weeks to the finality of a decision.

(2) The nature of the structure of the IAP adjudicator body calls for procedures that encourage consistency. The nearly 80 adjudicators are a non-cohesive group that reside across the entire country and operate in two languages. The opportunities to meet are quite limited and the training provided, initially and ongoing, are very modest. While supervision by DCAs is not the only method to create some common ground among adjudicators, informal reviews are an important vehicle through which consistency can be sought. The IAP seeks a large degree of consistency through the use of well defined "grids" for liability and compensation. It would seem somewhat incongruous not to implement further methods to encourage consistency. The Supreme Court of Canada in the *IWA* case stated that a tribunal "is justified in taking appropriate measures to ensure that conflicting results are not inadvertently reached in similar cases" (p. 47) and, "It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel…" (p. 47).

(3) Claimants deserve high quality decisions – this is the most compelling reason to support measures that seek to ensure quality, coherence and consistency. The entire IAP process, and the ADR before it, was designed to be claimant centred. Every step of the process is meant to be sensitive to the needs of claimants. Secretariat staff are trained to be most mindful of claimants in the pre-hearing stage and adjudicators conduct hearings in a manner respectful to claimants and other parties – they are directed to do so by the express terms of the IAP (p. 24). Decisions should not be released that will cause claimants anguish because of incorrect names, incorrect pronouns, required revisions because of routine errors or formal reviews because of clear misinterpretation of the IAP. If this occurs, the respect and dignity given claimants throughout the process will cease at the decision stage – this is unacceptable. This is especially so since the written authoritative decision is the most concrete symbol of the validation of claimants' claims and a memorialization of Indian Residential School experiences.

It is important for the parties to the IAP process, and for the adjudicators, to understand the background for the internal review mechanisms adopted by the CAO as well as the process itself. It is toward this end that this present paper was prepared. I will outline below the policy of the CAO with respect to routine informal reviews of decisions.

A summary of CAO procedures to be utilized are:

(1) The CAO will have all decisions read by another adjudicator colleague, usually a DCA or the CA.

(2) Comments, observations and advice on the decision will be provided to the primary adjudicator.

(3) Adjudicators are free to consider or ignore any or all comments, observations or advice.

(4) Adjudicators are entitled to engage in further consultation with the CA, DCA or other adjudicators with respect to their draft decision.

(5) Any consultations must be with respect to policy, interpretation matters, coherence and grammar. It is permissible to discuss policy issues arising from the body of evidence before the primary adjudicator even though the evidence may give rise to a variety of factual conclusions.

(6) The CA, DCAs or another adjudicator/colleague must not pressure adjudicators to vary their decisions.

(7) All adjudicators are responsible for preserving their independence. The IAP provides that:

> It is the 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 constitutes a continuing claim under this IAP.

The above guidelines and this paper will be distributed to all adjudicators, the Oversight Committee, Canada, the churches, claimants' counsel and the supervising courts.