

FINAL

Dispute Resolution Resource Manual

Prepared for the

**EASTERN CARIBBEAN TELECOMMUNICATIONS
AUTHORITY (ECTEL)**

by

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Dispute Resolution Resource Manual

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The Eastern Caribbean
Telecommunications Authority

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1. Introduction

This Manual is designed to assist the Commissioners and staff of the National Telecommunications Regulatory Commissions (NTRCs) in the ECTEL region to implement the new Telecommunications (Dispute Resolution) Regulations.

The “DR Regulations” have been developed to facilitate the resolution of telecommunications disputes outside the traditional court process – that is, using ‘alternative dispute resolution’ methods.

Alternative Dispute Resolution (ADR)

In the context of the DR Regulations, ADR refers to the methods employed or requested pursuant to the DR Regulations by parties to resolve a dispute that is intended to avoid the delay, expense, formalities or complexity of litigation and includes arbitration, conciliation mediation and tribunal hearings (DR Regulations, Part I, Regulation 2(1))

Under the DR Regulations, the NTRCs in the ECTEL member states will play an increased role in resolving telecommunications sector disputes. The regulations set out in some detail the alternative dispute resolution methods to be utilized by the NTRCs, namely:

- negotiation
- mediation
- conciliation
- arbitration
- tribunal hearings

Specifically, the regulations provide that licensees or customers of licensees, who are unable to resolve their disputes within the time prescribed, generally 30 days, may seek the assistance of the NTRC¹. The NTRC is then required to review the dispute with ECTEL², following which the NTRC must, within 60 days, make one of the choices set out in Regulation 12(1):

¹ Pursuant to Regulation 6(1).

² Regulation 11.

12. (1) In responding to an application filed pursuant to Regulation 6, the Commission shall within sixty days choose any of the following actions–
- (a) direct the parties to continue negotiations;
 - (b) request from a party such additional information as may be required;
 - (c) issue a decision;
 - (d) issue and publish an order noting a resolution and due date to be implemented;
 - (e) enter the order referred to in paragraph (d) and supporting information into the Commission Complaint Record Tracking System for the necessary follow-up action;
 - (f) determine that mediation is appropriate and appoint a mediator to the dispute;
 - (g) determine the alternative dispute resolution technique other than mediation which is appropriate in the circumstances and appoint a qualified person to facilitate that process;
 - (h) decide to operate as a tribunal to resolve the dispute; or
 - (i) approve an arbitration panel to resolve the dispute.

The Manual is designed to assist the NTRCs in developing skills in using the various dispute resolution methods outlined in the DR Regulations. The Manual provides a description of each of these methods, as well as procedural pointers and techniques for skills development.

The Manual begins with a detailed description of the main components of the legal and regulatory framework related to telecommunications dispute resolution in the ECTEL region, including a summary of the relevant provisions of the Telecommunications Acts and the DR Regulations. The Manual emphasizes the need to understand the dynamics and techniques of negotiation, and, in Chapter 4, describes the negotiation process in detail. This background on the negotiation process is intended to provide a good basis for employing all ADR methods, particularly the consensual methods: mediation and conciliation.

The Manual then goes on to examine the other ADR methods included in the DR Regulations. In addition to negotiation, the Manual addresses mediation and conciliation, as well as the two adjudicative dispute resolution methods: arbitration and tribunal hearings. Although it is unlikely that individual NTRC Commissioners or Staff will undertake arbitration or mediation, skills training in consensual and adjudicative techniques will be of assistance. Among other things, it will aid NTRCs in selecting

dispute resolution experts and in gauging the effectiveness of the different DR methods to address particular dispute settings.

Appendix I of the Manual includes a short bibliography of further readings on dispute resolution. Appendix II includes material for exercises that will be conducted during the workshop that will accompany the Manual.

2. The Telecommunications Acts

This Chapter of the Manual summarizes the provisions of the Telecommunications Acts that are most relevant to dispute resolution the NTRCs' dispute resolution roles. These Acts contain generally similar provisions³, and thus the Manual provides only a detailed description of the DR provisions one Act, that of Dominica. A shorter description is also included of certain DR provisions of the Telecommunications Act of St. Christopher and Nevis which are different from those of the other ECTEL member states.

2.1 Telecommunications Act, 2000 (Dominica)

The Telecommunications Act, 2000 of Dominica (the "Dominica Act") establishes the general legal and regulatory framework governing the telecommunications sector in Dominica.

As Dominica is a signatory to the ECTEL Treaty, one of the principal objects of the Act is to give effect to the purposes of this Treaty. Consistent with Dominica's obligations under the ECTEL Treaty, the Dominica Act establishes a sector regulator, namely the National Telecommunications Regulatory Commission (NTRC) of Dominica. The Dominica Act covers a wide range of matters including licensing, universal service, interconnection, infrastructure sharing, numbering, compliance, and offences.

Pursuant to the Dominica Act, the functions of the NTRC include the investigation and resolution of any dispute relating to interconnections or sharing of infrastructure between telecommunications providers. The specific provisions in the Act concerning dispute resolution (Sections 17 and 18), however, widen the scope of disputes with which the NTRC may become involved. According to Section 19 of the Act, the NTRC also has a broad authority to hear and to investigate into matters brought before it, presumably including matters involving disputes between stakeholders in the telecommunications sector such as service providers, consumers, and the Minister. These provisions are discussed in more detail below.

The NTRC is vested generally with the power to do all things necessary or convenient in connection with the performance of its functions, including dispute resolution. The Act provides guidance on measures that the NTRC should take to address disputes in the telecommunications sector. Section 18(1) provides that the Dominica NTRC "shall, wherever practicable, apply conciliation, mediation, and alternative dispute resolution techniques in resolving disputes".

The Dominica NTRC is required to seek the assistance of ECTEL in the case of certain types of disputes. When presented with disputes involving the interpretation of licences,

³ The numbering of some provisions varies between the Acts of the different Member States.

regulations, or frequency authorizations, the NTRC must refer the matter to ECTEL for an opinion or, with the consent of the licensees, for mediation or arbitration. The Dominica NTRC is required to take into account the opinion and recommendations of ECTEL when resolving these types of disputes. (See Section 17.)

The Dominica NTRC has the authority and obligation to investigate complaints by a person who has been aggrieved by the actions or conduct of a telecommunications service provider in respect of a decision against that person. The NTRC cannot begin such an investigation, however, until after the aggrieved person has sought and failed to receive redress for the complaint from the telecommunications services provider through an amicable dispute resolution process. (See Section 16.)

Section 13(2)(f) of the Dominica Act specifically vests the Dominica NTRC with the authority to sit as a tribunal in order to fulfill its functions. Section 18(2) of the Act stipulates that the Dominica NTRC is established as a tribunal to address specific types of disputes. Specifically, the NTRC is established as a telecommunications tribunal:

- to hear and to determine disputes between licensees of telecommunications services;
- to hear and to adjudicate disputes between licensees and the public that involve alleged breaches of the Act or regulations, the terms and conditions of licences, or the terms and conditions of frequency authorizations;
- to hear and to determine complaints by subscribers relating to rates payable for telecommunications services;
- to hear and determine claims from a licensee for a change in the rates payable for any of its services;
- to hear and determine any objections to agreements between licensees;
- to review and to determine the rate payable for any telecommunications services at its own motion or at the instance of the Minister; and
- to hear and to determine complaints between licensees and members of the public.

Tribunals established under Section 18(2) are composed of the chairperson of the Dominica NTRC and two other commissioners nominated by the chairperson. The Dominica Act does not specifically address the powers that the NTRC exercises in its capacity as a telecommunications tribunal. The Act does, however, set out a procedural framework governing the conduct of the NTRC when matters are brought before it. It is not clear whether this procedural framework applies only when the Dominica Commission is constituted as a tribunal or if the framework applies more generally to any situation where a matter is before the Commission.

The Dominica Commission is required to “expeditiously hear and inquire into and investigate any matter” which is brought before it. (See Section 19.) The Commission is specifically required to “hear, receive, and consider statements, arguments, and evidence made, presented, or tendered” by or on behalf of any complaint or licensee or on behalf of the Minister. Any person who is party to a matter brought before the NTRC has the right to appear at the hearing of the matter and to be represented by a lawyer.

The Dominica NTRC has various procedural powers related to matters brought before it. These powers include the authority to:

- determine the time periods that are reasonably necessary for the fair and adequate presentation of the matter by the parties, and to enforce compliance with these time periods;
- require that evidence or arguments be presented to the Commission in written form and to determine upon which matters it will hear oral evidence or arguments;
- compel the attendance of witnesses;
- examine witnesses under oath or affirmation; and
- compel the production of documents.

The Dominica Act puts weight behind the NTRC’s ability to exercise its powers and to fulfill its obligation to investigate and inquire into matters brought before it. Sections 65, 66, 67, and 68 of the Act make certain actions that would hinder the work of the NTRC an offence liable to punishment by fine or by imprisonment. Actions that are punishable under these sections include impeding or preventing any investigation of the NTRC; the destruction of documents or the failure to produce documents when so ordered by the NTRC; knowingly providing false or misleading information to the Commission; and the failure to appear before the Commission when so required or the refusal to take an oath or affirmation when appearing before the Commission as a witness. Section 21(3) of the Act specifically provides that sections 65, 66, 67, and 68 apply in respect of the Commission when sitting as a tribunal.

Matters brought before the Commission are determined by a majority of the members of the Commission (Section 19(4)). The Dominica Act does not provide specific guidance on decisions made by the Commission when it is sitting as a tribunal.

The Dominica Commission may do any of the following with respect to any matter that is brought before it (including, presumably, any disputes):

- make provisional or interim orders or awards with respect to the matter;
- give directions in pursuance of a hearing or determination on a matter;

- dismiss any matter or part of a matter, or refrain from hearing or from determining a matter or part of a matter where certain conditions are met;
- order any party to pay costs and expenses; and
- generally, do anything or make any order necessary and convenient for the expeditious and fair hearing and determination of a matter.

The Dominica NTRC has the power to review, vary, or rescind its orders and decisions. However, where a hearing was necessary before an order or decision was made, then the order or decision cannot be suspended or revoked without a further hearing.

All parties to a matter brought before the Dominica Commission have the right to appeal any judgement, order, or award of the Commission to the Court of Appeal. (See Section 19(5).)

2.2 Telecommunications Act, 2000 (St. Christopher and Nevis)

The Telecommunications Act, 2000 (St. Christopher and Nevis) (the “St. Kitts Act”) establishes the legal and regulatory framework governing the telecommunications sector in St. Christopher and Nevis.

Consistent with the obligations of St. Christopher and Nevis under the ECTEL Treaty, the St. Kitts Act establishes a sector regulator, namely the National Telecommunications Regulatory Commission (the “St. Kitts NTRC” or the “St. Kitts Commission”). The St. Kitts Act also covers a wide range of matters including licensing, universal service, interconnection, infrastructure sharing, numbering, compliance, and offences.

Pursuant to the St. Kitts Act, the functions of the NTRC include the resolution of any dispute relating to interconnection or sharing of infrastructure between telecommunications providers. (See Section 17(d).) The functions of the St. Kitts Commission also include the investigation of any complaints against licensees, either on its own initiative or upon request. (See Section 17(h)) The Act vests the Commission with a number of powers for the purposes of carrying out its functions. (See Section 18(1)) The Commission has the power to:

- summon and examine witnesses;
- call for and examine documents;
- administer oaths;
- require that any document submitted to the Commission be verified by affidavit;
- levy fines; and
- do anything incidental to the above powers.

Pursuant to Section 52(1) of the Act, a person who is aggrieved by the decision of the Commission may, within thirty days from the date the decision is communicated to him, appeal to ECTEL. This Section further provides that ECTEL shall review the decision and may reverse, modify, or sustain the decision being appealed against. By contrast, pursuant to Section 52(2), decisions of the Minister may be appealed to the High Court, and the High Court has the authority to determine the appeal and grant such relief as it deems fit.

Section 54(e) of the St. Kitts Act provides that the Minister may make regulations, on the recommendation of the NTRC, concerning the procedures to be followed by the NTRC in resolving disputes between telecommunications services providers. It does not appear, however, that any regulations concerning dispute resolution have been made.

2.3 Telecommunications Acts of other ECTEL Member States

The dispute resolution provisions in the Telecommunications Acts of Saint Lucia and Grenada (enacted in 2000) and of Saint Vincent and the Grenadines (enacted in 2000), are identical to the provisions in the Dominica Act.

3. The Telecommunications (Dispute Resolution) Regulations

The DR Regulations were prepared after a consultation process with key stakeholders. The regulations have now been finalized by ECTEL, approved by the ECTEL Council of Ministers and submitted to the Member States for adoption.

The DR Regulations set out a detailed framework governing dispute resolution in the telecommunications sector. In addition to provisions applying to dispute resolution generally, the Regulations also contain detailed processes and procedures applicable to each of four specific DR methods (i.e., conciliation, mediation, arbitration, and tribunal hearings). The role and responsibilities of the parties to a dispute and of the NTRC are established, and time deadlines are established for completion of various steps in resolving disputes. The main features of the dispute resolution framework established by the Regulations are described in this chapter.

3.1 Application of the DR Regulations

Regulation 3 of the DR Regulations establishes a broad application for the Regulations. Regulation 3(1) stipulates that the Regulations apply to “all disputes concerning the operation of telecommunications facilities and provision of telecommunication services,” including (but not limited to) complaints initiated by:

- subscribers and other members of the public against a telecommunications provider;
- a licensee against another licensee; and
- persons using frequencies authorization.

Regulation 3(3) makes reference to disputes arising between two telecommunications providers on matters related to an existing interconnection agreement or a RIO. The parties to such a dispute must first exhaust the dispute resolution process that is incorporated into the agreement or RIO before seeking the assistance of the regulator.

Regulation 3(4) states that the DR Regulations will prevail in the event that there is any conflict between the provisions of the DR Regulations and those of other regulations.

3.2 Initiating the Process

The dispute resolution process established by the DR Regulations begins with the parties to the dispute. Pursuant to Regulation 4, the first step in addressing a dispute between a retail customer and a telecommunications provider, or between two or more telecommunications providers, is to seek redress from the telecommunications provider. The process is initiated by filing a statement of complaint with said telecommunications

provider. The DR Regulations contain a standard form for statements of complaint, and also specify the type of information that should be included in these statements.

Once a telecommunications provider has received a complaint, it is obligated to take all reasonable steps to resolve the complaint within thirty days of the date of the filing of the statement of complaint. (See Regulation 5(3)) The provider must issue a confirmation of receipt of the statement of complaint to the complainant within three business days of receiving the statement. The provider must also respond to the complainant within thirty days, giving evidence of “good faith” efforts to resolve the dispute amicably.

3.3 Managing the Dispute Resolution Process

The DR Regulations contain several provisions aimed at managing and monitoring the dispute resolution process. Pursuant to Regulation 5, telecommunications providers must maintain a Telecommunications Provider Complaint Record Register and a Telecommunications Provider Complaint Record Tracking System. Each complaint received by a provider must be recorded in the Register and the status of resolution of such complaints is to be tracked through the Tracking System.

Telecommunications providers must also make monthly reports to the NTRC concerning the number of statements of complaints, the nature of disputes in statements of complaints filed, and the status of the resolution of such disputes. (See Regulation 6.)

Pursuant to Regulation 7, the NTRC must maintain a Commission Complaint Record Register and a Commission Complaint Record Tracking System. When the Commission receives an application for assistance in resolving a dispute, the Commission must enter the details of the application into the Register. The status of applications for assistance is followed using the Tracking System. Pursuant to Regulation 15(b) and Regulation 32(1), the NTRC must place the details of a dispute and such information respecting the resolution of the dispute in the appropriate weekly, monthly, quarterly or annual report to the Minister, ECTEL, the public, and telecommunications providers. In cases where the Commission has issued a dispute resolution order, the Commission must make the order available to the public by notice published in the Gazette within ten days of the service of the dispute resolution order to the parties to the dispute.

Regulation 28 requires the NTRC to maintain a Dispute Resolution Order Register in which dispute resolution orders issued in accordance with the DR Regulations are registered. Pursuant to Regulation 28(2), a copy of every dispute resolution order must be kept in this Register. The required content of the Dispute Resolution Order Register is set out in Regulation 29.

3.4 Seeking the Assistance of the NTRC

After thirty days of the date of filing of a statement of complaint, if the parties to a dispute are unable to resolve the dispute outlined in the statement of complaint amicably,

either party may file an application with the NTRC for assistance with the resolution of the matter. (See Regulation 6.) The DR Regulations clearly stipulate, however, that the NTRC must be satisfied that the parties have made “reasonable efforts in good faith” to resolve the dispute on their own before the Commission may offer any assistance to them. (See Regulation 8 and Regulation 6(1).)

Each application for assistance must be filed with the NTRC, the opposing party (the respondent), and ECTEL. The DR Regulations contain a standard form that must be used for filing applications for assistance (Form 2 of the Third Schedule). The Regulations also dictate what information must be contained in the application. After an application for assistance is filed, the respondent has ten days to file a response to the application together with such information describing the status of any negotiation between the parties to the dispute.

The NTRC must review the application for assistance and request any additional information that is necessary from a party within 15 days of receipt of the application for assistance. (Regulation 11(1)(a))

If the parties to a dispute wish to discontinue proceedings, they are required to file a Notice of Discontinuance with the NTRC using a standard form contained in the DR Regulations. (See Regulation 10 and Form 3 of the Third Schedule.) The parties will be liable for all costs incurred up to the date of discontinuance.

3.5 Consultation with and Reporting to ECTEL

The NTRC may consult with ECTEL concerning the best ADR process to resolve a dispute. (Regulation 11(1)(b)) In making a determination about which ADR process to use, the Commission and ECTEL must consider the resources respecting alternative dispute resolution that are available and any alternative dispute resolution process requested by the parties.

In certain cases, the NTRC is obligated to consult with ECTEL about a dispute. Regulation 11(3) provides that if an application for assistance indicates that a serious issue has arisen or a sufficient number of complaints indicate that a policy issue has arisen, the Commission must forward such issue and documentation to ECTEL for consideration and advice concerning the likely impact on regional policy issues.

In addition to consulting with ECTEL regarding the selection of ADR process, the NTRC must inform ECTEL regularly about the nature of disputes being heard; the ADR process being applied in the resolution of a dispute; and the impact of this ADR process on national and regional telecommunications policies. (See Regulation 21)

3.6 Disposing of the Application for Assistance

Regulation 12 of the DR Regulations provides that, in responding to an application for assistance, the Commission must choose any of the following actions within sixty days:

- direct the parties to continue negotiations;
- request from a party such additional information as may be required;
- issue a decision;
- issue and publish an order noting a resolution and due date to be implemented;
- enter the aforementioned order and supporting information into the Commission Complaint Record Tracking System for the necessary follow-up action;
- determine that mediation is appropriate and appoint a mediator to the dispute;
- determine the alternative dispute resolution technique other than mediation which is appropriate in the circumstances and appoint a qualified person to facilitate that process;
- decide to operate as a tribunal to resolve the dispute; or
- approve an arbitration panel to resolve the dispute.

Pursuant to Regulation 13, the NTRC must use its best efforts to resolve a dispute within 60 days from the date on which an application for assistance is filed. The NTRC has the flexibility to use such ADR process as is practicable to resolve a dispute, although the NTRC is obliged to endeavour to use mediation first where it is appropriate. If the dispute is not resolved by means of the first-chosen ADR process, then the NTRC may operate as a tribunal in order to resolve a dispute.

Regulation 11(4) provides that the NTRC may submit a dispute for ADR by arbitration if:

- (a) the parties do not agree to mediation and request the use of the arbitration process; or
- (b) within sixty days of the matter being submitted to the mediation process, the dispute is not resolved.

Once the NTRC determines the appropriate ADR process to use to address a dispute, the Commission must do the following:

- appoint the appropriate mediator or arbitration panel or designate the Commission as a tribunal as the case may be;
- notify the parties of the alternative dispute resolution process and personnel determined and selected;

- forward the application for assistance and other documents to the alternative dispute resolution personnel assigned to the case; and
- require the appropriate alternative dispute resolution personnel to establish a calendar and advise all parties and ECTEL of the calendar and process determined to be used.

3.7 Responsibilities of Various Actors

The duties of the NTRC in the dispute resolution process are multi-faceted, and described throughout this summary.

Pursuant to Regulation 17, once appointed, the alternative dispute resolution personnel must:

- establish a process and calendar to enable resolution within sixty days;
- notify all parties of the alternative dispute resolution process and calendar;
- ensure that the selected alternative dispute resolution process and calendar are activated and managed in the most efficient manner possible;
- request such information and resources from the Commission or ECTEL as the alternative dispute resolution personnel considers necessary for the purpose of resolving the dispute;
- ensure that the parties have an opportunity to know the case to be met and to respond to it;
- in the cases of the Commission, tribunal or arbitration panel, make a decision based on the evidence and mandate a fair resolution to each issue in dispute within the sixty-day time limit;
- record the resolution to each issue in dispute; and
- complete a report respecting the resolution of the dispute and file a copy thereof with the Commission and ECTEL.

Pursuant to Regulation 20, the parties to the dispute must:

- act in a responsible manner that enables resolution of the dispute within the shortest time possible without prejudicing the interests of other parties, and
- provide, upon request and subject to any claim for confidentiality, any additional and relevant information or document as may be required.

The information filed by the parties to the dispute must be accurate, complete, and filed in a timely manner. The DR Regulations stipulate that if a party fails to meet its obligation under Regulation 20 with respect to the filing of information, the NTRC may report the matter to the Director of Public Prosecutions for necessary action, as permitted in the Telecommunications Act.

3.8 General Procedures

Regulation 19(1) requires that an ADR process, including quality of process, must be provided to the parties on a non-discriminatory basis. Regulation 19(2) aims to foster transparency in the process by requiring that the details of an ADR process used in the resolution of a dispute must be included in the final report made available to the public, subject to certain stated exceptions (e.g., confidentiality of information).

Regulation 22 sets out the burden of proof applicable in ADR processes other than mediation and conciliation proceedings. Regulation 22(a) stipulates that the burden of proof respecting each complaint or concern is on a balance of probabilities and rests with the party making the assertion. According to Regulation 22(b), the Commission or other relevant appointed dispute resolution body has the responsibility of determining the accuracy and veracity of the information presented by the parties.

Where in respect of the resolution of a dispute the Commission requires evidence or information in writing, the Commission may prescribe the format for presentation of such evidence or information. (See Regulation 23.)

Regulation 31(2) provides that the NTRC must place documents filed during the course of a proceeding on the public record unless the party filing the document asserts a claim of confidentiality. Pursuant to Regulation 31(1), in all cases of ADR processes, a party may request that certain information provided in the course of a proceeding be treated as confidential. Regulation 31 also outlines the process for asserting confidentiality, challenging confidentiality, and other procedural rules related to a claim of confidentiality.

Sections 42 and 43 address approved means of filing and serving documents and effective dates of filing or service, respectively.

3.9 Issuance of a Decision

When the NTRC exercises its authority under Regulation 12(1) to address an application by issuing a decision, the NTRC may determine the application on the basis of the written documentation before it. The NTRC also has the ability to require that one or more of the parties provide further information. The NTRC may issue directions on procedure if it considers an oral hearing or other form of proceeding warranted. (See Regulation 12(2).)

3.10 Continuation of Service During a Dispute

Regulation 24 prohibits a telecommunications provider which is a party to a dispute from terminating service to a subscriber or a member of the public for breach of contract or non-payment during the period of a dispute except under specified conditions. These conditions are:

- the subscriber has been given an opportunity to be heard before the Commission;
- such termination has been specifically approved by the Commission; and
- written notice of the termination has been served on the subscriber or member of the public not less than seven days prior to such termination

Regulation 27 provides that, except as may be provided in any contractual arrangement between telecommunications providers a dispute between telecommunication providers shall not cause the partial or total disconnection of a relevant network unless the NTRC determines that such partial or total disconnection is necessary and so advises in the dispute resolution order. If the NTRC determines that partial or total disconnection of the relevant network is necessary, it must recommend and instruct the measures to be applied so as to minimise any negative effects on the users of that network or any other network.

3.11 Dispute Resolution Orders

Where the NTRC determines an application for assistance, the NTRC may issue a dispute resolution order dismissing the application, approving the relief sought, or approving the relief sought with amendments or variations, as the NTRC deems appropriate. (See Regulation 25.) The DR Regulations contain a standard form for dispute resolution orders. (See Form 5 of the Third Schedule.) The dispute resolution order must specify the date by which the parties must comply with the order. Dispute resolution orders are binding on the parties to the dispute.

The NTRC is required to maintain a Dispute Resolution Order Register. (See Regulation 28.) The Commission must register each of its dispute resolution orders in this Register. Each dispute resolution order must also be served on the parties to the dispute.

The NTRC must take steps to verify that the parties to a dispute have complied with an issued dispute resolution order. (See Regulation 28(4).) Regulation 28(5) stipulates that a person who fails to comply with a dispute resolution order is liable:

- in the case of a telecommunications provider, to suspension or revocation of its telecommunications licence in accordance with the Act; and

- in the case of a retail customer to termination of its telecommunication service.

Where disputes have been determined by ADR personnel, Regulation 26(1) requires the NTRC to review the findings and recommendations of the ADR personnel. Except in the case of decisions made by an arbitration panel, the NTRC then must issue a dispute resolution order based on the findings and recommendations of the ADR staff. In the case of arbitration, the arbitration panel prepares a written decision, and the details of the award made by the arbitration panel must be recorded in the Dispute Resolution Orders Register by the NTRC. (See Regulation 39.)

Once the Commission has issued a dispute resolution order based on the findings and recommendations of ADR personnel, the Commission must inform ECTEL of the order and must also serve the order on the parties to the dispute. Information concerning the dispute resolution order must also be registered into the Commission Complaint Record Register. The Commission must also make the dispute resolution order public by placing a notice in the Gazette or by using such other means as the NTRC deems appropriate. (See Regulations 26(1) and 32(2).)

3.12 Costs

Regulations 40 and 41 address costs in a dispute resolution process. Regulation 40 provides that the Commission, a tribunal or ECTEL, as the case may be, may on an application by a party or of its own motion make an order as to costs of any matter or proceedings or part thereof before it. Regulation 41 details what may be included in the costs order and also outlines a number of relevant considerations applicable to the Commission's decision concerning what is a reasonable cost order under the circumstances.

3.13 Appeals

Regulation 45(1) provides that any party with respect to whom a decision was made by the NTRC acting as a tribunal may appeal said decision to the Court of Appeal. The appeal must be made within six weeks after the date of service of a copy of the decision on the appealing party.

Regulation 45(2) provides that any party with respect to whom a decision was made in an arbitration process may appeal said decision to the High Court. The appeal must be made within six weeks after the date of service of a copy of the decision on the appealing party.

3.14 Mediation

The procedures and rules governing mediation are set out in Part II of the DR Regulations and in Part 1 of the Second Schedule to the DR Regulations. Paragraph 3 of Part 1 of the Second Schedule provides that the parties may agree to vary or to exclude

the provisions of Part 1. [Note: in this summary of the mediation provisions, and in the subsequent sections on conciliation, dispute resolution tribunals and arbitration, “Regulation” refers to portions of the DR Regulations and “Paragraph” refers to portions of the Second Schedule.]

“Mediation” is defined in Part I of the Second Schedule as “a private, informal alternative dispute resolution process by which the parties with the assistance of a neutral third party called a mediator try to reach a voluntary agreement on the matter in dispute and to end the conflict.”

Part I of the Second Schedule contains provisions that provide guidance on the role of the mediator and what the parties to a dispute can expect from the mediator during mediation. Part 15 states that the role of the mediator is “to attempt to facilitate voluntary resolution of the dispute between the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute, emphasising that it is the responsibility of the parties to take decisions which affect them; he shall not impose any terms of settlement on the parties.”

Regulation 16 emphasizes that the mediator “only facilitates arriving at a decision to resolve disputes” and that the mediator “will not and cannot impose any settlement”. Regulation 16 further states that neither the Commission nor the mediator warrants that the mediation will result in a settlement. For further emphasis, Regulation 16 prohibits the mediator from imposing any decisions on the parties.

Paragraph 2 states that mediation is justifiable when:

- there is a written agreement to submit conflicts to mediation;
- at least one of the parties requests mediation; and
- notwithstanding sincere or “good faith” efforts to amicably resolve the dispute the parties have failed to arrive at an amicable settlement.

Pursuant to Regulation 18(1) and Paragraph 5, the NTRC must maintain and must publish a list of approved mediators. Paragraph 7 sets out a list of people who are to be treated as qualified and eligible for inclusion on the list of approved mediators.

The parties to the dispute must select a mediator or co-mediators within a time frame established by the NTRC. (See Regulation 18(2) and Paragraph 4(1).) Pursuant to Regulation 18(3) and Paragraph 5, the parties may agree to select a mediator whose name does not appear on the NTRC’s list of the approved mediators. Where the parties to a dispute fail to agree upon a mediator within the time specified by the NTRC, the Commission may select and appoint a mediator from the approved list of mediators to carry out the mediation.

Paragraph 9(1) provides that the parties to a dispute may agree to the procedure to be followed by the mediator in the conduct of the mediation proceedings, including the time schedule for the mediation and its venue. If the parties are unable to agree on a procedure, then the mediator must follow the procedure set out in Paragraph 9(2).

Paragraph 10 preserves the flexibility of mediation proceedings by providing that a mediator is not bound by a country's civil procedure rules, code of civil procedure, or evidence act. Instead, the mediator must be guided by the principles of justice and fairness, having regard to the rights and obligations of the parties, the potential impact on the telecommunications sector, and the circumstances of the dispute.

A key characteristic of the mediation process is the confidentiality of the proceedings. The application of Paragraph 19 protects the confidentiality of all records, reports, and other documents, events that transpired during the mediation, proposals made by mediator, views expressed during mediation, and any admission made by the parties during the course of mediation. Paragraphs 19(1) and 19(2) set out the duties of the mediator and the parties respectively related to preserving the confidentiality of the mediation proceedings. Paragraph 19(3) stipulates that there will be "no permanent stenographic or other hand written notes, audio or video recordings of the mediation proceedings". This Paragraph further provides that at the end of every mediation session, all notes or records made during the sessions must be destroyed in the presence of the parties and the mediator.

Confidentiality of mediation proceedings is further protected by restrictions on who may be present during mediation sessions (Paragraph 20) and restrictions on communications between a mediator and the NTRC (Paragraph 22). Paragraph 23(4) provides that where no agreement is reached through mediation, any proposed terms of settlement will not impact any arbitration or subsequent court proceedings.

When an agreement on some or all of the issues in dispute is reached between the parties, the agreement must be reduced to writing in the prescribed form, signed, and delivered to the mediator. The mediator must then forward the agreement to the NTRC, along with a cover letter signed by the mediator. (See Paragraphs 23(1) and 23(2).) When all issues in dispute have been settled, the Commission must issue a Dispute Resolution Order to all parties within five days of receipt of the related settlement. (See Paragraph 24(1).)

When some of the issues have been settled, but other issues remain unresolved, the NTRC must issue a Dispute Resolution Order reflecting the resolution reached by the parties and giving further directions for the settlement of outstanding issues. This Order must be issued within 10 days of the receipt of notification from the mediator concerning the partial resolution of the dispute. (See Regulation 24(2).)

After sixty days have passed from the date fixed for the first appearance of the parties before the mediator, if no resolution has been reached, the mediation will stand terminated unless the mediator or the parties consider that an extension of time is

necessary or useful. (See Paragraph 17(1).) An extension of time cannot exceed 30 days unless both parties agree to a longer extension. (See Paragraph 17(1).)

Pursuant to Paragraph 23(3), where no agreement has been reached or where the mediator considers that no settlement is possible, the mediator must report the same to the NTRC in writing. Where none of the issues have been settled, the NTRC, in consultation with the parties, must issue a Dispute Resolution Order giving further directions on the procedure to be taken to resolve a dispute. This Order must be issued within 21 days of the receipt of the notification from the mediator concerning the intractability of the dispute. (See Paragraph 24(3).)

The balance of Part I of the Second Schedule sets out how the process of mediation will unfold, establishes various procedural rules governing the mediation, and describes the duties of the mediator and the parties to the dispute.

3.15 Conciliation

The procedures and rules governing conciliation are set out in Part 2 of the Second Schedule to the DR Regulations. Paragraph 3 of Part 2 of the Second Schedule provides that the parties may agree to vary or to exclude the provisions of Part 2.

Regulation 2 defines conciliation as “the settling of a dispute in an amicable manner as set out in the Second Schedule to these Regulations”. Both parties must agree to conciliation proceedings before such proceedings may begin. A party seeking conciliation must extend a written invitation to conciliate to the other party. The conciliation process begins when the other party accepts the invitation to conciliate. If inviting party does not receive a reply within 14 days from the date on which the invitation was sent, the party may elect to treat this case as a rejection to conciliate. It is not clear what will be done if the party does not elect to treat this case as a rejection. (See Paragraphs 3, 4, 5, and 6.)

Pursuant to Paragraph 7, unless the parties agree otherwise, there will be one conciliator. Paragraph 8(1) provides that the parties must endeavour to reach an agreement on the appointment of the sole conciliator. In conciliations with more than one conciliator, each party appoints one conciliator, and the two conciliators jointly appoint any further conciliators. (See Paragraph 8(1).)

Unlike the case with mediators, the NTRC is not required to maintain a list of individuals who may serve as conciliators. However, the parties may seek the assistance of either the NTRC or ECTEL in connection with the appointment of a conciliator. In this regard, the parties may ask the NTRC or ECTEL to recommend the names of suitable individuals to act as conciliators or to make the appointment of one or more conciliators. (See Paragraph 8(2).)

Once the conciliator has been appointed, the conciliator must ask each party to submit a brief written statement describing the general nature of the dispute and the points at issue. (See Paragraph 9.) The conciliator may request a further written statement, more information or documentation from either party, as the conciliator deems necessary. (See Paragraphs 9 and 10.) Each party must provide the other party with a copy of the written statement and further written statement, as the case may be. When the conciliator receives factual information about the dispute from one party, the conciliator must disclose the substance of this information to the other party in order to give the other party an opportunity to respond. (See Paragraph 17.)

The role of the conciliator is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement to their dispute. (See Paragraph 13(1).) The conciliator must be guided by principles of objectivity, fairness and justice giving consideration to, among other things, the rights and obligations of the parties, the business of the telecommunications industry and the circumstances surrounding the dispute. (See Paragraph 13(2).)

The conciliator has the flexibility to conduct the conciliation proceedings in a manner that he sees fit, taking into account the circumstances of the case, the wishes of the parties (including any requests for an oral hearing), and the need for a speedy settlement of the dispute. (See Paragraph 13(3).) The conciliator may communicate with the parties orally or in writing, and separately or together. (See Paragraphs 15 and 16.)

During conciliation proceedings, the parties to the dispute must not initiate any other proceedings in respect of the dispute that is subject to the conciliation. (See Paragraph 23.)

The conciliator may at any stage make a proposal for a settlement of the dispute. This proposal need not be in writing or be accompanied by reasons for the proposals. (See Paragraph 13(4).) The parties to the dispute may also submit suggestions for the settlement of a dispute, either at their own initiative or on invitation by the conciliator. (See Paragraph 19.)

The conciliator may offer assistance to the parties with the drafting of a settlement agreement. If a conciliator considers that there are elements of a settlement that would be acceptable to the parties, the conciliator must then formulate the terms of this possible settlement and submit them to the parties for comment by a stated date. After receiving the comments of the parties, the conciliator may reformulate the terms of a possible settlement in light of these comments. If the conciliator receives no comments or comments from only one party, then the proposal is deemed to have been rejected. (See Paragraph 20(a).)

Regulation 20(b) provides that if the parties reach agreement on a settlement of the dispute, they must draw up and sign a written settlement agreement. If requested by the parties the conciliator must draw up or assist the parties in drawing up the settlement

agreement. By signing the agreement, the parties indicate that the dispute is resolved and that they are bound by the terms of the settlement agreement. (See Regulation 20(c)). A copy of the agreement must be sent to the NTRC, although the NTRC is not required to issue a Dispute Resolution Order in respect of the settlement agreement.

The time period applying to conciliation proceedings differs from that of mediation. Pursuant to Regulation 21(a), after 30 days have passed from the date fixed for the commencement of the conciliation proceedings, the conciliation proceeding stands terminated unless the conciliator or the parties consider that an extension of time is necessary or useful. The extension of time must not be greater than 15 days unless the parties agree otherwise.

According to Paragraph 22, conciliation proceedings are terminated:

- by the signing of the settlement agreement by the parties on the date of the agreement; or
- by written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified; or
- by a written declaration of the parties addressed to the conciliator to the effect that conciliation proceedings are terminated;
- by a written declaration of a party to the other and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated; and
- by effluxion of time as outlined in Paragraph 21.

The conciliator must not act as arbitrator or as a representative or counsel of a party in any arbitration or judicial proceedings where he previously acted as conciliator. The conciliator cannot act as a witness in any such proceedings. (See Paragraph 24.)

Paragraph 25 establishes the confidentiality of the conciliation proceedings. Any views expressed by the parties or the conciliator, statements, admissions, proposals made by the conciliator, and the willingness of any party to accept a proposal for settlement must be kept confidential and may not be relied on or introduced as evidence in any arbitration or judicial proceeding, even if such proceedings do not relate to the dispute that was the subject matter of the conciliation proceeding.

3.16 NTRC Dispute Resolution Tribunal

The procedures and rules governing tribunal hearings are set out in Part III of the DR Regulations and in Part 3 of the Second Schedule to the DR Regulations.

The tribunal consists of three members of the NTRC, one of whom is the Chairman of the NTRC. Regulation 33(3) provides that where the Commission establishes itself as a tribunal, the Commission must, in exercising its duties as a tribunal, take into account:

- the interest of all parties to the dispute;
- the interests of the users as well as the interest of telecommunications providers;
- the public interest;
- the regulatory obligations or constraints imposed on any of the parties to the dispute; and
- any other relevant matter.

Regulation 33(4) of the DR Regulations states that where the Commission operates as a tribunal, the provisions of Part 3 of the Second Schedule shall apply.

Paragraph 3 states that a matter is instituted by an Applicant by filing a statement of complaint (the “complaint”) in the prescribed form with the Chairman of the NTRC. Paragraph 1 states that, “Upon receiving a complaint by the Commission the Commission shall determine: (a) whether a tribunal is the appropriate mechanism for resolving that dispute and if so the Commission shall establish itself as a tribunal or (b) determine what is the appropriate method of dealing with the matter.”

Pursuant to Paragraph 4, where the NTRC considers that the complaint does not seek or on the facts stated cannot entitle the applicant to a relief which a tribunal has power to adjudicate on, the Commission “may give notice to that effect to the applicant stating the reasons for its opinion and informing him that the complaint will not be heard”.

Paragraph 5(1) sets out a number of tasks that the Commission must complete upon determining that it is appropriate to establish itself as a tribunal, including sending a copy of the complaint to the respondent. The Commission must also send the respondent a notice in writing, which includes information, as appropriate to the complaint, as to the means and time for entering an appearance, the consequences of failure to do so, that a tribunal has been established to hear the complaint and the right to receive a copy of the decision.

Once a respondent receives a copy of the complaint, the respondent has ten days to enter an appearance to the proceedings by presenting to the tribunal a notice of appearance in the prescribed form. Subject to certain limited exceptions, a respondent who fails to file an appearance will not be entitled to participate in the proceedings. (See Paragraphs 6(1) and 6(3).) Paragraph 6(1) sets out the information that must be contained in the appearance.

Pursuant to Paragraph 7, the tribunal has a broad authority to give directions on any matter arising in connection with the proceedings. Directions may include any requirement relating to evidence, the provision of further particulars and the provision of written answers to questions put to a party by the tribunal. The tribunal may also set the time at or within which and the place at which any act it directs is to be done.

The tribunal has the authority to require the attendance of any person in the jurisdiction either to give evidence or to produce documents, or both, and may appoint the time and place at which the person is to attend and, if so required, to produce any document. The tribunal may also require one party to grant to another such disclosure or inspection (including taking of copies) as might be granted by a court under Part 28 of the Civil Procedure Rules. (See Paragraph 7(5).) Other procedural matters related to directions given by the tribunal prior to or during a hearing and establishing the time and date for the hearing are set out in Paragraphs 7 and 8.

At any time before the hearing of a complaint, the tribunal may, on the application of a party by notice to the NTRC or by its own motion, hear and determine any issue relating to the entitlement of a party to bring or to contest the proceedings to which the complaint relates. (See Paragraph 9(1).) However, the tribunal must not determine such an issue unless the Chairman has sent notice to each of the parties giving them an opportunity to submit representations in writing and to advance oral argument before the tribunal. (See Paragraph 9(2).)

Paragraph 10 provides that at any time before the hearing of a complaint, a tribunal may conduct a pre-hearing review. This review occurs on the application of a party by notice to the Chairman or by the tribunal's own motion. The pre-hearing review consists of a consideration of:

- the contents of the complaint and notice of appearance;
- any representations in writing; and
- any oral argument advanced by or on behalf of a party.

If the tribunal decides to reject a party's application for a pre-hearing review, the Chairman must provide notice to the parties using Form 9, Notice of Determination. (See Paragraph 10(2).) All parties must be provided with notice of the pre-hearing, which must give all parties an opportunity to submit representations in writing and to advance oral arguments at the review. A pre-hearing review cannot occur unless such notice has been provided. (See Paragraph 10(3).)

The tribunal is required under Paragraph 12(1) to avoid formality in its proceedings as far as it appears to be appropriate. The tribunal is not bound by any law relating to admissibility of evidence in proceedings before any court of law. The tribunal is empowered to make such enquiries of persons appearing before it and witnesses that it considers appropriate. Paragraph 12(1) further provides that the tribunal "shall otherwise conduct the hearing in such manner, as it considers most appropriate for the clarification of the issues before it and generally to the just determination of the proceedings."

Subject to the authority of the tribunal under Paragraph 12(1), a party is entitled to give evidence, call witnesses, question any witness and to address the tribunal during the hearing. (See Paragraph 12(2).) A party may also submit representations in writing for consideration by the tribunal provided that the party complies with the requirements set

out in Paragraph 11(2). Paragraph 12(3) addresses what happens when a party fails to attend or to be represented at a hearing.

Pursuant to Paragraph 12(4), the Tribunal may require any witness to give evidence on oath or affirmation and for that purpose there may be administered an oath or affirmation. Regulation 33(1) provides that “the Commission shall, within ten days of the receipt of all materials submitted to it by the parties, review such materials and notify the parties of its findings”.

Decisions of the tribunal are determined by majority vote. At the end of the hearing, the decision of the tribunal may be given orally or may be reserved. The tribunal is required to give reasons for its decision in a document that is signed by the Chairman. (See Paragraph 13.) In cases where the tribunal makes an award for compensation or determines that one party is required to pay another party a sum of money, the reasons must include either a table showing how the amount or sum has been calculated or a description of the manner in which the amount or sum was calculated. (See Paragraph 13(4).) The decision of the tribunal must be recorded in the Register.

The tribunal has the authority under Paragraph 14 to review any decision it makes either on its own motion or on the application of a party to the proceedings. The grounds for reviewing a decision are:

- the decision was wrongly made as a result of an error on the part of the staff of the Commission;
- a party did not receive notice of the proceedings leading to the decision;
- the decision was made in the absence of a party;
- new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing; or
- the interests of justice require such a review. (See Paragraph 14(1).)

Paragraph 14 sets out the procedures and rules relevant to a review of a tribunal’s decision. Upon a review of a decision, the tribunal may confirm the decision or vary or revoke the decision. If the tribunal revokes the decision, the tribunal must order a re-hearing before either the same or a differently constituted tribunal. (See Paragraph 14(5).)

Paragraph 15 gives the tribunal wide scope to regulate its own procedure, subject to certain provisions that are set out in the sub-parts of the paragraph. Paragraph 16 sets out the circumstances in which the tribunal may extend the time for doing anything subject to a specified time deadline under Part 3. Paragraphs 17 and 18 describe the power of the tribunal to join complaints together and to sever complaints, and outline the procedures related to joining or severing complaints.

Pursuant to Paragraph 19, a Register of matters pending before a tribunal must be created and maintained. This Register must contain details of the complaints and responses filed for hearing before the tribunal and documents recording the decisions of tribunal and reasons for these decisions. (See Paragraph 20.)

3.17 Arbitration

The procedures and rules governing arbitrations are set out in Part IV of the DR Regulations and in Part 4 of the Second Schedule to the DR Regulations.

“Arbitration” is defined in Regulation 2(1) as “the alternative dispute resolution process outlined in these Regulations in which an arbitrator, or panel of arbitrators, renders a binding decision on a dispute between the parties after reviewing the arguments presented by all parties.”

Regulation 34 provides that when a dispute arises between parties subject to the DR Regulations, the parties may: (a) agree in writing to submit their dispute to arbitration, or (b) be directed to arbitration by the NTRC. In the former case, the party initiating recourse to arbitration (the “claimant”) must provide the other party (the “respondent”) with a notice of arbitration. (See Paragraph 1.) Arbitral proceedings are deemed to begin on the date on which the respondent receives the notice of arbitration. (See Paragraph 2.) The required content of the notice of arbitration is described in Paragraph 3

Pursuant to Regulation 37 of the DR Regulations, the procedure for the conduct of arbitration proceedings is determined by the parties to a dispute. If the parties fail to agree on the procedure for their arbitration, then Part 4 of the Second Schedule will apply.

The parties to an arbitration agreement may determine the number of arbitrators to be appointed; however, where no such determination is made (e.g., because the parties fail to agree on the number of arbitrators), then the number of arbitrators will be three. (See Regulation 35 and Paragraph 5 of Part 4 of the Second Schedule.) The procedures and rules governing the appointment of the arbitrators are set out in Paragraphs 6 through 15, inclusive. The appointment of an arbitrator may be challenged pursuant to the rules and procedures set out in Paragraphs 15 through 22, inclusive. Paragraphs 22 through 25.2 address the removal and replacement of arbitrators and associated matters.

Subject to applicable Paragraphs in Part 4 of the Second Schedule, the arbitration panel may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at every stage of the proceedings each party is given a full opportunity of presenting his case. (See Paragraph 26.) Paragraph 70 emphasizes this point. Paragraph 70 provides that, subject to the provisions contained in the Paragraphs of Part 4, the arbitration panel may regulate its own procedure.

At any stage of the proceedings, if either party so requests, the arbitration panel will hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitration panel is free to determine whether to conduct an oral hearing or to proceed on the basis of documents and other materials. (See Paragraph 27.)

Paragraphs 31, 32, and 33 address the respondent's response to the claim. The respondent is obligated to reply to the claimant's written statement. The respondent must communicate his response in writing to the claimant and each of the arbitrators within a period of time determined by the arbitration panel. Provision is also made for the respondent to make a counter-claim arising out of the same facts that gave rise to the claim.

Pursuant to Paragraph 34, during the course of the arbitral proceedings, either party may amend or supplement his claim or response unless the arbitration panel considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration proceedings.

The arbitration panel has a broad authority to require the parties to produce further written statements, documents, exhibits, or other evidence. (See Paragraphs 35 and 37.) If a party fails without good cause to produce documentary evidence after having been invited by the arbitration panel to do so, the arbitration panel may make an award based on the evidence before it. (See Paragraph 44.) Pursuant to Paragraph 28, all documents or information that is supplied to the arbitration panel by one party must also be communicated by that party to the other party.

Each party has the burden of proving the facts relied on by that party to support his claim or response. The arbitration panel may, if it considers it appropriate, require a party to deliver to the panel and the other party a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his claim or response. (See Paragraph 36.) Pursuant to Paragraph 41, the arbitration panel determines the admissibility, relevance, materiality and weight of the evidence offered.

Paragraph 42 requires the arbitration panel to issue an order for the termination of the arbitral proceedings where the claimant has failed to communicate his claim without showing sufficient cause for such failure within the period of time fixed by the arbitration panel. This paragraph also requires the arbitration panel to order that the proceedings continue where the respondent has failed to communicate his response without showing sufficient cause for such failure within the period of time fixed by the arbitration panel.

Under certain circumstances, the arbitration proceedings may be terminated at an early stage. Paragraph 58 provides that if, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason, the arbitration

panel must inform the parties of its intention to issue an order for termination of the proceedings. The arbitration panel may exercise its authority to issue the order for termination, provided that no party raises justifiable grounds for objection.

If the parties to a dispute settle the matter before an award is made, the arbitration panel will either issue an order for termination of the arbitral proceedings or, at the request of both parties and accepted by the panel, record the settlement in the form of an arbitral award on agreed terms. In this case, the arbitration panel is not obliged to give reasons for the award. (See Paragraph 57.)

Procedures and rules relating to the closing of arbitration hearings and the re-opening of the same are set out in Paragraphs 45 and 46.

Paragraph 55 stipulates that the arbitration panel shall apply the law designated by the parties as applicable to the substance of the dispute. Paragraph 56 further provides that the arbitration panel must make its decision in accordance with the terms of the contract and must also take into account the usage of the trade applicable to the transaction.

Where there are three or more arbitrators, any award or other decision of the arbitration panel is made by a majority of the arbitrators. (See Regulation 36 and Paragraph 48.) The arbitration panel has the authority to make interim, interlocutory, or partial awards, in addition to the final award. (See Paragraph 49.) The award of an arbitration panel must be in writing and must be signed by the arbitrators. (See Paragraphs 50 and 52 and Regulation 38(1)) The arbitration panel must state on the award: the reasons on which the award is based, unless the parties agree that no reasons are to be given; the date on which the decision was made; and the place where the arbitration took place. (See Regulation 38(2) and Paragraph 51 and 52)

Awards of arbitration panels are final and binding. The parties to the dispute are required to carry out the award without delay. (See Paragraph 50) The awards may only be made public with the consent of both parties. (See Paragraph 53)

The arbitration panel must provide copies of the signed award to the parties and to the NTRC, pursuant to Paragraph 54. Regulation 39 of the DR Regulations provides that the NTRC must record the details of the award in the Dispute Resolution Order Register.

Either party may request that the arbitration panel provide an interpretation of the award. (See Paragraph 60.) The arbitration panel must provide such an interpretation in writing within a designated amount of time, and the interpretation forms part of the award. (See Paragraph 61.) Corrections in an award that relate to errors in computation, clerical or typographical errors, or any errors of similar nature are addressed in Paragraphs 62 and 63.

Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitration panel to make an additional award as to claims

presented in the arbitral proceedings but omitted from the award. (See Paragraph 64.) If the arbitration panel considers the request to be justified and considers that the omission can be rectified without any further hearing, the panel is to complete its award within sixty days after the receipt of the request. (See Paragraph 65.)

Paragraphs 67, 68, and 69 address costs. Arbitrators are entitled to be compensated and to be reimbursed for expenses related to the arbitral proceedings by the parties.

4. Addressing the Fundamentals: Negotiation

A good understanding of the dynamics, techniques and skills of negotiation will assist in understanding all dispute resolution processes. In addition, the DR Regulations specifically prohibit the NTRCs from taking any steps to assist in resolving a dispute unless it is satisfied that the parties have made reasonable efforts in good faith to resolve the dispute⁴ – presumably by negotiation. For these reasons, this Manual begins its consideration of dispute resolution methods with a discussion of negotiation techniques.⁵

Negotiation

A basic means of getting what you want from others. It involves back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed. (Roger Fisher & Bill Ury)

Negotiation occurs in situations in which two or more parties recognize that differences of interest and values exist ... and in which they want (or in which one or more are compelled) to seek a compromise agreement. (Howard Raffia)

The DR Regulations define negotiation as “Bargaining efforts by which parties attempt to resolve a dispute.” (Regulation 2(1))

4.1 Negotiation Strategy: Dual Concern Model

The Dual Concern Model has a long history in dispute resolution practice.⁶ Dean Pruitt and Jeff Rubin, two US experts in dispute resolution, developed the dual concern model as a framework for understanding negotiating strategies. The model suggests that negotiating parties have two independent sets of concerns, which are illustrated in Box 1 below. The first concern for negotiators is a concern for their own outcome; the second a concern over the other’s outcome, or as it is often described: concern over the relationship with the other party. Assuming we are negotiating in a two-person setting,

⁴ Regulation 8. See also Regulation 6 (1).

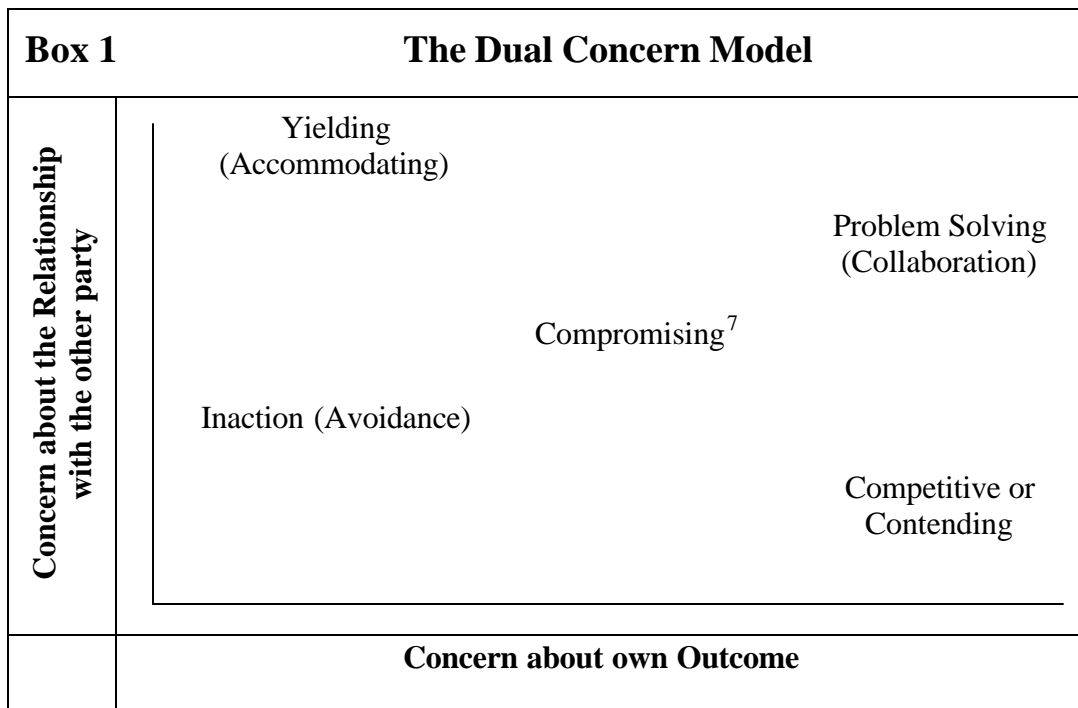
⁵ This chapter on negotiation has been significantly influenced by: Roy Lewicki, Alexander Hiam and Karen Wise. Olander, *Think Before You Speak: A Complete Guide to Strategic Negotiation*, (New York: John Wiley & Sons, Inc, 1996) and Roy Lewicki & Alexander Hiam, *The Fast Forward MBA in Negotiating and Deal Making*, (New York: John Wiley & Sons, 1999)

⁶ The Dual Concern Model was built on the earlier analysis of R.R. Blake and J.S. Mouton, *The Managerial Grid*, (Houston, TX: Gulf, 1964).

both sets of concerns can be represented from one extreme along a continuum of low concern at one end to the other extreme very high concern. As Box 1 below shows, this Dual Concern Model generates at least four possible strategies based on these concerns: Yielding or Accommodating, Inaction or Avoiding, Competitive or Contending and Collaborative or Problem Solving. In addition to being a theory about individual differences in conflict style, the Dual Concern Model is a theory about the impact of changing conditions on negotiators' strategic choices.

In the illustration in Box 1, below, the more the negotiating party is concerned over its own outcomes in a negotiation, the more likely it will be to employ strategies located on the right side of Box 1. And if a party is less concerned with its own outcome, it will favour strategies on the left side of Box 1. With respect to the other dimension, the more the party is concerned with permitting, encouraging or even helping the other achieve its own outcome – in other words the party is concerned with its relationship with other party, the more likely the strategy will move to the top of Box 1. The less concerned the individual is with the other party's outcomes, or with the relationship, the more likely will the strategies move toward those at the bottom of Box 1.

A collaborative bargaining strategy relies on the fact that an agreement is not restricted to establishing a fixed sum. It also works better in a situation where one party's claiming of value in the agreement is not the other party's loss. So a key to a successful collaborative strategy is the ability of the parties to create value through agreement. A key element in value creation for parties comes through trades where one party trade something of less value to it (however the party measures that value) but something that the other party considers of greater value. Parties that can reciprocally trade their lower value items for the other parties' higher value items can achieve a satisfactory agreement.



A variety of negotiating strategies are possible under the Dual Concern Model. Each provides a different approach and will generally result in a different agreement.

4.1.1 Accommodating

This strategy arises where a party finds the importance of the relationship is high but the importance of the outcome is low. In this situation a party is likely to “back-off” the party’s concern for the outcome to preserve the relationship.

4.1.2 Avoiding

In this strategy the priorities for both the relationship and the outcome are low. Neither aspect of the negotiation is important enough for the party to pursue the conflict further. Parties implement this strategy by withdrawing from active negotiation or by avoiding negotiation entirely.

⁷ In fact as Figure 1 points out there are actually more than just four strategies. At the centre of Figure 1 there is a potential fifth strategy – labelled here as “Compromising.” In this negotiating approach, it is presumed the individual is pursuing a rather lazy or half-hearted strategy that is premised on a moderate effort to achieve one’s own outcomes and equally a moderate concern for the outcomes of the other side. Many dispute resolution experts therefore dis miss “compromising” as a negotiating strategy.

4.1.3 Collaborative

This is a strategy where the negotiating party expresses a high priority for both the relationship and the negotiating outcome. In this strategy, parties attempt to maximize their negotiating outcomes while preserving or enhancing the relationship. This result is most likely to be achieved when both parties can find a resolution that meets the needs of each.

4.1.4 Competitive

Here the party has a high concern for the outcome and a low concern for the relationship. A party chooses this strategy where the party has a high desire to win and has little concern about the future state of the relationship. This approach is most likely to see highly combative negotiating with 'hard' positions and limited concessions.

4.2 The Negotiation Check List

The negotiation check list, set out and described below, is a useful preparation tool for all types of negotiations. We encourage you to use the template (a downloadable copy is provided at Appendix II) in preparing for and undertaking a negotiation.

Box 2 – Negotiation Checklist	
Action	Description
Authority Issues	
Agency Issues	
Coalitions	
Ground Rules <ul style="list-style-type: none">• Behavioural guidelines• Procedural rules• Decision-making rules• Rules for media	

• Public participants	
Your needs goals, wants and desires	
The needs, goals, wants and desires of the other side	
BATNA ⁸ – yours and the other side	
The minimum or Resistance point or Reservation point: estimation of walk-away point (For you and the other side)	
The maximum: what you hope to achieve – the Target point; the other side's	
Your opening position	
How successful you were: What worked what failed?	

4.2.1 Planning and Preparation

Planning is the key to successful negotiating. While some parties may have greater natural negotiating talent and more facility with various negotiating strategies and tactics than others, in the end the negotiating edge usually goes to the party who deliberately

⁸ Best Alternative to a Negotiated Settlement – i.e. a party's preferred course of action in the absence of a deal. The concept of a BATNA is discussed at section 4.2.5.

reflects on what he or she must achieve and ‘does their homework’ before commencing the negotiation. Good preparation is possibly the single most important element in achieving a successful negotiating outcome.

Without planning, parties to a negotiation risk entering into a process that they do not understand and over which they may lose control. Or ill-prepared negotiators may formulate a desired outcome or objective and cling to it desperately, refusing to compromise or modify their objectives. This approach too is likely to lead to failure. Ill-prepared negotiators may formulate an outcome or objective but then immediately surrender it in order to get a quick outcome based on what the other side offered. Such an approach can result in an agreement between the parties that is less advantageous to the parties than the one that could have been achieved.

As is evident from the negotiation checklist, the key to planning and preparation is not only to gather information on your interests and objectives but to obtain information about the other side. It may be valuable to talk to colleagues in the organization and determine if anyone else has dealt with the other party. You may call on other networks to determine if they have had dealings with the other party. Search public sources to determine if that provides useful information on the other side’s interests. You should try and collect, for example, financial information, examining the history of the issues between the parties, understanding perhaps market conditions and possibly the culture in which the negotiation is likely to take place. Understanding how the other party negotiates – what the party’s negotiating style is - as well as what its interests are can provide a substantial competitive advantage in your negotiating strategy.

It is important to consider the items on the checklist from the perspective of your position and that of the other’s side. You should also try to map out the way in which you hope the negotiation will proceed. Important parts of the planning and goal setting include:

- define what you want to achieve – be clear with respect your goals and underlying interests and what your target point is;
- define your limits – be clear about your reservation point or the walk-away⁹;
- decide on your opening bid or position;
- determine what alternatives you have, if you cannot successfully reach agreement – be clear in other words about your BATNA;
- assemble the information you gathered on the other side including how you think the other party will approach the negotiation;
- assemble all the information you gathered to fashion a course of negotiation that will help you achieve your objectives; and

⁹ The Walk-Away is, as the name implies, the point at which a party ends negotiating. The concept is taken up at 4.2.7 below.

- develop a proposed discussion agenda.

Planning should not be a static process. You should plan to cycle back and forth between planning, goal setting and information gathering. As you get to know the other party better and get more information about what that party wants, from the other party, you can modify your negotiation strategy.

4.2.2 Agents

Agents or representatives are involved in most negotiations. Agents may be employed where the principals are too emotionally involved, and agents bring a necessary degree of detachment or impartiality. Also representatives can bring needed expertise. This expertise can be related to the subject area of the dispute or it can be process expertise related to skills in conducting a negotiation. Finally, representatives can be included on a side where there is a team of negotiators. Because the negotiation can become chaotic it may be useful to have an agent that can focus the discussion and maintain order in the negotiation process.

Adding agents can have disadvantages as well. It will add to the number of negotiators. The more people there are, the more complex the mix. An agent will not have the exact same interests as the principal. An agent may not do exactly what the principal wants him to do. Adding agents will increase the costs of a negotiation. Communication may become more difficult and complicated with the addition of agents. Finally, there may be differences in ethics, tactics and strategy that may alter the success of the negotiation.

4.2.3 Authority Issues

Another key variable is the authority or power of the negotiators to decide on the actual outcome of the negotiation. In some cases, negotiators must take into account the position or concerns of principals or “higher ups.” In other circumstances, the negotiator may only have conditional authority. In those circumstances, the negotiator may have to ratify the agreement with principals not present at the negotiation. In the extreme, every element of the agreement will have to be ratified after agreement in principle by the negotiators.

For planning purposes, you must know how much bargaining authority you have as the negotiator. It is also critical to know what your mandate is. It is vital, for example, to know what concessions you can make and what you can offer to reach agreement. A negotiation process can be “intoxicating.” Negotiators can get caught up in the process - the back and forth - offer and counter-offer. Negotiators that exceed their mandate can cause subsequent problems and delays.

4.2.4 Ground Rules

As with planning and preparation, establishing ground rules in an unfacilitated negotiation is critical but is often overlooked by negotiating parties in their zeal to get on with the negotiation. Yet ground rules can be significant in the process of successfully or unsuccessfully reaching an agreement. Negotiators should pay attention to ground rules and establish them at the beginning of a negotiating process. Establishing ground rules generally cannot be accomplished once the negotiation has proceeded some distance.

A variety of rules should be considered. A party may want to avoid interruptions. Emotional outbursts may be excluded. On the procedural level, the order of speaking and responding can be set out. The amount of time available to a side on an issue can be agreed upon in advance. Time limits can be established and planned adjournments set.

Finally, rules for making decisions may be established. In some negotiations the parties will decide that there is no agreement unless all the elements have been settled and issues may be reopened when parties agree to new elements. Or the parties may agree to a process of agreement on each issue. In such circumstances, issues cannot be reopened. Except in multi-party negotiations, and even there, there is seldom a voting procedure for agreement. However, the parties may introduce a rule that where a party opposes an element of an agreement, the party is required to explain why it opposes the agreement and suggest what may allow a party to agree.

In some negotiations, the parties should address the issue of whether, and on what conditions, they will speak with the media. Where publicity is an issue, the parties need to determine if any of the parties may speak to the media. Will the parties appoint a spokesperson for all the parties? Will they limit what the parties may say after an agreement is reached or, more importantly, what can be said if the parties conclude that an agreement is not possible?

It is a basic rule of successful negotiation that the parties are expected to negotiate in 'good faith'. Negotiations that are not pursued in good faith will usually lead to failure, or to delayed or possibly less-than-optimal results. To the extent that negotiations are later subject to external review, for example by regulators or the Courts, parties who engage in bad faith negotiation may well be penalized.

Box 3 – Indicators of ‘Bad Faith’ Negotiation

- Unreasonable delay;
- Unnecessary postponement of meetings;
- Failure to contact the other parties;
- Failure to make proposals;
- Failure to make counter proposals;
- Adopting a rigid non-negotiable position;
- Failure to attempt to organize a meeting;
- Unexplained failure to communicate with other parties within reasonable time frames;
- Failure to follow up on a lack of response from other parties;
- Failure to take reasonable steps to engage in discussions;
- Failure to respond to reasonable requests for information within a reasonable time;
- Stalling negotiations;
- Sending negotiators without authority;
- Refusing to agree to trivial matters;
- Shifting position just as agreement seems in sight;
- Refusing to sign an agreement in respect of the process;
- Unilateral conduct that harms the negotiation process, such as issuing press releases;
- Failure to do what a reasonable person would do in the circumstances;¹⁰

¹⁰ *State of Western Australia v Thomas and Ors* [1998] NNTTA 8, at <
http://www.nntt.gov.au/determination/files/WF98_7Determination04091998.pdf>.

4.2.5 BATNA

The Best Alternative to a Negotiated Settlement (BATNA)

A concept introduced by Fisher and Ury in *Getting to Yes*. In a negotiation it is a party's preferred course of action in the absence of a deal. Knowing your BATNA means knowing what you will do or what will happen if you fail to reach agreement.

Alternatives are important. Alternatives give the negotiator the power to walk away from a negotiation where an emerging agreement does not look very good. The number of realistic alternatives that negotiators may have will vary considerably from one situation to another. In negotiations where the party has many attractive alternatives, the party can set its goals higher and generally make fewer concessions. In negotiations where the party has few attractive alternatives, such as when a party is negotiating with a sole supplier, the party has much less bargaining power.

It is useful to think through various alternatives because they can be weighed against the value of any particular outcome of the negotiations. Not only is an alternative an evaluative tool, it is also a powerful negotiating tool that can be introduced into negotiations to request an improvement in an offer. A party that introduces an alternative that is equally good and costs less, can then request the other side to improve its offer. Good negotiators look for ways to improve their alternatives even as they negotiate.

Evaluating the other side's BATNA is an important aspect of preparing to negotiate. You need to know whether the other party has any alternatives and when they do have alternatives, how strong or weak these alternatives are. If the other side has a strong alternative then bargaining may not be easy; a weak alternative may mean that the party will be loathe to terminate negotiations. This may work to your advantage.

4.2.6 Defining Goals and Underlying Interests

If you are party to a negotiation, goal setting is a critical part of analyzing your position. Think about what you want to attain in the possible agreement. List your goals in concrete measurable terms if possible. Be aware of intangible goals and try and name, and even measure them, whenever possible.

To sort your goals out, you should prioritize them. This ordering can be assisted by assigning each goal a dollar value or using some other procedure to assign value. Ordering your goals can be quite valuable when, later in the negotiation you may want to make trade-offs or concessions. With the goals ordered you can give up less important goals to achieve more important ones.

A party's interests—i.e., the party's underlying needs, wants, and desires—often underlie the party's defined goals. Interests may be concrete or more abstract. For example, a good relationship between the parties may be an interest of the party. In some instances, you may also be concerned by principles such those related to what is fair or right. A clear understanding of your interests may allow you and the other party to identify common interests. Though goals may differ, common interests can allow parties to fashion a successful interest-based agreement.

As with most of the categories it is critical to assess the goals and underlying interests of the other side. With respect to interests, it is particularly important to find out if there are common interests, as this will allow you to evaluate whether a collaborative strategy is possible. If information is not forthcoming before the negotiation, be sure to ask probing questions to elicit the other party's underlying interest as early as you possibly can.

4.2.7 Reservation Point or Price (The Walk Away)

Reservation Price

This price or what is often referred to as the Walk-Away, is the least favourable point at which one will accept a deal. Generally the reservation price, or resistance point, is derived from the BATNA but it is not necessarily the same as the BATNA.

The 'walk-away' point is the point where a party breaks off negotiation. It is important for parties never to reveal their walk-away or 'reservation price'. The disclosure of a party's walk-away would normally lead the other side to offer just that and no more.

4.2.8 ZOPA

Zone of Possible Agreement (ZOPA)

The ZOPA is the range or area of agreement where both parties can be satisfied with an agreement that achieves their minimum interests or better. It is an agreement that potentially satisfies both parties

As a final point in this list of issues to consider in preparation for negotiations, parties should consider their ZOPA. A bargaining range is set by the party's starting point, the opening offer or price, the target point and the reservation point or walk-away. The target point is where a party would like to end up. The reservation point, as noted above, is the price where a party breaks off negotiation. A ZOPA will only be possible where

the parties' bargaining ranges overlap. The bargaining range is primarily associated with competitive situations, where each side takes a stance and there is give-and-take adjustment until the two parties reach a compromise point between the two extremes.

4.3 Competitive (Distributive) versus Collaborative (Integrative) Strategies

A Distributive Negotiation

This is a negotiation in which the parties compete over the distribution of a fixed sum of value. Generally in such a negotiation a gain by one party is made at the expense of the other party.

An Integrative Negotiation

A negotiation where the parties cooperate to achieve their joint maximum benefits. The individual's goal is to achieve his interests while enabling the other to achieve the other's interests. These negotiations not only enable the parties to claim value but generally are designed to create value.

A distributive or competitive negotiation is one that pits two or more parties in a competition against each other for a fixed amount of value. In a competitive strategy, each side seeks to gain as much of the value that is "on the negotiating table" as is possible. Generally in distributive negotiations if one side gains more value, then there is less for the other side. This is a classic win-lose environment and it is clear why these negotiations are competitive.

On the other hand, collaborative or integrative bargaining strategies focus far more on trying to increase the total value being negotiated by the parties. Such an approach increases the value that each side is likely to claim in concluding an integrative negotiation. In a collaborative negotiation the parties share information over what the parties identify as their interests. The objective of an integrative negotiation is to ensure that each party satisfies their key interests. Paraphrasing what negotiating experts frequently proclaim: "There is mutual needs satisfaction." Integrative bargaining is all about joint problem solving.

Few negotiations employ only one or the other of the two key negotiating strategies – distributive or integrative. Indeed most negotiations provide instances where the negotiator would benefit from a collaborative strategy; and there other instances where the negotiator would benefit from employing a distributive strategy. The negotiator

needs to be constantly assessing which negotiating strategy is best for a particular moment in the negotiation.

4.3.1 A Competitive Strategy

As noted above, in a competitive strategy the outcome of the negotiation is more important than the relationship. The thinking and the goals in this strategy are short term: to maximize the size of the outcome in the negotiation and not to pay much attention to the long-term consequences of the strategy or the relationship. A competitive strategy tends to emphasize differences between the parties. The parties will exhibit a lack of trust in the negotiation and there may even be conflict. The goal in such a negotiation is to satisfy the party's needs. The party will be able to identify a clear starting point, a target and walk-away point. The bargaining range for each party is different and negotiating attempts to bring the two bargaining ranges closer in the hope that the bargaining ranges will overlap and the parties will be able to successfully conclude an agreement.

The competitive strategy requires the parties to hold their interests close. Concessions are offered by negotiators sparingly and often after much negotiating. The parties are likely to spend time researching, pressuring and "psyching out" the other side. Time is expended also in making moves and countermoves. Competitive strategies are often compared with strategies used in chess and other tactical competitive battles. Generally parties will make some significant initial concessions and then follow those initial concessions with smaller and smaller ones as the parties approach their walk-away points. The tougher the party is, the fewer the concessions the party will make and the smaller the concessions will likely be at all stages of the negotiation.

The competitive strategy is apt to employ many of the negotiating tactics described below at Section 4.5. An alert negotiator will be on the look-out for such tactical negotiating behaviours and be prepared to respond appropriately. A competitive strategy is particularly useful when the other side employs a competitive strategy. However, it is not always conducive to concluding an agreement where the parties can create or claim significant value. It may be advantageous to shift to a collaborative strategy when the other side indicates or exhibits such an approach. It may ensure a better and more successful outcome.

4.3.2 A Collaborative Strategy

A collaborative or integrative bargaining strategy is likely to arise when the parties consider the relationship and the outcome to be equally important. In a collaborative bargaining context, the parties to the negotiation either begin with compatible goals or are willing to search for ways to pursue their individual goals so that the parties both gain from a successful agreement. The parties will look for common needs and goals and engage in mutually supportive behaviour to achieve these goals and interests. In a collaborative setting the parties realize that they are interdependent: their cooperative

efforts can solve the problems and meet the needs of both sides. In an integrative bargaining environment, communication between the parties is generally open and accurate.

The collaborative strategy approach traditionally has been underutilized. Most people are unclear how such a negotiating strategy is conducted and default to a competitive strategy in part because there is not sufficient trust between the parties. A collaborative strategy relies on both commitment and trust. Parties should to be committed to:

- understanding the other party's needs and objectives;
- providing a free flow of information, both ways; and
- finding the best solution(s) to meet the needs of both sides.

Both parties will strive in a collaborative negotiation to understand the other party's goals and underlying interests. Both parties must be willing to ask questions and listen carefully to the answers provided by the other side. These efforts will improve a party's understanding of the other party's needs. To provide a free flow of information, both parties must be willing to volunteer information to the other side. The information should be accurate and as comprehensive as possible. For both sides the objectives are to understand the issues, the problems, the priorities and the goals of the other. And finally, having listened closely to the other side, both parties can proceed to work toward achieving the goals that will satisfy both parties.

There are a number of major steps to a collaborative strategy including:

- identifying the problem;
- understanding the problem;
- generating alternatives; and
- selecting a solution.

As will be seen in Section 6.3, a facilitated interest-based negotiation – a form of mediation - operates in much the same manner as an interest-based negotiation.

In conclusion, there are several key elements to a successful collaborative negotiation. They include:

- creating common goals and/or objectives;
- maintaining confidence in your ability to solve problems;
- valuing the other party's opinion;
- sharing the motivation and commitment to working together;
- trusting the other side; and
- employing clear accurate communication.

For those apt to choose a collaborative approach, it is important to gauge the approach of the other side. If a party favours using a collaborative approach but the other side initially uses a competitive strategy, then it may be critical for the party to reconsider its choice. A party is very unlikely to be successful playing a collaborative strategy when the other side chooses to employ a competitive approach.

4.4 The Critical Skills: Questioning and Listening

There are two critical skills that a negotiator or a third party neutral, such as a mediator or conciliator, should possess to achieve success consistently. The first skill is the ability to ask probing questions and the second is the ability to listen intently. To ask probing questions, a skilled negotiator or dispute resolution expert must be able to ask open questions. Listening skills require the negotiator to be able to understand what the party is saying accurately, to read the emotions in the party's voice and not just understand the words, and to interpret the party's underlying interests correctly.

Good questions are essential for securing information. Asking good questions can give a negotiator a great deal of information about the other party's positions, supporting arguments and needs. The same is true for a third party neutral.

4.4.1 Open versus Closed Questioning

Open questions are those that do not anticipate or direct the content of the answer. Closed questions, on the other hand, suggest or direct the content of an answer. Closed questions are also called leading questions.

Open questions are preferred in most dispute resolution processes. The information you might be seeking in an interest-best negotiation or in a mediation for example, can include any of the following kinds of information: objective, reflective, interpretive and decisional. What kind of information does a party or a third party neutral require in a particular situation? All parties need to think about what kind of information they require and then fashion the appropriate question to elicit the appropriate facts.

Objective information can generally be elicited by the following kind of questions: "What do you know about this dispute?" The question is neutral and hopefully will encourage a response that provides objective facts. To elicit reflective information, which is concerned more with feelings, the following kind of question might be helpful: "What worries you about your proceeding with a written complaint?" Then there is interpretive information a party or third party neutral may need. Interpretive information is about meaning. The kind of question that might elicit interpretive information is: "If you could obtain an apology, would that be sufficient to settle the matter?"

Finally a party or third party neutral may need to obtain decisional information. Decisional information provides the party or the third party neutral with the actions or the facts that possibly resolve the matter or dispute. So, a party or third party neutral might be capable of soliciting decisional information by asking the following kind of question: "What amount of compensation would you be prepared to accept to settle the dispute?"

4.4.2 Reflective or Active Listening - Listening on two levels

Communications can be loaded with multiple meanings. Communication can have a factual basis but communication also can carry emotional content. It is important in a negotiation for a party or a third party neutral to reflect understanding of both levels (See Appendix I-Exercise Section on Active Listening.). It is even more critical for a third party neutral to be able to convey to both parties the different levels of communication. Such a facility improves communication enabling the parties to better understand the interests of the sides.

4.4.3 Reframing

Reframing is an important skill as well. In decision theory, a frame is a perspective or point of view that people use to gather information and solve problems. Reframing is an important skill especially for third party neutrals. In particular third party neutrals are called on to turn a negative comment or question into a positive or neutral statement or question. Reframing plays an important role in avoiding misunderstanding or the failure to effectively convey information to one of the parties.

4.5 Negotiating Tactics

Some of the tactics reviewed in this section are considered aggressive; in some circumstances, even threatening. That is why many of these negotiating tactics are referred to as “hard ball” tactics. It is important for negotiators, whether they use such tactics, or not, to be able to identify such tactics quickly when used by other parties. Parties need to determine how best to respond to hard ball tactics. A party’s response will depend on a part’s goals and the larger context of the negotiation. It will also depend on who the party is negotiating with and the possible alternatives to the current discussion – the BATNA.

A party may choose to respond to the use of such tactics by the other side by not responding at all. Some experts suggest that this response may seem weak. Indeed it may. But the approach may prove a successful strategy as the negotiation proceeds. A party may find that it takes a lot of energy to use a hard ball tactic. When the other party is using it, the second party can focus on achieving its goals. There may therefore be value in not responding. Another possible response to the use of hardball tactics is to pretend not to recognize the tactic. The party can change the subject. The party can call a break and when the parties restart it can switch the subject.

Another approach is to discuss the use of the tactic with the other side. The party can indicate that it knows what the party’s approach is and even what the tactic itself is. The party at that point can suggest that it is prepared to negotiate the negotiating process before continuing with the substance of the negotiation. The party can also propose a less aggressive approach. The party can indicate that it is prepared to use aggressive behaviour as well but it might be more valuable for both parties to adopt a more effective negotiating approach.

It is possible that a party may want to respond to aggressive negotiating tactics by a hard ball approach. Of course, employing such a response may well create some chaos or even hard feelings on the other side, but it should not be dismissed out of hand. Having responded in kind to the other side, it is now apparent to the parties that each can employ such tactics and it may be possible to alter tactics. Particularly if the party that first used such tactics was intent on testing the other's resolve, such a choice may be helpful to the course of the negotiation.

The following sections describe a number of tactics that negotiators use, particularly in distributive negotiations. You should familiarize yourself with these tactics and consider what responses you might adopt. You should also consider whether you feel comfortable employing some of these tactics.

4.5.1 Mutt and Jeff¹¹

This tactic entails a negotiator acting reasonably, even generously to a proffered concession only to have another member of the same party castigate the other side for an inadequate concession. The 'reasonable' partner will then suggest that the party provide some additional concession to the offer if there is any hope of convincing the more recalcitrant partner that the offer should be accepted.

This tactic can be employed by a single negotiator as well. Here a negotiator praises the concession but suggests that a partner or principal not at the negotiation will never accept this offer and that the party will have to improve the offer if an agreement is to be finally concluded. It is generally unproductive to challenge the unreasonable negotiator and parties often make the mistake of focusing on the unreasonable one. The response generally is to focus on the reasonable party and to seek agreement with that party. If you can secure an agreement then you can use that agreement and that party to work against the recalcitrant negotiator.

4.5.2 Low Ball/High Ball

This tactic consists of a negotiator starting with an extremely low or high opening offer, which the negotiator knows that the other side will never accept. The idea for employing this tactic is that such an extreme offer will cause the other party supposedly to re-evaluate its position and move closer to the reservation point. A problem in employing such a tactic is that the other party may think that negotiating is just a waste of time and may decline to negotiate further. If the other party does not decline to negotiate further, it will still be difficult for the first party to explain why this offer is not extreme and to move the negotiation forward to a point where the party will actually respond with its

¹¹ This section is strongly influenced by, Charles B. Craver, "Negotiation Techniques," in Roy Lewicki, David M. Saunder, John Minton, eds. *Negotiation: Readings, Exercises and Cases, Third Edition*, (Irwin/McGraw Hill: Toronto, 1999), pp.87-96

own offer. However, if the extreme offer is allowed to remain, it could influence the final agreement price in the offeror's favour.

The recipient of such an offer should generally make no counter offer. If the party has done its negotiation planning, it will know that this offer is out of the zone of a possible agreement. The prepared party may, among other things, refuse to continue the negotiation until the offering party provides a more reasonable opening or explains how such an offer could be made. The party can threaten to end discussions asserting that the offering party is not taking the negotiations seriously. Alternatively, the recipient may also decide to respond with an equally extreme offer at the other end of the spectrum to indicate that it is not going to be influenced by such an extreme offer.

4.5.3 Bogey (Straw Man)

Negotiators will use this tactic to suggest that an issue of little or no importance to them is in fact quite important. Using this approach allows a party later to trade the issue for major concessions on issues that are actually important to it. This tactic is most effective when negotiators identify an issue that is quite important to the other side but of little value to the originating party.

For example, an employee may argue for a particular work assignment or project (when the employee in fact does not prefer the work assignment) and then, in exchange for large concessions from the manager accept the assignment the employee actually prefers. The tactic is fundamentally deceptive and may be difficult to employ. Use of the tactic may result in both negotiators arguing against their own true wishes. Again planning is critical since the party may have a sense of the other side's presumed interests. Probing why the other party wishes this outcome may reduce the effectiveness of the bogey tactic. Also offering little or conceding little may reduce the effectiveness of a bogey tactic.

4.5.4 The Nibble

The tactic leads a party to ask for a small concession on an item that hasn't been discussed previously in order to complete an agreement. The classic example occurs when, having tried on or examined many suits, the party tells the salesperson in the clothing store that it will buy a given suit if the salesperson will include a tie for free in the sale where the tie had not previously even been discussed. The tie is the nibble.

In the broader context, after a lengthy negotiation, a party suddenly produces a clause that had previously not been discussed. The additional clause is not so costly as to lose the deal over but it is large enough to upset the other party who is presented with the choice to accept the clause. To respond to a nibble, a party can request to know of any other request of this sort. This is repeated until all presumed nibbles have been made transparent. Then, at that point the party may suggest that now both parties are in a position to conclude a successful agreement. Also, parties may find it useful to have a few nibbles available. You can then respond to a nibble with a nibble of your own. Such

counter-nibbles can reduce the overall advantage that a party may hope to achieve with the tactic.

4.5.5 Chicken

Negotiators who use this tactic combine a large bluff with a threatened action to force the other party to give the party what it may want. The weakness of employing a chicken tactic is that the negotiation is turned into a serious game in which one or both of the parties find it difficult to distinguish reality from the postured negotiation positions.

It is difficult to respond to this tactic. Employing chicken in response may back both sides into positions where neither side is easily able to back down. Again, preparation and planning is generally the most effective antidote to the use of chicken. Knowing where reality ends and the tactic begins is the best means for a party to counter the use of the tactic.

4.5.6 Threats and Promises

Many negotiations employ the use of either overt or at least implicit threats in their negotiation. Threats show recalcitrant parties that the cost of disagreeing may exceed the cost of accommodating the party. Many negotiators avoid the actual use of formal “threats” preferring instead “warnings.” In these warnings, for instance, the party may caution the other side of the consequences of rejection. For threats to be effective, they must be believable.

A credible threat is one that is proportionate to the action it is intended to deter. Seemingly insignificant threats tend to be ignored, while large ones tend to be dismissed. A party should never issue a threat unless it is prepared to carry the threat out. Negotiators often substitute negative threats for affirmative ones. In these situations, the party indicates that it is willing to alter its position simultaneously with the other party. Affirmative promises can be much more effective than negative threats since with affirmative promises the party indicates that it is willing to change at the same time as the other side.

4.5.7 Anger

If the other side becomes angry, listen for the inadvertent disclosure of information by the other side. A party that loses its temper seldom benefits from it. However, negotiators may feign anger. This tactic should be used sparingly since anger, whether feigned or not, may offend the other side. Nevertheless, the use of anger may convey the seriousness of the issue. A party may use the outburst to indicate how the party cannot understand how its reasonable approach has raised such an intemperate response. If this response is successful, the other side may feel either guilty or embarrassed, possibly shaming the party into a concession.

4.5.8 Intimidation

There are a number of tactics that can be lumped under the heading 'intimidation'. All have in common the fact that the tactic is designed to force the other party to agree through an emotional ploy – usually anger or fear. For instance to indicate the importance of the issue, the party may use anger. Guilt, also, can be used as a form of intimidation. A party may question the other party's integrity or the other's lack of trust. The purpose of this tactic is to place the other negotiating party on the defensive.

The objective of intimidation is to draw concessions using emotional, rather than objective, means. If, rather than act on the basis of facts, a party makes concessions on the basis of emotions, then the tactic may have an influence on the negotiation. A party can respond effectively to intimidation by openly confronting it: the party may request that use of the tactic end and that the negotiation proceed in a fair and respectful manner.

4.5.9 Silence and Patience

Many parties fear silence since they believe that they will lose control of the discussion if they stop talking. If one party is silent, the other will often talk more, providing the first party with information about its negotiating position and potentially offering concessions. Parties should state what is essential, including concessions or offers, and then remain quiet and await a response. If a party finds the silence uncomfortable, it is reasonable for the party to look at and review its notes while awaiting a response.

4.5.10 Boulwareism

This technique acquired its name from Lemuel Boulware, former Vice-President for labour relations at General Electric. Boulware tried to avoid general distributive negotiating that began with rather extreme opening positions and then an extended process of minor concessions leading finally to an agreement. Boulware adopted a take-it-or-leave-it bargaining approach. Having "done its homework" focusing intently on its goals and the other side's goals, the party opens with a final offer, which the party claims is the best outcome for both sides.

This approach is potentially off-putting, especially since it asserts that the party knows what is best for both sides. It also deprives the other side of a negotiating process. However, a smart negotiator should not reject the offer out of hand, even though paternalistic, especially if the offer is in fact reasonable. If it is reasonable, the negotiator might well decide to take it seriously.

4.5.11 Passive-Aggressive Behaviour

Instead of directly challenging an opponent's proposals, a party may use oblique but highly aggressive forms of resistance. For example a party may show up late for a scheduled meeting or forget to bring important documents. Or the party may have agreed to prepare to draft a preliminary agreement but then fail to do so. It is important to

recognize these tactics and counter them. For example, a party may respond to these tactics by signalling that it will not engage in similar behaviour. Thus, the party may wish to ensure that it is able to present a draft of the preliminary agreement even if the other side is not able to do so. The party may also wish to ensure that it brings all documents that the parties have agreed are necessary to have at the meeting. Once a passive-aggressive party is presented with these responses to its passive-aggressive behaviour, the party then normally ends such behaviour.

4.6 Looking at Multi-Party Skills and Tactics

Much of the discussion in this Manual is focused on a two-party negotiating setting. However, the reality is that much negotiating is done on a multi-party basis. Even two-party settings often turn out to take forms of multi-party negotiation. In many two-party contexts, a party may include both a principal and agent. Disputes in which a party retains lawyers are a classic agent-principal negotiation. Where an organization, a private company for instance, is involved in a negotiation, most company negotiators include agent-principal actors – an employee and a higher management official. In addition there are issues where disputes typically include a variety of parties. For example, many disputes among regulated telecommunications service providers involve multiple interests, including service providers, consumers, equipment suppliers, governments and even regulators.

Though this Manual does not delve deeply into multi-party negotiations, differences with the multi-party negotiation context should not be disregarded. Like the two-party negotiating setting, the multi-party context does raise distinct negotiating strategies. Like the two-party context, there are distinct competitive and interest-based strategies. The competitive multi-party strategies are generally focused on coalition formation – building and destroying coalitions, with the objective of achieving a successful outcome.

More recently a number of experts have devised multi-party interest-based strategies – the so-called Mutual Gains Approach. A mutual gains approach does not focus on competitive coalition building. Instead, this consensus building approach involves a process of seeking unanimous agreement. This approach involves good-faith efforts to meet the interests of all the stakeholders.¹² The mutual gains approach represents collaborative bargaining at the multi-party level. The consensus approach avoids

¹² The mutual gains approach was developed over a number of years at the MIT-Harvard Public Disputes Program and at the Program on Negotiation at Harvard Law School. A number of books can be referenced to provide you with greater detail on the consensus building approach including: Lawrence Susskind and Patrick Field, *Dealing with an Angry Public: The Mutual Gains Approach to Resolving Disputes*, (New York: The Free Press, 1996), Lawrence Susskind and Jeffrey Cruikshank, *Breaking the Impasse: Consensual Approaches to resolving Public Disputes*, (New York: Basic Books, 1987) and Lawrence Susskind, Sarah McKernan and Jennifer Thomas-Larmer, eds., *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, (Thousand Oaks, CA.: Sage Publications, 1999)

dividing parties into winning and losing coalitions by using the following coalition-building tactics:

- mobilizing compatible interests, i.e., identifying compatible alignments that can serve as long-term or short-term members of a winning coalition ;
- altering the incentives of the various parties thereby influencing the incentives for both adversaries and potential coalition partners;
- eliminating options to undermine the status quo;
- framing choices;
- using social influence to alter perceptions and encouraging attraction to a winning coalition; and
- Using sequencing to attract parties and making it easier to attract other outstanding parties at the same time you add to coalition resources.¹³

¹³ This is a classic set of tactics in coalition building in multi-party negotiations. For texts on classic competitive multi-party negotiating see, Michael Watkins and Susan Rosegrant, *Breakthrough International Negotiation: How Great Negotiators Transformed the World's Toughest Post Cold War Conflict*, (San Francisco: Jossey-Bass, 2001), and Michael Watkins, *Breakthrough Business Negotiation: A Toolbox for Managers*, (San Francisco: Jossey-Bass, 2002)

5. Selecting the Best Dispute Resolution Approach

How, and when, can public policy matters be appropriately addressed through various dispute resolution approaches – including ‘non-official’ approaches? This question is at its sharpest where there could be a conflict between public policy and the resolution of a privately negotiated or arbitrated dispute. The DR Regulations have prescribed an important decision-making role for the Commissions in determining which dispute resolution course of action should be adopted following a request for assistance by one of the parties.

The Commission’s choice will be significantly influenced by the type of dispute, the cost and the evidence available to the Commission. For instance, what if the matter is a consumer complaint concerning a relatively small billing matter (though the amount may well be material to the consumer)? Where such a dispute presents itself to a Commission and the Commission identifies that there has been little informal discussion between the parties, then a Commission may well request the parties to continue negotiating. Where there have been unsuccessful informal discussions, the Commission may direct the parties to mediate the dispute. Where there appears to be a technical issue at the heart of the dispute, the Commission may judge that conciliation is appropriate, including the appointment of an expert as conciliator. Of course, the DR Regulations require that both parties consent to conciliation before the Commission directs the party to participate in a conciliation

It will be a rare occasion, presumably, where a Commission will direct arbitration in a consumer dispute given the likely cost burden on the consumer. But since arbitration results in a binding decision, a telecommunications service provider may agree to pay for all costs in order to secure such a result.

Subject to the record in a consumer dispute, a Commission may consider that the facts provided to it by the parties permit the Commission to render a decision. Where there is insufficient evidence, the Commission may request further information or it may determine that a tribunal hearing of the dispute is warranted by the circumstances.

As in the case of the DR Regulations, telecommunications regulators from other jurisdictions may have a choice of DR methods to apply in the case of a particular dispute. As an example, Box 4 describes the variety of ADR choices available to the Saudi Arabian regulatory commission and the factors that the commission must consider when determining which course of action to take.

Box 4 – Flexibility in Choosing DR Mechanisms: An Example from the Saudi Arabian Commission

Chapter 6 of the Saudi Telecommunications Bylaw sets forth a flexible dispute resolution mechanism. The procedures for resolving disputes are clear and straightforward. A period of negotiation is required before parties may bring a dispute to the Saudi Communications and Information Technology Commission (Bylaw, Article 45.1). The Commission then has discretion to determine the best mechanism to adopt for each dispute. It may choose from a selection of mechanisms that include mediation, final offer arbitration and regulatory adjudication (Bylaw, Article 44).

In deciding whether to accept a request for consensual resolution or to proceed by way of a rule-making proceeding, the Commission must take into account:

- Whether the dispute will have regulatory or precedent-setting value, and whether a consensual proceeding likely will be accepted as an adequately authoritative precedent;
- Whether the dispute raises policy issues that extend beyond the interests of the parties involved and that may require additional comment from other concerned parties before a final resolution may be made; and
- Whether the dispute might have a material effect on persons who are not parties (Bylaw, Article 45.8).

This is significant from a regulatory point of view since resolution by the parties themselves – by mediation or by an independent arbitrator – can preclude the Commission from implementing regulatory policy through dispute rulings. This is frequently a sensitive issue in constructing dispute resolution mechanisms in a regulatory context. For example, where the dispute concerns interconnection, policy is upheld by requiring the Commission’s resolution of disputes to be in accordance with its Interconnection Guidelines (Bylaw, Article 46.1).

The Commission retains considerable influence over the process to be

followed in a consensual proceeding. It may override the parties' chosen dispute resolution approach and timetable and appoint an inquiry officer to propose an approach and timetable in consultation with the parties. If there is disagreement, the Commission may resort to a rule-making proceeding (Bylaw, Article 45.9).

In general, the more a dispute raises public policy concerns, whether a consumer dispute or a licensee dispute, the more likely a Commission will choose to direct a dispute to a Tribunal hearing as opposed to a private process. Where disputes between licensees engage private or contractual matters, the Commission may well favour directing the parties to a facilitative problem-solving approach, say a mediation as a first step. Failing resolution by the parties, the Commission may then direct the licensees to arbitration.

Commissions are likely to ask some or all of the following questions before choosing a course of action:

- Does the dispute raise larger public policy concerns or is there a number of these complaints already identified?
- Is there likely to be ongoing business relations between the disputing parties?
- Will cost impact unduly on one of the parties: generally this will arise in consumer disputes?
- Have the parties made reasonable efforts to resolve the dispute? If not, why not?
- Is there enough information available to the parties and a possible third party neutral?
- Is there a technical issue relevant to the dispute where the appointment of an expert would be beneficial to the resolution of the dispute?
- What is the preference of the parties?

6. Mediation and Conciliation

Facilitation

Facilitative dispute resolution approaches include mediation and conciliation. Under such approaches, decisions are reached by agreement of the parties. Facilitative approaches focus on the interests of the parties and on problem solving.

There are two broad dispute resolution approaches included in the DR Regulations – facilitative approaches and adjudicative approaches. In the next section, we will examine the consensual interest-based approaches included in the DR Regulations. With facilitative approaches, no resolution is possible, unless the parties accept it. Following the discussion of the facilitative approaches, the Manual will examine the principal adjudicative approaches in the DR Regulations – arbitration and tribunal hearings

6.1 Comparing Mediation and Conciliation¹⁴

Mediation

Mediation is a private, informal alternative dispute resolution process by which the parties with the assistance of a neutral third party called a mediator try to reach a voluntary agreement on the matter in dispute and to end the conflict. (DR Regulations, Part II, Second Schedule, Part 1)

Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution. (Centre for Effective Dispute Resolution (<http://www.cedr.co.uk>)

Conciliation

A process that seeks to bring about the diminution of hostility between

¹⁴ This section is heavily influenced by Genevieve A. Chornenki and Christine E. Hatt's, *Bypass Court*, and Christopher W. Moore's, *The Mediation Process: Practical Strategies for Resolving Conflict*

the parties and like mediation is a non-binding dispute resolution process. Also like mediation the process involves an individual who is not involved in the dispute assisting the parties to resolve the dispute. Conciliation differs from mediation in the DR Regulations in that the third party neutral is permitted at any stage to make a proposal for settlement of the dispute. (DR Regulations Part II, Second Schedule, Part 2)

Mediators and conciliators rely on similar facilitation skills. The Manual reviews facilitation skills – and the variation in process between mediation and conciliation. The major distinction between the two mechanisms is that a mediator focuses solely on facilitating the process and the effort to achieve agreement (Second Schedule, Part 1, Paragraph 15), while a conciliator (Second Schedule, Part 1, Paragraph 13(4)) at any stage of the process may offer proposals to the parties for settlement. This difference in role may obviously have a significant influence on the choice of third party neutral, i.e., the mediator or conciliator.

Regulation 13(3) indicates that mediation is the preferred ADR approach to resolution of a dispute where appropriate. The Second Schedule, Part 1, Paragraph 4(1) sets out the selection methods for mediators. Mediators can either be selected jointly by the parties, or where such a selection is not possible, each party shall nominate one, or where that is not possible, the Commission shall select a mediator. Mediation is, however, a consensual collaborative process, and though selection can obviously fall to the Commission, the failure to obtain the parties' agreement on the mediator should weigh on the Commission's determination to mediate the matter at all. Although co-mediation is a mainstream approach in mediation generally, it occurs where the issues in the dispute call for a particular expertise that may not be evident in the chosen mediator. It is more unusual for each party to choose its own mediator, and again the Commission should weigh the prospect for a successful mediation.

Conciliation is only possible where both parties accept the process (Second Schedule, Part 2, Paragraph 5). Conciliations proceed with one conciliator, unless the parties agree there shall be more than one. Unlike mediation, the NTRC is not obliged to maintain a roster of Conciliators. The parties can seek to enlist the assistance of the Commission or ECTEL in naming the Conciliator (Second Schedule, Part 2, Paragraph 8(2)). The selection process and the absence of a roster do permit the possibility of a selection with a wide range of skills and expertise.

Mediators and Conciliators may bring different approaches to their role as third party neutral. Some may be more willing to assess the information or proposed offer of a party. This evaluative approach is not always followed by third party neutrals. Some third party neutrals bring what is described as a facilitative style to mediation. A facilitative style focuses on managing the process, and seldom assesses or engages in

evaluating the substance of a party's position. There is a range of third party neutral styles but there are also common elements in the practises of third party neutrals.

Key skills of a good third party neutral include the ability to:¹⁵

- create an atmosphere conducive to discussion;
- encourage the parties right away to agree on the goal of the session and on the rules that they will abide by, which might include speaking in turn, without interruption, and without personal attacks;
- elicit factual information about the conflict;
- understand the dispute from each party's perspective and communicate that understanding so that each party feels "heard;"
- manage the interplay between the parties - at some points engineering civility if necessary in their communications and other times permitting the parties to "vent;"
- help the parties identify the strengths and weaknesses of their case, often by playing devil's advocate;
- work with the parties to go beyond their positions to discover their underlying interests and to talk about them;
- smooth communications between the parties in many ways – by listening to a "loaded" or angry statement made by one party and reframing it to convey the essential information to the other party without the potentially distorting emotional overlay, or by acting as the courier for information when the parties are physically located in separate caucus room (more on the use of "caucus" below), to name just two;
- provoke the parties to be creative in generating options for settlement and meet as best as possible the joint interests of the parties;
- assist the parties to analyze and assess their alternatives to a negotiated resolution to the dispute;
- control the pace of the negotiation to enable the parties to reach the moment of resolution on each point at the same time;
- keep the parties working and focused on the future and on their goal of resolving their differences;
- ensure that the parties' efforts are productive in moving them ever closer to the goal; and
- display endless optimism that an agreement can be achieved and sustain commitment to the effort of its achievement. The best mediators do not easily give up.

¹⁵ A more complete list can be found in *Bypass Court: A Dispute Resolution Handbook*, at pp.89-90

6.2 The Mediator's Role

As a facilitator, a mediator should take a problem-solving stance, seeking to aid the parties in achieving their interests. The mediator focuses on the parties' interests – their needs, wants, desires and goals. The mediator works to get beyond each party's positions.

Mediators do not necessarily have expertise in a subject or an industry such as telecommunications. There may be issues such as those that arise in technical or commercial disputes between licensees where knowledge of the telecommunications sector is beneficial. In those circumstances, the parties may seek to identify a mediator with both expertise and knowledge in the telecommunications sector and facilitation skills. Where that is not possible, and where costs are not prohibitive, the parties could arrange to have co-mediators (a mediator with telecommunications expertise and a skilled mediator). But no matter which approach is used, the mediator must be skilled in undertaking an interest-based negotiation: mediation is facilitated negotiation – a negotiation with a third party neutral who manages the negotiation process.

What should a mediator cover in the facilitated negotiation? If the cost is not prohibitive, the mediator may want to have a pre-meeting with each party separately to learn about the parties' interests. When the parties meet for the first time, the mediator should assume a managing role for the process. A mediator will generally cover the following matters when he first brings the parties together:

- explain how the mediation works;
- emphasize confidentiality in the group and caucus sessions;
- stress the low risk nature of the process – meaning that for the parties an agreement will only come because the parties agree to the terms;
- indicate the prospect of success where the parties have a commitment to try and reach agreement. In the Second Schedule, Part 1, Paragraph 18 the parties commit, “to participate in the proceedings in good faith and with the intention to settle the dispute if possible”; and
- identify the use of the caucus in the mediation.

Mediation is confidential (Second Schedule, Part 1, Paragraph 19). It is a discussion in furtherance of settlement. What goes on in the mediation, in other words, is to remain with the parties and the mediator. In addition, the events that take place, or the offers made, are not to be introduced in any other proceeding. Finally, a mediator cannot be compelled to divulge information to any outside party including a Commission. Similarly, conciliation is confidential (Second Schedule, Part 2, Paragraphs 24 and 25).

Mediations are frequently conducted pursuant to mediation agreements. Such agreements often cover such issues as disclosure, confidentiality, termination and costs. Mediations are not necessarily complex but the mediation agreement can be very helpful to the pending process by clarifying what the parties and the mediator can expect of one another.

The mediation process usually includes the use of ‘caucus’ sessions. Though mediation almost always commences with a joint party meeting, there may come a point where the mediator will want to meet privately with one party and then privately with the other. This is referred to as a ‘Caucus.’ Caucus can give the party meeting with the mediator the opportunity to refocus and reflect on the goals of the mediation, explore in private options or proposals, and gather facts to develop a new option. In caucus sessions, parties can explore issues that they might not initially be prepared to discuss in a joint session. Often the mediator will suggest a break from a joint session but parties may initiate such a request as well.

Mediators have two approaches concerning the information they obtain in these private sessions. Some mediators consider all the information obtained from such a session as confidential and will not reveal any of that information to the other side unless the party instructs the mediator to do so. Other mediators believe that information learned in caucus can be conveyed to the other side if the information gained may further settlement, unless the party expressly indicates that specific information provided is not to be conveyed to the other side. Both approaches are possible. Parties need, however, to understand which approach a mediator is proposing to take.

6.3 The Course of A Facilitative Process

A mediation or conciliation moves through several reasonably predictable stages. These are:

- Beginning the Meeting – Mediator or Conciliator’s Opening;
- Statements by the Parties;
- Defining Issues & Agenda Setting;
- Exchanging Information, (Uncovering Interests);
- Clarifying the Joint Question;
- Generating and Assessing Options;
- Bargaining; and
- Achieving Formal Settlement

6.4 Beginning the Meeting – The Mediator’s Opening¹⁶

The mediator’s major task in the opening phase parallels what a negotiator might do in an opening to an interest-based negotiation. The mediator should ensure a positive tone and indicate his or her impartiality. The Mediator’s opening statement usually contains the following:

- introduction of the mediator and, if appropriate, the parties;
- commendation for the willingness of the parties to cooperate and seek a solution to their problems;
- definition of mediation and the mediator’s role;
- statement of impartiality and neutrality;
- description of mediation procedures (this may have been discussed previously if a pre-mediation meeting has been held);
- explanation of the concept of caucus;
- definition of the parameters of confidentiality established by the DR Regulations;
- description of logistics, scheduling and length of the meeting;
- suggestions for behavioural guidelines;
- answers to questions posed by the parties; and
- a joint expression of commitment to proceed by the parties.

6.5 Statement by the Parties

Parties in a dispute generally start with opening statements of some form. These statements usually outline their substantive interests, establish how they will proceed and attempt to build some form of rapport with the other side, if possible. Parties will approach substantive issues differently. Some will focus directly on the substance, some will focus on the history; while others will combine the history with the party’s needs or positions. In some cases, the parties will open with a focus on procedures. Though somewhat more unusual, a process focus can allow parties to encounter early success in working together. A discussion of procedures can include some of these issues:

- how to develop an agenda;
- time frames and schedules for sessions, including beginning and ending times;
- how information will be shared;
- how legal rights and administrative mandates will be recognized and protected;
- the parties’ relationships with their lawyers;

¹⁶ The comments on the role of mediators in this chapter are generally also applicable to conciliators.

- relationship possibly to the media;
- acceptable and unacceptable behaviour;
- role of substitutes, if any; and
- maintenance of meeting records.

6.6 Defining Issues & Agenda Setting

Interest-based negotiations, mediations and conciliations are problem-solving processes. The problem-solving occurs in the context of discussing issues and interests that are generally substantive and procedural in nature. To move to settlement, the parties must move from contentious to cooperative interaction. The three critical tasks that mediators must accomplish in the stage of defining the issues and setting the agenda are:

- identify the broad topic areas of concern to the parties;
- agree on the subtopics or issues that will be discussed; and
- determine the sequence for the discussion of the topics or issues.

Though the parties may be able to frame the issues in a productive and problem-solving way, deadlock may still occur. To avoid this, the mediator in this phase will assist by discovering a mutually acceptable definition or framing of the issues that will allow the parties to cooperate. The same deadlock may occur in reaching agreement on the agenda. The mediator may have to suggest a procedure that in his or her judgment will facilitate the resolution of the issues.

6.7 Exchanging Information & Uncovering Interests

The parties' interests are often hard to identify. Difficulties may arise because the parties themselves may not know what their genuine interests are or the parties may attempt to hide their real interests. In some disputes because of the intensity of the conflict, a party's interests may become equated with the party's position. Separation of the interest from the position may become rather difficult.

Where parties have not locked themselves into the process of positional bargaining a mediator can act directly to elicit interests. A mediator may be directive by asking why such a position has been adopted or requesting the party to focus on the general interests or elements that would make a settlement possible. Where the parties have adopted positional stances, then indirect approaches – active listening, restatement, summarizing and framing, are the mediator's tools to determine the parties' real interests and to avoid having them simply reinforce their positions.

6.8 Clarifying the Joint Question (Generating Options)

The objective of describing a joint question is to include the interests of both parties in one comprehensive task. The joint question including all the interests often enables the

parties to commit to work on a common problem because they believe that their needs will be respected, if not met, by the solutions that will be developed. Once the parties have reached an agreement on the joint question, the parties can proceed to explore the issues and interests in more detail

6.9 Generating and Assessing Options

The task at this stage of the mediation is to develop mutually acceptable settlement solutions. To develop options, the parties must be made aware of the need for a range of alternatives from which the parties may choose. The parties must be flexible enough to disengage from unacceptable proposals. A standard way for a mediator to develop mutually acceptable settlement solutions is to generate several options so that the parties can move from an us-them view of solutions to a group view.

A mediator can adopt a variety of approaches to generate options including: open discussion, brainstorming, a past successful approach or a hypothetical approach. Mediators and parties should avoid mixing the generation of options from assessing options. The mediator and the parties can establish the standards that will be used to evaluate the various options. These criteria should be ones that are seen to be fair, that are based on historical precedent or tradition, or that may commonly be used to establish value.

The central task of the parties at this stage is to assess how well their interests will be satisfied by any one option or any combination of the options that have been generated collaboratively or offered by one party. For the mediator, the role is to assist in the evaluation of the options and to assist the parties in determining the costs and the benefits of acceptance or rejection.

6.10 Bargaining

Final bargaining involves activities initiated late in negotiations to reduce the scope and number of differences between the parties and to progress toward agreement and termination of the conflict. Mediators will use a variety of techniques to reach agreement. These include:

- incremental convergence where the parties make gradual concessions within the zone of possible agreement or bargaining range until they arrive at a satisfactory compromise position;
- a delay of agreement and then a final leap to a package settlement where the package is often designed to include the needs of all the parties;
- development of a consensual formula where the process is to move from the most general level of agreement to the more specific details of a settlement; and

- procedural means to reach agreement where there is an inability to conclude an agreement on a substantive issue. Instead the parties determine to resolve the dispute without directly deciding the issue. The process solution in the dispute resolves the substantive impasse. Such procedural means include: procedural time lines; the use of third-party decision-makers; mechanical decision making procedures and finally postponement or abandoning an issue.

6.11 Formal Settlement

The final stage of the mediation requires the parties to formalize the agreement. The mediator may need in this final phase to assist parties in carefully devising reasonable, efficient and effective implementation procedures. To avoid non-compliance, mediators will encourage the parties to strictly define the criteria and the steps to be used in implementing their agreement.

Implementation steps should have the following characteristics: they are,

- cost-effective;
- simple enough to be easily understood yet detailed enough to prevent loopholes that create later procedural disputes;
- realistic with respect to the demands or expectations on the parties; and
- able to withstand public scrutiny.

6.12 Med-Arb

Med-Arb

In this process the parties agree to combine the role of the mediator and the arbitrator. In most cases the parties agree to allow the third party neutral to first mediate the dispute. Where agreement cannot be reached the third party neutral is armed with the authority to settle unresolved issues by arbitration.

The DR Regulations do not recognize this combined ADR mechanism. It is nevertheless, worth considering, if only to be aware that it may be suggested as an approach. In some contexts and in some geographical settings, especially in Asia, med-arb is viewed with favour. Med-Arb is less encouraged in North America.

With consent of the parties, a mediator in a dispute may convert from mediator into that of an arbitrator. Such a transformation, it is argued, can facilitate swift resolution of the dispute. The conversion to an arbitrator would at this point provide the arbitrator with much greater knowledge of the case. Such a role change is generally called upon where parties have resolved some or nearly all of the issues in dispute. The outstanding issues seem to be resisting agreement between the parties and the parties agree to enable the third party neutral to become the adjudicator and to decide the final matters in dispute between the parties.

Although the change of role from a mediator to an arbitrator is encouraged by some, there are issues that suggest that such a transformation is not to be encouraged. The primary difficulty with this role alteration is that moving from facilitator to adjudicator requires procedural changes that cannot be achieved easily. An arbitrator will render a decision based on evidence and argument presented by the parties. But the arbitrator in this case has learned much from the parties already. In addition the mediator turned arbitrator has acquired, likely in caucus, confidential information from one party that is not to be conveyed to the other. That knowledge should not be relevant to the arbitration proceeding. How the arbitrator excludes information learned as a mediator is difficult to understand. As a last point, note that a conciliator is barred from acting as an arbitrator in a subsequent proceeding (Second Schedule, Part 2, Paragraph 24).

7. Arbitration

As with the facilitation process, a key goal of the adjudication process is to resolve disputes without recourse to the Courts. Unlike the facilitation process, however, the focus of decision-making is not primarily on the parties but on a third party, who renders a decision, usually binding on the parties, after hearing evidence and arguments from them.

Adjudication

The making of a decision by a person other than the parties to the dispute. The adjudicator's authority may be granted by the parties themselves as in an arbitration or it may come through a statute as with the NTRCs constituted as a Tribunal through the DR Regulations relying on the telecommunications statute. A third party neutral hears the parties' evidence and arguments and renders a decision that is binding on the parties. The third party neutral uses objective standards and is concerned primarily with rights of the parties.

Two forms of adjudication included in the DR Regulations are: Arbitration and Tribunal Hearings. This section of the Manual deals with arbitration; the following sections deal with Tribunal Hearings.

7.1 Telecommunications Industry Arbitrations

Arbitration

In the context of the DR Regulations, arbitration is an alternative dispute resolution process in which an arbitrator, or panel of arbitrators, renders a binding decision on a dispute between the parties after reviewing the arguments presented by all parties.(DR Regulations, Part I, Regulation 2(1))

Arbitration is an adjudicative process which operates outside the traditional court system. Arbitration may be mandated by statute or private contract, or may be consensual between parties.

Part IV of the DR Regulations and the Second Schedule, Part 4 set out the procedures for arbitration. The parties by agreement or by direction from the Commission may submit their dispute to arbitration.

Arbitration has been used as a method to resolve many types of disputes in the telecommunications industry. A good example of telecommunications arbitration can be found in the American Arbitration Association's Wireless Industry Arbitration Rules. These rules provide examples of the different types of procedures that can be used in telecommunications arbitrations.

Box 5 – The AAA's Wireless Industry Arbitration Rules

The American Arbitration Association (AAA) has developed an arbitration program in conjunction with the U.S. Cellular Telecommunications and Internet Association (CTIA) for the wireless industry and its customers. AAA includes, as members of its Telecommunications Panel, individuals that are competent to hear and adjudicate disputes administered under the Wireless Industry Arbitration Rules. These individuals are neutral parties, and many have direct experience in the telecommunications industry.

The rules contain three tracks: Regular Track Procedures; Fast Track Procedures for cases involving claims of less than US \$2,000; and Large/Complex Case Track Procedures for cases involving claims of at least US \$500,000.

Regular Track: The Regular Track Procedures apply to cases involving claims between US \$2,000 and US \$500,000. They also apply in Fast Track and Large/Complex cases where they do not conflict with any portion of the Fast Track Procedures or the Large/Complex Case Procedures. Features of the Regular Track Procedures include:

- Optional pre-arbitration mediation and/or early neutral evaluation;
- Express arbitrator authority to control the discovery process;
- Broad arbitrator authority to control the hearing; and
- Written breakdowns of the award and, if requested in a timely manner by all parties or at the discretion of the arbitrator, a written explanation of the award.

Fast Track: The Fast Track Procedures apply to cases involving claims of less than US \$2,000. Features of these procedures include:

- A 45-day “time standard” for case completion;
- An expedited arbitrator appointment process, with a single arbitrator appointed directly by the AAA from the Telecommunications Panel; and
- A presumption that cases involving less than US \$2,000 will be heard based on documents only, with an option of an oral hearing for an additional fee.

Large/Complex Case Track: Large/Complex Case Procedures, which supplement Regular Track Procedures, are for use in cases involving claims of at least US \$500,000. Key features of the Large/Complex Case Track Procedures include:

- Mandatory pre-arbitration mediation and/or early neutral evaluation;
- A presumption of multiple arbitrators;
- A mandatory preliminary hearing with the arbitrators, which may be conducted by telephone;
- Broad arbitrator authority to order discovery, including depositions; and
- A presumption that there will be multiple hearing days scheduled consecutively or in blocks of hearing days.¹⁷

7.2 The Arbitrator’s Role

Under the DR Regulations, an arbitrator or a panel of arbitrators may be appointed to hear argument and evidence from the parties and render a decision. The DR Regulations provide that where there is no determination of the number of arbitrators, then the number will be three (3). For purposes of a decision, a majority of a panel will determine

¹⁷ Wireless Industry Arbitration Rules, American Arbitration Association, effective July 1, 2003. A summary of the Wireless Industry Arbitration Rules can be found at: <<http://www.adr.org>>.

the outcome. Parties should be cognizant that failure to agree on an arbitrator can result in the appointment of a panel of arbitrators. Such a default will necessarily add significant costs to the arbitration.

Whether there is one arbitrator or a panel of arbitrators the decision reached is to be in writing and signed. In addition to providing the written decision to the parties, a copy will be delivered to the Commission. In turn the Commission will record the details of the award in the Dispute Resolution Order Register (Second Schedule, Part IV, Regulation 39).

In many respects the arbitrator acts like a judge. But the expertise of the arbitrator can go well beyond the judge's knowledge of procedure and possess important industry knowledge. An arbitrator or arbitrators must be impartial and independent. A prospective appointment must disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence (Second Schedule, Part IV, Paragraph 15)

Normally an arbitrator will take careful notes of all the evidence given by the parties and their witnesses throughout the hearing. The arbitrator can then compare what the witness has said at one part of his evidence with what he says at another part of the evidence. The arbitrator can also compare what the witness says to what he said at another occasion, e.g., in an affidavit. The arbitrator may compare the testimony to what other witnesses say. His or her notes are valuable when the arbitrator comes to make findings of fact. Finally, the notes are valuable when it comes to recording what the advocate's final submissions were.

7.3 The Course of the Arbitration

Subject to the Second Schedule, Part IV, the arbitrator or the arbitration panel may conduct the arbitration in manner he or they consider appropriate. But an arbitrator or an arbitration panel has a duty to act in accordance with the rules of natural justice. (For a more complete discussion of 'natural justice' see Section 8.1 below.).

An arbitrator must act fairly to both parties. An arbitrator is required to treat the parties with equality, and at every stage of the proceeding each party must be given a full opportunity to present their case (DR Regulations, Second Schedule, Part IV, Paragraph 26). The arbitrator may deviate from the strict rules of the court as long as the arbitrator follows the principles of natural justice. For example, the arbitrator must normally not hear one party, or his witness, unless the other party is present or represented. Furthermore, where one party attempts to communicate with the arbitrator without knowledge of the other party, the arbitrator should refuse to hear, read or be influenced by such communications. The prudent course for the arbitrator is to provide the other party copies of any written communications and to inform the other party of any oral communications.

In some cases, arbitrators will conduct an arbitration in a manner similar to the procedures followed in a court hearing, albeit usually less formally. The following are typical procedures at a hearing:

- the claimant (or his advocate) opens the party's case, and if the respondent has a counterclaim he or she will open the claimant's defence to such a counterclaim;
- the claimant calls and examines his witnesses, who may be cross-examined by the respondent;
- if a witness is cross-examined, the claimant may re-examine that witness but only on any matter raised in the cross-examination;
- the respondent (or his advocate) opens the respondent's case including the counterclaim, if any;
- the respondent calls and examines his or her witnesses, who may be cross-examined by the claimant;
- if a witness is cross-examined, the respondent may re-examine on any matter raised in the cross-examination;
- the respondent makes final submissions to the arbitrator; and
- the claimant makes final submissions to the arbitrator.

Generally an arbitrator will hold a preliminary meeting with the parties before holding the actual hearing. A preliminary meeting can be very useful. In some instances the parties may request particulars of the claim or counterclaim. Parties may request discovery and inspection of documents or of property. Parties may raise issues concerning confidentiality or the media.

The arbitrator may direct the parties to adopt procedures that may shorten the hearing and generally deal with procedures such as the time and place of the hearing, etc. The arbitrator may determine the amount of time available to the parties for the various stages of the arbitration. Finally, at a preliminary meeting the parties are likely to agree on the rate, terms and conditions relating to the arbitrator or the panel's remuneration (Second Schedule, Part 4, Paragraph 67). As set out in the Second Schedule, Part 4, Paragraph 27 the arbitration may include a hearing with the presentation of evidence by witnesses including experts, oral argument or a hearing may be conducted on the basis of documents and other materials alone.

Where a hearing is requested, or ordered, the hearing will generally follow the sequence noted above. In openings the claimant may take the position that the arbitrator knows

nothing about the matter. Where the list of issues has been agreed upon at the preliminary meeting and documents and witnesses statements have been prepared and delivered to the other side and the arbitrator, the opening can be quite short.

The object of the evidence in chief, to the degree it is permitted, is to obtain the witness's unprompted statement of what he or she knows about the issues to which the evidence is directed. Some prompting will generally occur but the more counsel uses leading questions, the less weight an arbitrator or an arbitration panel is likely to give to that evidence.

Cross-examination has the following purposes:

- to put before the witness the facts of the cross-examining party's case insofar as they conflict with the evidence given by the witness;
- to elicit from the witness facts favourable to the cross-examining party's case; and
- where the evidence that the witness has given in chief is disputed, to elicit facts relevant to the credibility of the witness so as to show that he or she should not be believed.

Re-examination is designed to allow counsel to "rehabilitate" its witness after cross-examination. Counsel has the opportunity to ask questions of clarification or of qualification regarding matters raised in cross-examination. Re-examination is strictly limited to addressing matters raised during cross-examination.

As set out in the Second Schedule, Part 4, Paragraph 36, each party has the burden of proving the facts the party relies on with respect to the claim, response or counterclaim.

As noted above, the arbitrator or the panel must provide an award in writing and that award is binding on the parties. Unless the parties agree otherwise, the arbitrator in the award will state the reasons upon which the award is based (Second Schedule, Part 4, Paragraph 51). Note that the arbitrator shall apply the law designated by the parties as applicable to the substance of the dispute and shall decide in accordance with the terms of the contract taking into account as well the usage of the trade applicable to the transaction (Second Schedule, Part 4, Paragraphs 55 and 56). The award is only made public with the consent of the parties (Second Schedule, Part 4, Paragraph 53).

Within thirty days after receipt of the award, either party with notice to the other side may request the arbitrator, or panel, to give an interpretation of the award (Second Schedule, Part 4, Paragraph 60). This interpretation then becomes part of the award. Where an additional award is justified, following the request of a party, and the arbitrator believes the omission can be rectified without a further hearing, the arbitrator may do so (Second Schedule, Part 4, Paragraph 65).

The parties may, within six weeks of the receipt of an award, appeal the arbitration decision to the High Court (DR Regulations, Part VI, Regulation 45(2)).

8. Tribunal Hearings: Guiding Principles

The Telecommunications Acts of the ECTEL member states provide that the NTRCs may act as tribunals to resolve telecommunications disputes. The DR Regulations provide a general framework for the resolution of disputes through tribunal hearings. Before considering how the NTRCs should operate as dispute-resolving tribunals, however, it is important to review several guiding principles for the operation of administrative tribunals in Commonwealth countries and other jurisdictions with a common-law tradition. Prime among these principles are those related to procedural fairness and transparency.

8.1 Procedural Fairness

In general, tribunals are not subject to the same strict rules of procedure and of evidence that govern hearings before a law court. With respect to tribunals constituted under the DR Regulations, Second Schedule, Part 3, Paragraph 12(1) provides,

The tribunal shall, so far as it appears to be appropriate, seek to avoid formality in its proceedings and shall not be bound by any law relating to the admissibility of evidence in proceedings before any court of law...[the tribunal] shall...conduct the hearing in such manner, as it considers most appropriate for the clarification of the issues before it and generally to the just determination of the proceedings.

As Paragraph 12(1) indicates, a tribunal must seek to ensure that its proceedings, though not overly formal, are conducive to yielding a just result. The guiding principle for the tribunal in making decisions about how it will proceed to determine a matter must always be respect for each party's right to procedural fairness.

Procedural fairness or 'natural justice' is widely regarded as being the foundation of a legally-sound tribunal process.¹⁸ The rules of procedural fairness generally relate to two core principles: the right to a fair hearing and the right to an unbiased decision-maker. Although the specific content of these rights varies in different jurisdictions, there are common trends and shared understandings about what these principles imply.

¹⁸ There is some debate about whether "natural justice" and "procedural fairness" mean the same thing. This debate is largely waged among academics. For practical purposes, Commissioners and NTRC staff may proceed on the understanding that natural justice and procedural fairness impose the same requirements.

Box 6 – Natural Justice

Natural justice (often referred to as “procedural fairness”) requires decision makers to adopt fair procedures. What is “fair” depends on the circumstances of each case, including the interests at stake. Decision makers must therefore adapt procedures in each case, having regard to what is appropriate under the circumstances, in order to ensure that each proceeding is procedurally fair.

There are two main aspects of natural justice:

- The right to be heard: a person should have the opportunity to be heard before a decision maker makes a decision that could adversely impact him or her in an individual way; and
- The rule against bias: decision-makers should make decisions free from bias and prejudice.

Source: Administrative Review Council (Australia), “Legal Training for Primary Decision Makers: A Curriculum Guide” (June 2004), available online at:
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/6CE5CDED992BB3D6CA256EB0018B18F/\\$FILE/Legal+Training+ARC.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/6CE5CDED992BB3D6CA256EB0018B18F/$FILE/Legal+Training+ARC.pdf).

The right to be heard requires that all interested parties in a particular matter be given the opportunity to comment or otherwise make their case before a decision that directly affects such persons is made. The right to be heard generally includes:

- the right to notice about the impending hearing of the matter;
- the right of a party to know the case against it;
- the right to be advised of the process to be used in the hearing;
- the right to disclosure, *i.e.*, the right to know all relevant information about the case; and
- the right to make representations before the decision-maker.

The scope of the rights associated with the right to be heard varies, depending on the nature of the interests at stake. The greater the interest, the more extensive procedural rights must be afforded to a person in order to ensure that his or her interests are adequately protected. Box 7 describes the scope of rights that may be engaged, depending on the nature of the interests involved in a particular matter. An example of an interest that would trigger a robust set of procedures is the potential loss or suspension of a service provider’s licence. By contrast, an individual who is only marginally affected

by a dispute concerning cell phone sites may be entitled to only lesser procedural rights in tribunal hearing related to the dispute. Box 7 provides some differences that *could* be made in according procedural rights to different types of parties. These procedural rights tend to vary from tribunal to tribunal.

Box 7 – Examples of possibly different procedural rights		
Scope of Right:	Incidental Interest	Significant Interest
Type of Notice:	General notice in local newspaper	Specific notice delivered to party
Right to know the case against a party	General details provided in local newspaper or on the website of the NTRC	Specific details, often contained in the notice delivered to the party
Right to know what process will be used in the hearing	General details provided in local newspaper or on the website of the NTRC	Specific instructions and details provided to the party
Disclosure	General details provided in local newspaper or on the website of the NTRC	Specific information provided to the party, in written form or through pre-hearing procedures.
Make representations	Submit written comments	Right to make oral pleadings; call evidence, including witnesses; cross-examination of other parties' witnesses; make opening and closing statements.

The DR Regulations provide guidance concerning the types of procedures that a tribunal may employ in the course of a hearing. These procedures and their relationship to each disputant’s right to be heard are described below in the discussion of the typical steps in a tribunal hearing. In addition, Box 8 cross-references the components of the right to be heard with relevant sections of the DR Regulations that govern tribunal hearings.

Box 8 – The Right to be heard under the DR Regulations	
Right	DR Regulations
Notice	Para. 5(1) Para. 6(2) Para. 7(6) Para. 8(2) Para. 9(2) Para. 10 (3)
Know the case against the party	Para. 7(1), 7(3) and 7(5)
Advised of the process to be used in the hearing	Para. 7(1)
Disclosure	Para.10(1) Para. 7(1), 7(3), and 7(5)
Make representations	Para. 12(1) and 12(2)
<i>All paragraph references are taken from Part 3 of the Second Schedule of the DR Regulations.</i>	

The right to be heard serves pragmatic purposes in addition to legal ones. Allowing interested parties to participate in the decision-making process increases the likelihood that parties will feel that they have been treated fairly. This makes them more likely to accept the end result of the process, even if the decision is not favourable to them. Another benefit associated with providing interested parties with the right to be heard is ensuring that the NTRC has access to the full range of perspectives on a particular matter before making a decision. By enhancing access to these perspectives, the right to be heard places the NTRC in a better position to make well-informed decisions.

The second core principle associated with procedural fairness is the right to an unbiased decision-maker. This right is based on the Latin maxim *nemo iudex in sua causa debet esse*, or “do not be a judge in your own cause”. Decisions made by the tribunal must be based solely on the evidence and the submissions made by the parties. The personal opinions of tribunal members and any personal interests (financial or otherwise) of a tribunal member must not be permitted to influence the outcome of a tribunal hearing.

The right to an unbiased decision-maker requires not only that tribunal members be unbiased in fact, but also that there is no reasonable apprehension of bias. The proper test for determining the existence of a reasonable apprehension of bias is whether a reasonable person who is knowledgeable of all the facts would perceive a real likelihood of bias. Thus, the requirement is that “justice must not only be done, it must be seen to be done”. Accordingly, tribunal members should always avoid the appearance of bias and impropriety.

Box 9 – The rule against bias

No bias in fact or in appearance:

“First, the tribunal must be subjectively free from personal prejudice or bias. Second, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect”.

Source: R. v. Chief Constable of Merseyside Police, ex parte Bennion [2000] IRLR 821, as cited in Council on Tribunals (UK), *Guide to Drafting Tribunal Rules* (November 2003) at 181, available online: <http://www.council-on-tribunals.gov.uk/publications/guidance.htm>.

Test for the appearance of bias: Would a reasonable person who is knowledgeable of all the facts perceive a real likelihood of bias?

What gives rise to actual or perceived bias? Per the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2)* [1999] 2 WLR 272, there are two strands to the rule that a person may not be a judge in his or her own cause:

- ◆ first, an automatic disqualification of any tribunal member who has a financial, proprietary, or other non-pecuniary interest in the outcome of a case.
- ◆ second, the possible disqualification of any tribunal member whose conduct or behaviour may give rise to a suspicion that he or she is not impartial. The test in this case is whether there is a “real danger” of bias.

Perceptions of regulatory bias may arise from a variety of different factors. Examples of potential sources of the appearance of bias include:

- a direct, personal interest in a matter held by a tribunal member;
- a financial interest in a matter held by a relative of a tribunal member;
- one of the parties involved in the hearing is a close friend, relative, or enemy of a tribunal member;
- a management or employment position once held by a tribunal member in a telecommunications service provider that is before the tribunal;
- the involvement of a tribunal member in the dispute prior to the initiation of tribunal proceedings such that the member has formed a preliminary judgment on the issues; and
- public comments that a tribunal member makes either before or during the hearing that appears to favour the position of one party.

Tribunal members must be able to listen to the evidence and submissions in a case openly and fairly and must also appear to be capable of so doing. Tribunal members should note that merely holding an opinion, even a strong one, about an issue in general does not necessarily disqualify a person from participating in a hearing due to bias. However, making subjective or conclusory comments about the specific facts of a case, particularly before all the evidence and submissions have been heard, may give rise to an apprehension of bias.

In *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2)*¹⁹, the English House of Lords provided guidance on the application of the rule against bias. In that case, the House of Lords identified two strands to the principle that a man may not be a judge in his own cause. First, a tribunal member who has a financial, proprietary, or other non-pecuniary interest in the outcome of a case ought to be automatically disqualified from hearing that case. Second, any tribunal member whose conduct or behaviour may give rise to a suspicion that he or she is not impartial ought to be disqualified if there is a “real danger” of bias.

In cases where a Commissioner is in a real conflict of interest or where there is a reasonable apprehension of bias, the Commissioner should not be appointed as a member of the tribunal hearing the matter. If the conflict develops or only becomes apparent once a Commissioner has already begun to hear a case as a tribunal member, then details concerning the potential or actual conflict should be disclosed to all parties involved in the case. The parties should be given the opportunity to make submissions concerning whether the Commissioner should be allowed to continue to serve as a member of the

¹⁹ [1999] 2 WLR 272.

tribunal. Ultimately, the tribunal must come to a decision about whether the Commissioner can continue to sit on the tribunal panel. In making this decision, the tribunal should consider whether a conflict actually exists and, if so, the nature of the actual or potential conflict, the interests at stake, how much of the proceeding has already occurred, the availability of other Commissioners to hear the case, and whether the case may be suitable for other forms of dispute resolution, such as arbitration.

In some countries, it may be difficult to convene a tribunal panel without giving rise to a possible apprehension of bias. Some NTRCs may have only three Commissioners. The disqualification of one or more Commissioners would make it impossible to convene a tribunal panel, as tribunals consist of three Commissioners (See Second Schedule, Part 3, Paragraph 2.). Moreover, the telecommunications sector may be sufficiently small that almost everyone knows each other. In such a case, it is highly likely that at least one of persons appearing before the tribunal will know and have prior dealings with at least one of the tribunal members.

In situations where it would be impossible to convene a tribunal panel without giving rise to a possible apprehension of bias, it may be necessary to suspend disqualification rules so that a tribunal panel may be constituted. If the alternative to creating a possible apprehension of bias is the frustration of the purpose of the DR Regulations, then the tribunal panel should be constituted notwithstanding the possible conflict of interest that one or more tribunal members may have in the matter.²⁰ The possible conflict of interest should be disclosed to the parties involved in the dispute and an opportunity should be given to the parties to make submissions on the matter. The NTRC should also carefully consider whether the dispute could be addressed through arbitration rather than a tribunal hearing. Submissions from the parties concerning this possibility should be considered once the conflict of interest has been disclosed to the parties.

The rule against bias promotes the credibility of the tribunal and its decisions by preserving the objectivity of the proceedings. Enhanced credibility fosters a sense of fairness in the proceedings. As noted above, the belief that a party has been treated fairly in a proceeding often makes the party more likely to accept the outcome of the proceeding, even if this outcome is adverse to the party.

Box 10 outlines a number of steps that the NTRC can take to avoid breaking the rule against bias.

²⁰ The Australian Administrative Review Council has taken the position that disqualification rules do not apply in every instance. In its commentary on the Standards of Conduct for Tribunal Members, the Council states, “[i]f bias is established, a tribunal member may be disqualified from hearing or continuing to hear an application. The disqualification rule does not apply if, as a matter of necessity, to prevent a failure of justice (or a frustration of statutory provisions), an otherwise biased tribunal member is the only qualified person available to hear the proceeding.” See Administrative Review Council, *A Guide to Standards of Conduct for Tribunal Members* (Australia, September 2001).

Box 10 – Checklist for avoiding actual and perceived bias in the tribunal process

- Adopt procedures for the appointment of tribunal members that are fair and independent of any party with an interest in the outcome of a matter;
- Adopt procedures that ensure that conflicts of interest are identified and avoided in a timely way;
- Make tribunal hearings open to the public, except where circumstances warrant the private hearing of a matter (e.g., where confidentiality of evidence is an issue);
- Communicate the identity of the tribunal members to the parties at the outset of a proceeding;
- Avoid overly aggressive examinations of participants, particularly those who are unrepresented by legal counsel;
- Avoid meeting with or speaking to one party in the absence of the other parties involved in a hearing. Do not hold private interviews with witnesses. Even seemingly innocuous conversations could be perceived as an exchange of information concerning the hearing, thereby giving rise to an apprehension of bias; and
- Do not accept gifts or favours of any kind or value where their acceptance could reasonably be perceived to compromise the impartiality of a member of a tribunal or the tribunal panel as a whole.

8.2 Transparency

Regulatory processes, including tribunal hearings, should be as transparent as possible. Transparency is a key regulatory principle. Transparency increases the credibility of the regulator and builds confidence in the regulator's decisions. Such confidence is critical in the dispute resolution process. Transparency also reduces the risk of corruption and helps to ensure that justice is not only done, but is seen to be done in the eyes of the public.

NTRCs can foster transparency in the tribunal hearing process in a number of ways. NTRCs can:

- ensure most aspects of tribunal hearings are public;
- place statements of complaint, responses, and evidence filed in a hearing on the public record except where claims of confidentiality are raised;
- ensure that tribunal decisions are published in a timely fashion; and
- maintain a public record of past decisions and orders.

The DR Regulations contain a number of provisions that help to foster transparency in the dispute resolution process. Regulation 19(2) aims to foster transparency in the process by requiring that the details of an ADR process used in the resolution of a dispute are included in the final report made available to the public, subject to certain stated exceptions (e.g., confidentiality of information).

The DR Regulations also require the NTRC to maintain a Dispute Resolution Order Registry that is accessible to the public. (See Regulations 28 and 30.) Finally, pursuant to Regulation 31(2), the NTRC is required to place documents filed with the NTRC during a proceeding on the public record unless the party filing the document asserts a claim of confidentiality.

9. Typical Steps in a Tribunal Hearing

The process and procedures governing tribunal hearings are set out in the Second Schedule, Part 3 of the DR Regulations. All paragraph references in this chapter of this Manual refer to paragraphs in the Second Schedule, Part 3.

9.1 Commencement of Proceedings

Pursuant to Paragraph 3, a matter is instituted by an Applicant presenting a statement of complaint (the “Complaint”) to the Chairman of the Commission.²¹ The Complaint summarizes the position and the claim of the moving party, *i.e.*, the Applicant. The Complaint must be in the prescribed form and must include:²²

- the name and address of the applicant and, if different, an address within the Member State to which he requires notices and documents relating to the proceedings to be sent;
- the names and addresses of the person or persons against whom relief is sought; and
- the relief and the grounds with particulars thereof, on which such relief is sought.

NTRCs may wish to provide directions to stakeholders about acceptable means of presenting complaints to the Chairman of the Commission. Directions about how to present complaints to the Chairman should be readily accessible by members of the

²¹ Note that the provisions governing the initiation of proceedings in Part 3 of the Second Schedule are not consistent with the provisions of the actual regulations. Whereas Part 3 contemplates that an applicant may file a statement of complaint with the NTRC, Regulation 6 contemplates that a party will file an application for assistance with the resolution of the dispute. Paragraph 1 of Part 3 provides that, upon receiving a complaint, the NTRC must determine whether a tribunal is the appropriate mechanism to resolve a dispute and, if so, to establish itself as a tribunal. By contrast, Regulation 12 provides that, upon receiving an application for assistance, the NTRC must take one of a list of possible actions, including operating as a tribunal. Regulation 33(4) stipulates that “subject to sub-regulation (2) herein, where the Commission operates as a tribunal, the provisions of Part 3 shall apply.” This regulation appears to suggest that, subject to Regulation 33(2), the provisions of Part 3 govern tribunal hearings, implying that to the extent that there are inconsistencies between Part 3 and the regulations, the provisions of Part 3 are to be considered binding. However, the provisions of Part 3 appear to provide parties with a means of circumventing the requirement of filing an application for assistance pursuant to Regulation 6 by filing a statement of complaint. It is not clear whether this is the intended effect of the aforementioned provisions. Commissioners should exercise discretion when receiving a statement of complaint from a complainant and, where appropriate, direct the complainant to file an application for assistance in accordance with the main body of regulations.

²² Note that the DR Regulations do not contain a standard form for complaints.

public and industry stakeholders. It would be practical, for example, to include a copy of the directions together with the form for filing a complaint. Alternatively, directions could be posted on the NTRC's website.

9.1.1 The Complaint

The Complaint must contain the specific information required by Paragraph 3. The relief sought by the applicant and the grounds on which such relief is sought is a key element in the Complaint, as this information represents the position of the applicant concerning the dispute with the respondent. The statement of the relief sought and the grounds supporting such relief establish the framework for the tribunal hearing.

9.1.2 Assessing the Complaint

Once the Complaint has been received by the Commission, the Commission must determine whether a tribunal process is the appropriate mechanism for resolving the dispute. The Commission must establish itself as a tribunal if it determines that a tribunal process is the appropriate mechanism for addressing the matter. However, if the Commission makes a negative determination in this regard, then it must determine what the appropriate method of dealing with the matter is. (See Paragraph 1.)

There is no set class of disputes that are clearly appropriate or clearly inappropriate for referral to the tribunal. In each case, the NTRC must weigh a number of factors in its determinations. Factors that suggest that a matter should be heard by a tribunal include:

- the dispute involves key issues of credibility and questions of fact;
- the dispute engages important policy issues;
- the parties to the dispute have already unsuccessfully attempted to mediate or to conciliate the matter;
- there are allegations of particularly egregious conduct by one of the parties; and
- there is a significant power imbalance between the parties to the dispute such that mediation or conciliation is unlikely to yield a balanced and just result.

Factors that suggest that a tribunal would not be an appropriate mechanism to address a matter include:

- the dispute involves a relatively insignificant amount of money or a trivial matter;
- the parties have not yet attempted mediation or conciliation (See Regulation 13(3).), which states that “the Commission shall in resolving any dispute endeavour to first use mediation where it is appropriate, and if within the period referred to in sub-regulation (1) the dispute is not resolved by means of the

alternative dispute resolution process, the Commission may subject to section [] of the Act operate as a tribunal in order to resolve the dispute”);

- the facts suggest that the dispute engages matters that a tribunal is not empowered to adjudicate;
- the matter has previously been adjudicated by an arbitration panel;
- a tribunal has already heard a matter involving the same parties and the same set of facts;
- the Applicant seeks a relief that a tribunal is not empowered to give;²³
- the parties have an established relationship with one another and have successfully negotiated solutions with each other in the past; and
- there is unlikely to be major differences between the parties concerning the facts that gave rise to the dispute between them.

As a general rule, where the NTRC determines that a tribunal hearing is not the appropriate mechanism to address a dispute, the NTRC should provide the Applicant with written notice to this effect. The notice should include a brief statement of the reason(s) why the NTRC does not consider a tribunal to be an appropriate body to hear the dispute. For example, the NTRC may state that, “having regard to the prior relationship between the parties and to the nature of the dispute, and considering that the parties have not yet attempted mediation or conciliation, the Commission determines that a tribunal hearing is not the appropriate mechanism to resolve this dispute. The Commission further determines that mediation or conciliation is an appropriate mechanism for addressing this dispute, and the Applicant is directed to pursue mediation or conciliation.”

Paragraph 4 provides the NTRC with the discretion to provide notice to an Applicant in cases where the Applicant seeks a relief which the tribunal is not empowered to adjudicate.²⁴ Although the NTRC is not bound to provide such notice, it is good practice to do so as providing such notice responds to the right to be heard and cultivates transparency in the process.

²³ Paragraph 4 provides that in such a case, the Commission may give notice to this effect to the Applicant, stating the reasons for its opinion and informing the Applicant that the Complaint will not be heard.

²⁴ Paragraph 4 states,

Where the Commission is of the opinion that the complaint does not seek or on the facts stated cannot entitle the applicant to a relief which a tribunal has power to adjudicate on, it may give notice to that effect to the applicant stating the reason for its opinion and informing him that the complaint will not be heard.

9.1.3 Establishing the NTRC as a Tribunal

Once the NTRC determines that it is appropriate for a tribunal to adjudicate a dispute, the NTRC must establish itself as a tribunal. (See Paragraph 1(a).) Subject to the provisions of the *Telecommunications Act*, the tribunal consists of three members of the Commission, one of whom must be the Chairman of the Commission. In determining which members will serve on a tribunal panel, it is prudent to consider carefully whether there are any actual or potential conflicts of interest in order to avoid issues related to bias.

Wherever possible, at least one member of a tribunal panel should be a lawyer or have an understanding of administrative law and issues related to the process and procedures for tribunal hearings. If no such member is available, the tribunal should attempt to retain a consultant to advise the tribunal about the administrative law aspects of managing the tribunal process. Alternatively, a Commission staff member with related expertise could be assigned to assist the tribunal with the proceedings. The consultant or staff member must not participate in the actual decision-making process. Rather, the role of the consultant or staff member should be limited to providing the tribunal with advice about procedural matters.

Once the Commission determines who will serve as a member of particular tribunal, the members of the tribunal should be identified to the parties to the proceeding.

9.1.4 Serving the Complaint on the Respondent

Pursuant to Paragraph 5(1), within fourteen days of determining that it is appropriate for a tribunal to adjudicate a dispute, the NTRC must send a copy of the Complaint to the Respondent. The NTRC must also send the Respondent a notice in writing advising the Respondent that a tribunal has been established to hear the Complaint and that the Respondent has the right to receive a copy of the decision to establish a tribunal in the matter. The notice should also advise the Respondent about the means and time for entering an appearance in the proceeding to hear the matter, as well as the consequences for failing to do so.

Paragraph 5(1) further requires the NTRC to give every party notice in writing of the complaint number and of the address where notices and other communications to the tribunal must be sent. This notice must be provided within fourteen days of the determination that a tribunal is an appropriate mechanism to address the dispute. The complaint number assigned to the matter serves as the title of the proceedings.

Box 11 provides practice tips concerning the service of notices to parties. Please Note: the notice procedures described in this box are recommended as “good practice” in complex matters involving significant interests of parties. Strict compliance with all of these notice procedures may not be required or be practical in case of smaller disputes or where the parties agree to alternative procedures.

Box 11 – Notice

Providing “effective notice”

Providing a party with “notice” means more than just providing administrative details about a complaint and when a particular matter will be heard. Giving parties effective notice is a key component of the right to be heard. It includes:

- providing notice on a timely basis
- providing parties with administrative details about the hearing (e.g., identification of parties and when and where certain matters will be heard);
- ensuring that parties know the case against them;
- ensuring that parties understand the process that will be followed in the proceeding; and
- providing the parties with the right to disclosure.

Providing parties with effective notice thus requires more than ensuring that the correct forms are served on the parties at various points in the process. Effective notice requires that the tribunal proceeding is managed in a way that ensures that adequate information flows to the parties at key points during the proceeding.

It is helpful to think of “effective notice” as a cumulative process. Effective notice will be provided if, throughout the tribunal proceedings, the individual requiring notice receives sufficient information concerning the proceeding to be able to prepare and to present his case.

The form of notice

- Notice does involve providing parties with formal notification of certain dates and key information.
- The DR Regulations include a number of forms of notice, including: Notice of Hearing (Form 6); Notice of Application for an Extension of Time (Form 7); Notice of Pre-Hearing (Form 8); Notice of Determination (Form 9); Witness Summons (Form 10); Order (Form 11); and Dispute Resolution Order (Form 5). The NTRC should take care to use the proper form of notice where required.
- Notices should be personally addressed when the participants are known.
- In cases where notice must be given to a very large or uncertain number of individuals, the notice may take the form of “to whom it may concern” notices in newspapers.

The timing of notice

- In some cases, Part 3 specifies how far in advance parties must receive notice of a particular matter. For example, Paragraph 8(2) stipulates that the notice of hearing must be sent to all parties not less than fourteen days before the date fixed for the hearing.
- In cases where Part 3 does not specify how far in advance notice must be given, the general rule is that notice should be provided sufficiently in advance of a proceeding to permit the parties to prepare their own cases adequately. The length of time required to prepare a case depends on the complexity of the matter and the event for which notice is being given.

Failures in disclosure

- The right to be heard includes the right to disclosure, which is the right to notice of all relevant information about the case.
- Occasionally, there may be failures in disclosure where a party is taken by surprise at a hearing by the introduction of unexpected evidence. In such a case, an adjournment may be granted in order to permit the party time to receive information about this evidence and to prepare to meet it. The length of adjournment depends on the complexity and importance of the evidence in question.
- In some cases, it may be impossible to provide proper notice due to urgent circumstances. In such a case, the hearing may proceed on the basis of short or no notice provided however that the party disadvantaged by the failure in disclosure has a subsequent opportunity to protect its interests adequately.

Service of notice

- In general, the tribunal should seek to provide notice either personally or by registered mail.
- The parties to a proceeding have the obligation to keep their addresses and contact information current with the tribunal, and the tribunal is entitled to rely on the information on file for serving notice.
- Some form of proof of the sending of notices should always be placed on the tribunal's file. An affidavit or a statement of compliance will serve as adequate proof in most cases.
- If notice was given personally, the person who served the notice should provide an affidavit or a statement to this effect and should also include a copy of the notice that was provided.

- If notice was served by mail, the person responsible should provide an affidavit or a statement certifying the names and addresses to which notice was sent, the type of mail used (registered, regular, or other), and the date on which the notice was mailed. A copy of the notice sent should also be included in the file.
- If notice was provided in some other way (e.g., through a newspaper), the person who gave the notice should file an affidavit or a statement certifying how notice was given, (if known) to whom the notice was given, and the date on which notice was given. A copy of the notice should be attached to the affidavit or statement.

Management of notice

- Prior to the hearing, the tribunal's file should be reviewed to verify that all notices required to be provided have in fact been served. The notices should also be reviewed to ensure that they were in proper form and that they were served properly.
- At the opening of a hearing, the tribunal should ask if there are any concerns respecting the adequacy of notice. Any such concerns should be addressed as soon as practicable so that any deficiencies in notice can be corrected before a serious problem that may require the rehearing of a matter develops.

Source: These tips are based in part on: Robert W. Macaulay & James L.H. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002).

9.1.5 Entering the Complaint into the Register

Pursuant to Paragraph 5(2), the NTRC must cause certain details of the Complaint to be entered in a Register either within twenty-eight days of receiving it, or, if that is not practicable, as soon as reasonably practicable thereafter. The details required to be included in the Register are: the complaint number; the date that the application was received by the Commission; the name and address of the Applicant; the name and address of the Respondent; and the type of claim brought in general terms without reference to its particulars.

9.2 The Respondent's Reply

9.2.1 Filing a Notice of Appearance

Pursuant to Paragraph 6(1), once the Respondent has received a copy of the Complaint, the Respondent has ten days to enter an appearance to the proceedings. The Respondent

enters an appearance by presenting a notice of appearance (Form 4) to the tribunal. The notice of appearance must contain the following information:

- the Respondent's full name and address and, if different, an address within the jurisdiction to which the Respondent requires notices and documents relating to the proceeding to be sent;
- a statement concerning whether or not the Respondent intends to resist the application; and
- if the Respondent does intend to resist the application, information with sufficient particulars outlining the grounds for resistance.

Once the NTRC receives the Respondent's Notice of Appearance, the Commission must cause the Notice to be served to each other party.

9.2.2 Consequences of Failing to File a Notice of Appearance

If the respondent fails to file a Notice of Appearance in a timely manner, the Complainant may request that the tribunal adjudicate the matter in the absence of the Respondent. In such a case, the Respondent will not have the right to be heard by the tribunal except in accordance with Paragraph 6(3). Thus, unless the Respondent is able to bring himself within one of the subsections of Paragraph 6(3), the tribunal should not permit the Respondent to participate in the proceeding.

Paragraph 6(3) provides:

6(3) A respondent who has not entered an appearance shall not be entitled to take any part in the proceedings except:-

- (a) to apply under Paragraph 16(1) for an extension of the time appointed by this paragraph for entering an appearance;
- (b) to make an application under Paragraphs 7(3) and 16 herein for a direction requiring the applicant to provide further or better particulars of the ground on which he relies and of any facts and contentions relevant thereto;
- (c) to be called as a witness by another party; or
- (d) in the discretion of the tribunal where no harm or prejudice would be caused to the applicant.

9.2.2.1 Extensions of Time

Pursuant to Paragraph 16(1), the Respondent may apply to the tribunal for an extension of time to enter an appearance. Such applications are made by presenting the tribunal with a Notice of Application for Extension of Time (Form 7). An application made under

Paragraph 16(1) may be made after the time limit for filing the appearance has already expired.

The DR Regulations do not indicate whether applications for extensions of time must be heard orally or whether such applications may be determined on the basis of written materials. Form 7, however, appears to contemplate that an application will be heard orally. Nevertheless, the tribunal has the authority to regulate its own procedure. (See Paragraph 15(1).) Presumably, this includes the authority to hear an application on the basis of written submissions, if it is appropriate.²⁵ If there are no issues of credibility at stake, then it may be appropriate to determine an application for an extension of time on the basis of written submissions only.

Some of the factors that the tribunal should consider when determining whether to extend the time for filing the appearance upon application by the Respondent include:

- the time that has elapsed between the filing deadline for the appearance and the date on which the application for an extension of time was filed;
- the reasons for the failure to meet the filing deadline;
- the potential prejudice to the other parties; and
- whether the initial notice was properly served on the Respondent.

9.2.2.2 Requests for Further Particulars

In some cases, the Respondent may be unable to complete its notice of appearance without further particulars from the Applicant. In such a case, the Respondent may make an application under Paragraph 7 for the tribunal to order the Applicant to provide further particulars about the Applicant's claim. However, before such an application can be made, the Respondent must make an application for an extension of time under Paragraph 16 since only parties to a proceeding may make an application under Paragraph 7. (The Respondent will no longer be considered a party to the proceeding if he does not file his appearance in a timely fashion.)

In considering whether to order the Applicant to provide further particulars, the tribunal should consider whether the Complaint contains enough information for the Respondent to exercise his right to be heard in a meaningful way. The right to be heard includes the

²⁵ Paragraph 15(2)(f) stipulates that a tribunal may determine a dispute on the basis of written submissions with the consent of both parties. This paragraph applies to the determination of the dispute as a whole, however, and not the hearing of an application within a proceeding. Presumably, a tribunal may decide an application within a proceeding solely on the basis of written submissions without the consent of both parties.

right to know the case against oneself. The Complaint must therefore disclose enough information with sufficient specificity for the Respondent to understand the case he must meet in defending himself. If the Complaint fails to do so, it is appropriate for the tribunal to order the Applicant to provide further particulars.

Orders for the production of further particulars should include directions about when the particulars must be provided to the tribunal and to the Respondent. The tribunal should also provide directions to the Respondent concerning when the Respondent's appearance must be filed.

9.2.2.3 Waiving Failure to file an Appearance

Pursuant to Paragraph 6(3)(d), the tribunal may permit the Respondent to participate in the proceeding notwithstanding the failure to file an appearance if the tribunal considers that no harm or prejudice would be caused to the applicant. It would be appropriate for the tribunal to exercise its discretion under this paragraph where the Applicant is aware of the Respondent's position concerning the Complaint. In such a case, the Applicant's right to know the case against him will not be compromised by the failure of the Respondent to file details of his reply to the Complaint in his appearance.

9.3 Applicant's Rebuttal

In some cases, it may be appropriate to allow or to order the Applicant to file a rebuttal to the Respondent's position concerning the Complaint. The tribunal may exercise its authority under Paragraph 7(1) to make such an order, in conjunction with its right under Paragraph 15(1) to control its own procedure.

A rebuttal is not necessary or advisable in every case. In general, a rebuttal is appropriate when the complexity of the case is, or the interests at stake are, such that extra care must be taken in order to ensure that the process is fair. A rebuttal may also be appropriate where the Respondent's statement in its appearance alleges wrong-doing on the part of the Applicant or the Respondent makes a counter-claim. In such a case, the Applicant should have the right to respond to such allegations and claims.

The Applicant may not raise new issues in his rebuttal. The rebuttal must be limited to replying to matters raised in the Respondent's statement in the Respondent's appearance.

9.4 Pre-hearing Discovery

During pre-hearing discovery, parties are required to file information about their case and the evidence on which they intend to rely during the hearing. Other parties then have the opportunity to review this information. Pre-hearing discovery allows the parties to know the case they will have to meet and facilitates their ability to prepare to make their own case. Pre-hearing discovery helps to prevent surprise at the hearing which may otherwise give rise to requests for adjournments. In large and complex cases, pre-hearing discovery

allows for detailed and lengthy evidence to be pre-filed and thus placed on the record far more quickly and efficiently than if such evidence would have to be introduced during the hearing.

Pre-hearing discovery is not appropriate in all cases. It is most appropriate in disputes involving complex issues or significant interests. Disputes that are relatively straightforward or that involve small amounts of money should be heard through an expedited process that does not include a pre-hearing discovery phase.

Box 12 – The value of pre-hearing discovery

The purposes of holding a pre-hearing discovery process include:

- focusing the issues to be addressed at the hearing;
- avoiding the waste of time and money;
- preventing surprise at the hearing and thereby reducing the need for adjournments; and
- enabling parties, interveners, and the tribunal to better prepare for the hearing.

Source: Robert W. Macaulay & James L.H. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002).

9.4.1 The Authority to Order Pre-hearing Discovery

The authority of the tribunal to order pre-hearing discovery stems from Paragraphs 7(1), 7(3), 7(4), and 7(5). These Paragraphs provide:

7(1) The tribunal may at any time, on the application of a party to the proceedings or of its own motion, give such directions on any matter arising in connection with the proceedings as appear to the Tribunal to be appropriate.

7(3) Directions under Paragraph (1) may include *any requirement relating to evidence*, the provision of further particulars and *the provision of written answers to questions put to a party by the tribunal*.

7(4) The tribunal may appoint the time at or within which and the place at which any act required in pursuance of this paragraph is to be done and *may direct that a copy of any document furnished pursuant to any requirement imposed under this paragraph be presented to the Tribunal*.

7(5) The tribunal may, on the application of either of the parties to the proceedings or of its own motion: -

(a) require the attendance of any person in the jurisdiction either to give evidence or to produce documents or both and may appoint the time and place at which the person is to attend and, if so required, to produce any document; or

(b) require one party to grant to another such disclosure or inspection (including taking of copies) as might be granted by a court under Part 28 of the Civil Procedure Rules 200_.

[Emphases added.]

Authority for requiring pre-hearing discovery may also be found in the provisions of Paragraph 10(1). Paragraph 10(1) provides:

10. (1) A tribunal may at any time before the hearing of a complaint on the application of a party made by notice to the Chairman or of its own motion, conduct a pre-hearing review, consisting of a consideration of:-

(a) the contents of the complaint and notice of appearance;

(b) any representations in writing; and

(c) any oral argument advanced by or on behalf of a party.

The right of the tribunal to regulate its own procedure pursuant to Paragraph 15(1) may also serve as a basis of authority for ordering pre-hearing discovery.

When the tribunal makes an order for pre-hearing discovery, it should ensure that proper notice of this order is served on affected parties.

9.4.2 The Production of Documents

The types of documents that should be produced during pre-hearing discovery vary according to the nature of the dispute. Documents could include technical materials, financial documents, call records, and summaries of the evidence of potential witnesses. If permitted by the tribunal, pre-hearing discovery may also include the filing of interrogatories. Interrogatories are written questions directed to one or more parties that are submitted by the NTRC and/or by other parties.

Once the necessary documents, summaries, and interrogatory responses have been produced, these materials are reviewed by the parties and the tribunal.

Box 13 – Pre-hearing discovery

The documents produced during pre-hearing discovery are useful for introducing the tribunal members to the issues at stake in a dispute.

...

It is important that tribunal members avoid forming preliminary judgements on the basis of the documents produced during pre-hearing discovery. Tribunal members must maintain an open mind about the merits of a matter during the hearing. It is inappropriate to begin a proceeding by noting that the “evidence” on file appears to support one party’s contentions or another. Such a statement would amount to a pre-judgement and would likely give rise to a reasonable apprehension of bias.

*Source: Robert W. Macaulay & James L.H. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002).*

9.4.3 Sanctions for non-compliance

Where a party fails to produce documents after being so ordered by the tribunal pursuant to its authority under Paragraphs 7(1) or 7(5), the tribunal may respond by taking action under Paragraph 7(7)(a). This Paragraph allows the tribunal to “strike out the whole or part of the complaint, or as the case may be, the notice of appearance, and where appropriate direct that a respondent be debarred from defending altogether.”

Before a tribunal exercises its powers under Paragraph 7(7)(a), it must provide notice to the offending party and provide that party with an opportunity to show cause as to why the tribunal should not exercise its powers under Paragraph 7(7)(a).

9.5 Pre-hearing Applications and Orders

9.5.1 Directions on Procedure

Prior to the commencement of the hearing, it may be useful for the tribunal to provide the parties with directions on procedural matters. The tribunal has the authority to issue such directions either on its own motion or on the application of a party pursuant to Paragraph 7(1). Box 14 outlines the types of directions that the tribunal may commonly provide to parties. Any directions issued by the tribunal should be duly served on all parties and proof of such service should be placed in the tribunal’s file.

It is often prudent for a tribunal to issue directions on procedure in proceedings involving large, complex matters or significant interests. As discussed above, the right to be heard includes the right to know the procedures that will be applied during a hearing. Advising parties in advance about the process helps the parties to prepare their cases and so facilitates their right to be heard.

In relatively straight-forward cases or in cases involving relatively minor interests, fairness may not require the tribunal to issue directions on procedure. In such cases, fairness may be met by proceeding in an expedited fashion directly to the hearing of the matter.

Box 14 – Directions on procedure

Prior to the hearing of a matter, the tribunal should consider issuing directions on procedural matters such as:

- the production of further particulars or documents, as the need arises;
- any requirements concerning the introduction of evidence that will be imposed during the hearing;
- the amount of time that each party will have during the hearing to make submissions;
- any limitations on the witnesses that may be called in support of a party's case;
- the order in which the parties will present their cases, if there are more than two parties involved with the proceeding; and
- whether the hearing will be based either in whole or in part on written submissions (subject to Paragraph 15(2)(f)).

9.5.2 Stays and Dismissal of Proceedings

A stay of proceeding suspends a proceeding but does not end it. A stay may be lifted if certain conditions are met. For example, if a tribunal stays a proceeding due to the failure of the Applicant to comply with a particular requirement, the stay may be lifted once the Applicant so complies. However, in some cases, the failure of the Applicant is such that it will not be possible for the Applicant to remedy the failure. In such cases, the granting of a stay implies that the proceeding is effectively terminated.

The tribunal has the authority to stay a proceeding until the Applicant has complied with a particular requirement. This authority flows from the general authority of the tribunal to regulate its own procedure pursuant to Paragraph 15(1). In this regard, a stay may be used to discipline the Applicant, to ensure that the Applicant complies with procedural requirements imposed by the tribunal.

Paragraph 9(1) provides that a tribunal may at any time before the hearing of a complaint hear and determine any issue relating to the entitlement of a party to contest the proceedings to which a complaint relates. If the applicant is found not to be entitled to contest the proceedings, then the tribunal should issue a stay.

The tribunal may exercise its authority under Paragraph 9(1) either on its own motion or on the application of another party. The tribunal may conduct a pre-hearing review pursuant to Paragraph 10(1) in order to make a determination under Paragraph 9(1). Paragraph 10(1) allows the tribunal to consider the contents of the complaint and the notice of appearance; any representations in writing; and any oral argument advanced by or on behalf of another party.

The tribunal also has the authority under Paragraphs 15(2)(c) and (d) to strike out or dismiss any complaint on the grounds that the complaint is scandalous, misconceived, or vexatious or on the grounds that the manner in which the proceedings have been conducted on behalf of the Applicant has been scandalous, misconceived, or vexatious. In such a case, a complaint could be simply dismissed, rather than suspended or stayed.

Some of the common grounds for dismissing a complaint include:

- there has been unreasonable delay on the part of the Applicant in bringing the complaint;
- the Applicant's complaint discloses no grounds whatsoever for relief;
- the Applicant lacks standing to bring a complaint; and
- there has been some form of abuse of process that would make it unfair to proceed.

The tribunal should take care to ensure that applicable notice requirements are met and that the Applicant has an opportunity to be heard on the matter before a determination is made to strike out or dismiss a complaint.

9.5.3 Joinder

Paragraph 18(1) vests the tribunal with the authority to order that different complaints be heard together in the same proceeding under certain circumstances. This Paragraph provides,

- 18 (1) Where, in relation to two or more complaints pending before the tribunal it appears to the tribunal on the application of a party made by notice to the Chairman or of its own motion, that: -
- (a) a common question of law or fact arises in some or all of the complaints; or

- (b) the relief claimed in some or all of those complaints is in respect of or arises out of the same set of facts; or
- (c) for any other reason it is desirable to make an order under this paragraph,

the tribunal may order that some or all the complaints in respect of which it so appears to the tribunal shall be considered together, and may give such consequential directions as may be necessary.

The tribunal may not issue an order under Paragraph 18(1) unless each party has had an opportunity to show cause why such an order should not be made. (See Paragraph 18(2)). The tribunal should ensure that parties have been granted sufficient notice so that the parties may make submissions on the matter if they so choose.

9.5.4 Interveners

Interveners “are generally individuals or groups who do not meet the criteria to be a party (such as an Applicant or a Respondent) but who still have a sufficient interest, or some expertise or view which the agency feels will benefit the proceeding to have represented.”²⁶ As third parties, interveners neither seek relief in a proceeding nor are the subject of a request for relief.

The authority of the tribunal to grant an intervener standing in a proceeding flows from the tribunal’s right to regulate its own procedure pursuant to Paragraph 15(1). Paragraph 12(1) also provides a basis of authority for granting a person intervener status. This Paragraph provides,

12. (1) The tribunal shall, so far as it appears to be appropriate, seek to avoid formality in its proceedings and shall not be bound by any law relating to admissibility of evidence in proceedings before any court of law. The tribunal shall make such enquiries of persons appearing before it and witnesses that it considers appropriate and *shall otherwise conduct the hearing in such manner, as it considers most appropriate for the clarification of the issues before it and generally to the just determination of the proceedings.* [Emphasis added.]

The determination of who may be granted intervener status is a matter of discretion for the tribunal. The tribunal should to consider whether the person seeking to intervene has special expertise or knowledge that may benefit the tribunal in making its determination. The tribunal should also consider whether the interests of the person are such that the

²⁶ Robert W. Macaulay & James LH. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002) at 12-62.

rules of procedural fairness, i.e. the right to be heard, require that the person be granted the right to intervene.

Where a number of persons offer the same expertise to the tribunal or seek intervener status on the basis of essentially the same interest, the tribunal may order that the persons work together and make submissions before the tribunal through one spokesman. This ensures that the tribunal receives the benefit of hearing the views of the persons and respects their right to be heard while making efficient use of its scarce resources.

Since interveners are not parties to the proceeding, they are not automatically entitled to the same procedural rights as parties. In each case, the tribunal must determine the extent of the procedural rights that will be accorded to an intervener. The procedural rights accorded to an intervener will be a function of (1) the extent to which the tribunal considers that the participation of the intervener will assist the tribunal in hearing and in determining the complaint, and (2) the extent of the intervener's real interest in the subject matter of the hearing.

Thus, in some cases, the intervener may be granted the right to make oral or written submissions to the tribunal, for example, but not to call its own witnesses or cross-examine the witnesses of the parties. In other cases, it may be appropriate to allow the intervener to call and to examine witnesses. While the intervener usually is not required to produce documents for pre-hearing discovery, it may be entitled to ask interrogatories and to review the documents of the parties. As a general rule, however, the intervener should not be permitted to address an issue that is not relevant to the proceeding.

Persons who seek intervener status should be required to provide the tribunal and the parties with notice. The notice of intervention should set out:

- the identity of the proceeding (e.g. the complaint number);
- a description of the intervener (to assist the tribunal in knowing who is seeking the intervention and what he can bring to the proceeding);
- a description of the intervener's interest – i.e. how the intervener can be impacted or affected by the tribunals decision;
- a brief description of the position being taken by the intervener for or against; and
- the address for service upon the intervener.²⁷

In order to ensure that persons who may have special expertise to offer or interests that may be affected have notice of a proceeding, the tribunal should ensure that notice of

²⁷ *Ibid.* at 12-63.

complaints is provided to the public where appropriate. Public notice may be provided through newspaper advertisements and on the NTRC's website. Complaints which are unlikely to affect persons other than the Applicant and Respondents need not be subject to public notice.

9.6 The Hearing

A hearing may be oral, written, or a combination of both. Although the tribunal has the authority to regulate its own procedure, a tribunal may only determine a matter on the basis of written submissions alone or on a combination of written and oral submissions with the consent of the parties. (See Paragraph 15(2)(f).) Thus, parties have the right to insist that some or all of the submissions and evidence be received orally.

9.6.1 Notice of the hearing

Paragraph 8 sets out the requirements for providing notice of the hearing to the parties. This Paragraph provides as follows:

8. (1) The Chairman shall fix the date, time and place of the hearing of the complaint and shall cause a notice of hearing as prescribed in Form 6 Notice of Hearing the Third Schedule, together with information and guidance (if necessary) as to attendance at the hearing, witnesses and submission of documents, representation by another person and the making of written representations.
- (2) The notice of hearing shall be sent to every party not less than fourteen days before the date fixed for the hearing except where the Chairman has agreed to a shorter time with the parties.

9.6.2 Written hearings

In general, written hearings are appropriate when there are no issues of credibility at stake in the complaint and/or the dispute only concerns policy issues.

Written hearings generally have three steps: (1) the filing of the Application and further submissions regarding the same; (2) the Response to the Application; and (3) the Reply to the Response. The Reply is limited to addressing matters raised in the Response. A party may not use his Reply to introduce fresh arguments or evidence that is not connected to the matters raised in the Response.

The tribunal should provide directions to the parties concerning the time limits for filing written submissions, and serving them on other parties.

Pursuant to Paragraph 11(2), if a party wishes to submit representations in writing for consideration by the tribunal, he must present his representations to the Chairman not less

than ten days before the hearing. The party must also send a copy of his representations to the other parties at the same time that he presents them to the Chairman.

The tribunal has the discretion to consider representations in writing from a party which have been received less than ten days before a hearing where appropriate, however. (See Paragraph 11(3).) In deciding whether to exercise its discretion under Paragraph 11(3), the tribunal should consider whether any other party would be prejudiced by considering the representations. The tribunal may also wish to consider the reasons for the tardy filing of the written representations and the impact that disregarding the representations would have on a just determination of the complaint.

9.6.3 Oral hearings

Oral hearings typically include the steps set out in this section:

9.6.3.1 Opening statement by the Presiding Members of the tribunal and/or counsel.

The opening statement is an opportunity for the tribunal to provide the parties with directions concerning the procedures during the hearing, the timing of various events in the proceeding, the order in which the parties will proceed, and so forth. The tribunal should also use the opening statement to address any concerns about bias and to enquire whether the parties have received adequate notice of the proceedings. This allows the tribunal to identify potential problems at an early stage. The opening statement is also an opportunity to verify who all the parties are and to ensure that all preliminary procedural matters have been met.

Generally, the Chairman of the panel should deliver the opening statement as part of his/her responsibilities as Chairman. There is no fixed rule about who delivers the opening statement, however, and the Chairman may ask another panel member or a staff member to make the statement. Opening statements may be read from a prepared text or made ad hoc.

Box 15 – Suggestions for the opening statement

The tribunal's opening statement may contain some or all of the following:

- An introduction to the members of the tribunal panel;
- Introduce the subject matter of the hearing;
- Note the statutory authority under which the tribunal will be operating;
- Set out in summary form what the tribunal will attempt to accomplish in the hearing;
- Review who is in attendance at the hearing. Note the names of the parties and their representatives;
- Include a checklist of the preliminary procedural requirements

- necessary to vest the tribunal with authority;
- Caution the participants of any statutory offence provisions applicable to the proceedings (e.g., perjury). This will serve as a reminder to the parties that the proceeding is a serious matter notwithstanding the informal atmosphere;
 - Explain the general procedure that will be followed in the proceeding; and
 - Remind the participants of the days and hours of sitting. If certain days are not sitting days, advise the parties accordingly. In large regulatory proceedings, it may be advisable to set aside a day for public participation.

Source: Robert W. Macaulay & James L.H. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002).

9.6.3.2 Introduction of Parties.

After the tribunal concludes its opening statement (or as a component of the tribunal's opening statement), the tribunal should ask the parties to introduce themselves briefly and to identify briefly the general position taken in relation to the matter before the tribunal (*i.e.*, for or against).

One practical suggestion is to call for representations from all persons in the room in the following order:

- First, from the Applicant(s) and then the Respondent(s), in alphabetical order if there are more than one of each;
- Second, from the interveners, in alphabetical order. The tribunal should have a list of the interveners prepared in advance, outlining the names in alphabetical order; and
- The tribunal, or another NTRC staff member should take notes of the names of other persons, or circulate an attendance form.²⁸

9.6.3.3 Opening Statements of the Parties.

The tribunal may allow the parties to make opening statements. However, the parties do not have an absolute right to make an opening statement. The tribunal may wish to expedite the hearing by moving directly to the parties' cases where the matter at issue is relatively straight-forward or does not involve significant interests.

²⁸ *Ibid.* at 12-107.

9.6.3.4 The Applicant's Case.

The Applicant presents his case to the tribunal first. The Applicant will be given the opportunity to put forward his case and to offer evidence in support of his position. The Applicant may also call witnesses and introduce documents into evidence. Opposing parties have the right to cross-examine the witnesses of the Applicant. The tribunal and/or counsel may also ask the Applicant and his witnesses questions as appropriate and necessary to decide the issues in the proceedings. (See Paragraphs 12(1) and 12(2).)

9.6.3.5 The Respondent's Case.

After the Applicant has presented his case to the tribunal, the Respondent has the opportunity to present his case. The Respondent has the same right as the Applicant to make statements about his case and to offer evidence in support of his position. The Respondent may also call witnesses and introduce relevant documents into evidence. The Applicant has the right to cross-examine the witnesses called by the Respondent. The tribunal and/or counsel may ask the Respondent and his witnesses questions as appropriate and necessary for the just determination of the proceedings. (See Paragraphs 12(1) and 12(2).)

9.6.3.6 The Applicant's Reply.

Once the Respondent has concluded the presentation of his case, the Applicant has the opportunity to reply to matters raised by the Respondent. This allows the Applicant to clarify issues and to respond to any allegations made by the Respondent. The right of reply must be strictly limited to the right to make submissions and to lead evidence relating to matters raised by the Respondent. The Applicant may not "split his case". That is, the Applicant may not present some of his arguments and evidence first and reserve the balance of his arguments and evidence for the Reply. This would deprive the Respondent of the opportunity to answer the latter part of the Applicant's "split case".

9.6.3.7 Closing Statement of the Tribunal.

After the parties have presented their cases, the tribunal normally closes the hearing portion of the proceeding by thanking the parties for their participation and by outlining the post-hearing process to the parties.

9.6.4 Applications During the Hearing

9.6.4.1 Issuing a Witness Summons

The tribunal has the authority to require the attendance of any person in the jurisdiction at the hearing either to give evidence or to produce documents or both, pursuant to Paragraph 7(5)(a). The tribunal may appoint the time and place at which the person is to attend and, if so required, to produce any document.

The tribunal may require the attendance of a person on its own motion or on the application of either of the parties. The tribunal's authority to require the attendance of a person at the hearing is exercised by serving a Witness Summons (Form 10) on the person required to attend.

Prior to issuing a Witness Summons, the tribunal should ensure that the witness's testimony or the documents to be produced are relevant to the subject matter of the hearing. The tribunal cannot issue a Witness Summons in relation to information that is protected by a privilege recognized in law.

The Witness Summons should be personally served on the witness. An affidavit or certification statement attesting to personal service should be included in the tribunal's file.

A Witness Summons issued to a party in his absence or to a person other than a party may be challenged with notice to the Chairman of the Tribunal and to all parties. (See Paragraph 7(6).) A person challenging a Witness Summons may apply to have the summons varied or set aside. The application to vary or to set aside the summons must be made before the expiration of the time within which the person named in the summons is required to attend the hearing or to produce documents.

Pursuant to Paragraph 7(7)(a), where a person fails to comply with a witness summons, the tribunal may strike out the whole or part of the complaint or the notice of appearance, and, where appropriate, may direct that a respondent be debarred from defending altogether. The tribunal may exercise this authority before or at the hearing. The tribunal cannot exercise its authority under Paragraph 7(7)(a), however, until the party that has not complied with the requirement has had an opportunity to show cause why the tribunal should not exercise its authority. Notice must be provided to the party in this regard. (See Paragraph 7(7)(b).)

An alternative to striking out the whole or part of the complaint or the notice of appearance when a witness fails to attend or to produce evidence after having been ordered to do so is to draw an adverse inference. To draw an adverse inference means that the tribunal will assume that the witness failed to attend the hearing or to produce required documents due to the unfavourable content of the evidence to be proffered. This assumption will play a role in the tribunal's assessment of the evidence during the decision-making phase of the proceeding. The tribunal's authority to draw an adverse inference stems generally from the tribunal's authority to regulate its own procedure under Paragraph 15(1).

9.6.4.2 Adjournments

The tribunal has the power to adjourn a hearing pursuant to its authority to regulate its own procedure under Paragraph 15(1). Paragraph 15(6) further provides that the "Chairman of a tribunal may postpone the day or times fixed for, or adjourn any hearing and vary any such postponement or adjournment." Paragraph 12(3) also specifically

empowers the tribunal to adjourn the hearing where a party fails to attend or to be represented at the time and date fixed for the hearing.

Requests for adjournments are not infrequent in hearings. These requests are made for a variety of reasons and under different circumstances. As a general rule, the guiding principle for determining whether or not to grant a request for an adjournment is whether such an adjournment is necessary for the proceeding to be fair. Some of the considerations relevant to determining whether an adjournment should be granted in light of this guiding principle are:

- What the purpose of the adjournment is? What does the requesting party hope to accomplish with the adjournment? Is the adjournment necessary for a fair hearing?
- The reasons for the request for adjournment. Why has the adjournment become necessary? Has the party requesting the adjournment acted in good faith and has this party made reasonable efforts to avoid the need for adjournment?
- The position of the other parties. Do they oppose the adjournment on reasonable grounds?
- The impact of refusing the adjournment on the party requesting. What is the impact of granting the adjournment on the party or parties contesting it? What is the impact on the public interest? How long is the requested adjournment?²⁹

In some cases, a party may be required to seek an adjournment as a result of the conduct of his counsel. In these cases, the party should not be penalized for the behaviour of his counsel. The tribunal should consider what is required to ensure a just determination in the hearing, and not refuse the request solely on the grounds that counsel's inappropriate conduct gave rise to the need for the adjournment. On the other hand, if a party's own conduct has given rise to the need for an adjournment, this may be considered as a factor weighing against the granting of the request.

The tribunal should seek to be pragmatic wherever possible when faced with requests for adjournments. For example, a party may request an adjournment on the basis that he has been surprised by the introduction of a piece of evidence by another party. The tribunal may respond by proceeding with some other aspect of the hearing first and delaying the hearing of the evidence that gave rise to the surprise in order to give the requesting party enough time to prepare. This avoids the need for an adjournment while still responding to the party's need for additional preparation time.

²⁹ *Ibid.* at 12-125 and 12-136.

Some good adjournment – related practices and precedents can be found in the example at Box 16.

Box 16 – Listing and Adjournment Practice Direction, the Australian Administrative Appeals Tribunal

The following is a practice direction issued by the Australian Administrative Appeals Tribunal relating to listing and adjournments.

Hearing Policy Listing and Adjournment Practice Direction

This practice direction sets out the policy and procedures of the Tribunal relating to fixing matters for hearing and to applications for adjournments of hearings. The practice direction applies to all applications lodged in the Tribunal throughout Australia whether or not the applicant is represented.

The Tribunal has a responsibility to manage cases so that they are brought to a conclusion at the earliest reasonable opportunity. Bearing in mind this objective, as well as the Tribunal's obligation to give parties a reasonable opportunity to present their case, the following policy will be applied by the Tribunal:

1. Cases will not be fixed for hearing unless the Tribunal is satisfied that they are ready for hearing or a fixed timetable or other arrangements are in place to ensure that each matter will be ready before the hearing date.
2. Parties must ascertain and communicate to the Tribunal their availability and the availability of witnesses and representatives, including counsel, before a hearing date is fixed. If parties do not provide this information within the time specified by the Tribunal, the matter may be fixed for hearing without further consultation.
3. Matters are fixed for hearing on the basis that the hearing will proceed on the day fixed.
4. An application for an adjournment will not be granted unless there are good reasons to justify the adjournment.
5. Unavailability of counsel is not generally a sufficient reason for an adjournment to be granted.
6. The consent of the other party to an adjournment is not of itself a sufficient reason for an adjournment to be granted.
7. An application for an adjournment must be made at the earliest possible opportunity. Application is to be made in writing addressed to the District Registrar. The application must set out the reasons

why an adjournment is necessary and be signed by the person or representative seeking the adjournment. The application must be accompanied by any documents that support the reasons for seeking an adjournment.

8. An application for an adjournment will be referred to the Presiding Member or Listing Coordinator for consideration. The Member will ordinarily consider the application in a hearing at which both parties or their representatives should attend in person or by telephone as required by the Tribunal.
9. An application for an adjournment made less than ten working days prior to the hearing date will not be granted unless there are particular and compelling reasons for the matter to be adjourned. Applications made the day of a hearing, even when advance notice has been given, will not be granted unless there are exceptional reasons.
10. Where an adjournment is granted, the matter will not usually be adjourned generally but will be re-listed as soon as possible. Unless directed otherwise at the hearing of the adjournment application, parties must ascertain and communicate their availability and the availability of witnesses and representatives, including counsel, within two working days of the adjournment being granted. Adjourned matters will be given priority by the District Registrar. A new date for hearing will be given by the Registry within two working days of receiving the information from the parties.
11. Where the Tribunal has jurisdiction to make costs orders, the Tribunal may take into account any adjournments, the identity of the party seeking the adjournment and the reasons, in relation to any final decision as to costs.

This practice direction has effect from 1 May 2005.

Justice Garry Downes

President

19 April 2005

Source: Administrative Appeals Tribunal (Australia), "Listing and Adjournment Practice Direction" (2005), available online:
<http://www.aat.gov.au/LegislationAndJurisdiction/ListingAndAdjournment.htm>.

9.6.4.3 Confidentiality Claims

Tribunal hearings should generally be open to the public. It is not unusual, however, for some of the evidence (usually documentary) in a hearing to be considered confidential by the party introducing it. Evidence relating to sensitive financial data or competitive

technical information, for example, could result in direct harm to a party's interests if made public. In such a case, a party may apply to have this evidence treated as confidential by the tribunal.

By adopting measures to protect the confidentiality of sensitive information, the tribunal can ensure that a party can introduce the evidence necessary to make his case fully without compromising his legitimate business or privacy interests. This allows the tribunal to strike a balance between the need to have all relevant information before it as evidence, the protection of the parties' right to be heard, and the need to protect the legitimate interests of a party.

When a party asserts a claim of confidentiality over a document, the tribunal should review the document, along with the party's reasons for making the claim, in private. Opposing parties should have the opportunity to make submissions as to why the document should be made public, although the parties should not be permitted access to the document since the parties may be competitors. Instead, opposing parties may be provided with a summary of the document so that they have a general idea of the nature of the information over which protection is sought.

If the party claiming confidentiality establishes that placing the document on the public record would compromise its legitimate interests, then the tribunal should take steps to protect the confidentiality of the information in the document. The tribunal may:

- order that the document be entered into evidence, and thus taken into account by the tribunal, but not be placed onto the public record;
- order that an abridged version of the document be placed on the public record (where the confidential portions of the document are removed); or
- order that the document be disclosed to the parties in a hearing conducted *in camera*.

The protection of documents as confidential safeguards the interests of one party, but undermines the opposing parties' ability to meet the case against them. This may be redressed, however, in the weight that the tribunal attributes to the documents as evidence. Since the documents were not subject to cross-examination and since the opposing parties did not have the opportunity to respond to the information contained in the documents, it may be appropriate to reduce the weight given to the documents in the tribunal's consideration of the evidence.

Box 17 outlines the procedure adopted by the Canadian Radio-television and Telecommunications Commission in its Rules of Procedure to respond to claims of confidentiality.

Box 17 – CRTC Procedure on claims of confidentiality

19. (1) Where a document is filed with the Commission by a party in relation to any proceeding, the Commission shall place the document on the public record unless the party filing the document asserts a claim of confidentiality at the time of such filing.

(2) Any claim for confidentiality made in connection with a document filed with the Commission or requested by the Commission or any party shall be accompanied by the reasons therefore, and, where it is asserted that specific direct harm would be caused to the party claiming confidentiality, sufficient details shall be provided as to the nature and extent of such harm.

(3) A party claiming confidentiality in connection with a document shall file with the Commission an abridged version of the document to be placed on the public record or his reasons for objecting to the filing of an abridged version thereof.

(4) A claim for confidentiality referred to in subsection (2) shall be placed on the public record and a copy thereof shall be provided on request to any party.

(5) Where a claim for confidentiality is made in connection with a document that has not been filed by a party, the Commission may require the party to file the document and, after the document has been filed, the document shall

- (a) be reviewed by the Commission in confidence; and
- (b) be dealt with as provided in subsection (10) or (11), whichever is applicable.

(6) Any party wishing the public disclosure of a document in respect of which there has been a claim for confidentiality may file with the Commission

- (a) a request for such disclosure setting out the reasons therefore, including the public interest in the disclosure of all information relevant to the Commission's regulatory responsibilities; and
- (b) any material in support of the reasons for public disclosure.

(7) A copy of a request for the public disclosure of a document shall be served on the party claiming confidentiality and that party may, unless the Commission otherwise determines, file a reply with the Commission within 10 days after the date of service of the request and shall, where a reply is filed, serve a copy thereof on the party requesting public disclosure.

(8) Where the Commission of its own motion requests that a document be placed on the public record, the party claiming confidentiality shall have 10 days to file a reply, unless the Commission otherwise determines.

(9) The Commission may dispose of a claim for confidentiality on the basis of the documentation filed or may, if it considers such procedure to be just and proper,

(a) refer the matter to a conference under section 15;

(b) require depositions to be taken before a person appointed to take evidence under section 22; or

(c) where the proceeding includes an oral hearing, refer the matter to the oral hearing.

(10) Where the Commission is of the opinion that, based on all the material before it, no specific direct harm would be likely to result from disclosure, or where any such specific direct harm is shown but is not sufficient to outweigh the public interest in disclosing the document, the document shall be placed on the public record.

(11) Where the Commission is of the opinion that, based on all the material before it, the specific direct harm likely to result from public disclosure justifies a claim for confidentiality, the Commission may

(a) order that the document not be placed on the public record;

(b) order disclosure of an abridged version of the document; or

(c) order that the document be disclosed to parties at a hearing to be conducted *in camera*.

Source: Canadian Radio-television and Telecommunications Commission, *CRTC Telecommunications Rules of Procedure* (Canada), available online: <http://www.crtc.gc.ca/eng/LEGAL/TELEACT.HTM>.

9.6.4.4 *In camera* Hearings

An *in camera* hearing is a hearing that takes place in private, off of the public record. *In camera* hearings are held to receive oral evidence that is sensitive or confidential. For example, in a dispute involving the failure of a business due to one of the disputant's conduct, the party whose business has failed may not want the full details of the failure made public. In such a case, the party may apply to the tribunal to give some or all of the oral evidence *in camera*.

In determining whether to hold an *in camera* hearing, the tribunal should be guided by the principle of maintaining the fairness of the proceeding. The tribunal should strive to balance the interests of the parties, the public, and the process itself. The tribunal should

also consider that any prejudice suffered by a party as a result of holding an *in camera* hearing may be addressed by assigning less weight to the evidence received *in camera*.

9.6.4.5 Applications Against the Tribunal

During the hearing, applications may be brought against the tribunal itself, to challenge the jurisdiction of the tribunal to hear a particular matter. In order to maintain jurisdiction to hear a matter, the tribunal must adhere to the principles of natural justice and must act in compliance with its empowering legislation (the *Telecommunications Act* and its regulations, including the DR Regulations). The tribunal cannot exercise authority it does not have under the Act or its regulations. Similarly, the tribunal cannot take measures that would violate the principles of natural justice. Procedural irregularities may therefore give rise to applications against the tribunal.

Possible challenges to the tribunal may relate to the following issues, among others:

- inadequate or insufficient notice of the hearing;
- failure to comply with any applicable legislation;
- failure to comply with any procedural order;
- alleged bias;
- the application or matter before the tribunal is beyond the powers granted to it;
- the reference is faulty or misunderstood by the tribunal; and
- a party has applied to the court to stop the proceeding.³⁰

The tribunal has the authority to determine whether it has jurisdiction in a matter, although the tribunal's determinations will be subject to review by the courts. Thus, where a party brings an application to challenge the jurisdiction of the tribunal, the tribunal may hear the party's application. The tribunal should try to hear the motion concerning the application as soon as possible in order to avoid prejudicing the moving party as a result of delay.

In many cases, it may be prudent for the tribunal to hear the motion, and then to reserve its decision and subsequently move on with the proceeding. It may be necessary, for example, for the tribunal to hear further evidence in order to understand the factual basis for the application. A written decision on the matter may be provided later in the proceeding and read into the record. Alternatively, the tribunal may take the time to

³⁰ *Ibid.* at 12-119.

consider the matter and then subsequently issue an oral decision on the matter. The decision would be read into the record and, assuming that the tribunal determines it retains jurisdiction over the matter, the proceeding would then continue. In this case, the final written decision issued by the tribunal should include a section on the jurisdictional challenge.

The fact that a party has brought an application before a court to stop the proceeding does not mean that the tribunal is obligated to halt the proceeding. The tribunal may generally continue to hear the matter unless and until a court issues an order directing the tribunal to stop the hearing.

9.6.5 Other Process-related Issues

9.6.5.1 The Hearing Room

Although not a procedural issue, the tribunal should take care to ensure that the hearing room is set up in a manner appropriate for the hearing. As a general rule, the tribunal members should be seated at the front of the room. Tables should be provided for tribunal members so they can take notes. If possible, the tables should be slightly raised so that the panel members can see and be seen throughout the room. A “modesty screen” should be provided (e.g., a drape or a barrier that covers from the top of the table down to the floor).

If a lot of documents will be entered into evidence, it is helpful to have a table ready for collecting the documents. Tables should also be provided for the NTRC staff members who may attend the hearing. The staff table is generally at the front of the room, near the members’ table.

The parties should also be provided with tables. The parties should face the tribunal. There is no set practice concerning whether the Applicant should be on the left or right side of the tribunal panel. Tribunals may follow local custom and practice in this regard.

Since hearings are public, there should be room for members of the public to attend the hearing. Chairs may be set up at the back of the room or possibly on the side of the room if space is a problem.

Witnesses should give evidence from a central location where they can be both seen and heard by the tribunal members. A chair should be provided for witnesses. A Bible should be kept in the hearing room so that oaths can be administered where necessary.

The hearing room should be provided with a clock so that the tribunal members and the parties can keep track of time. This may be particularly important if the tribunal decides to restrict the time that each party has to make submissions.

9.6.5.2 Receiving Evidence on Oath

Paragraph 12(4) provides that the tribunal “may require any witness to give evidence on oath or affirmation and for that purpose there may be administered an oath or affirmation.”

Receiving evidence under oath or affirmation is a way to enhance the veracity of the evidence. The tribunal should require witnesses to give evidence on oath or affirmation where the fairness of the proceeding and the determination of a just outcome require it. For example, in cases where credibility is a key issue, witnesses should generally be required to give evidence on oath or affirmation.

There may be some instances where very little will be gained by taking evidence on oath or affirmation. Some witnesses may be called primarily to provide expert opinion evidence. Since opinion evidence generally does not raise the same concerns about veracity, the evidence will not be enhanced by taking it on oath or affirmation. In other cases, the tribunal may want to keep the proceedings as informal and unthreatening as possible, particularly if there are parties who are unrepresented by counsel. In such cases, the tribunal may elect not to require witnesses to give evidence on oath or affirmation.

As will be discussed below, the formal rules of evidence do not apply in a tribunal hearing. In many cases, evidence is not excluded from tribunal proceedings on the grounds that it is inadmissible under the formal rule of evidence. Evidence may, however, be given more or less weight, depending on its relevance and credibility. Evidence that is received on oath or affirmation has greater veracity in most cases and thus may be accorded greater weight in the decision-making phase of the proceeding.

9.6.5.3 Failure of a Party to Attend

Where a party fails to attend or to be represented at the time and place fixed for the hearing, the tribunal may proceed to adjudicate fully on the case. Alternatively, the tribunal may decide to adjourn the hearing until a later date. (See Paragraph 12(2).)

In the absence of a party, prior to adjudicating on the case, the tribunal must consider the complaint or notice of appearance, any representations in writing duly filed with the tribunal, and any written responses provided to the tribunal.

9.6.5.4 Maintaining Order

The tribunal should maintain order in the hearing at all times. The tribunal will be able to set the tone for the hearing during its opening statement by making clear to the parties that although the hearing is informal, it is still a serious proceeding that will be conducted in an orderly manner. The fact that the tribunal has an obligation to keep the hearing as informal as possible does not mean that the parties or members of the public should be allowed to show disrespect for the tribunal, the process, or each other. In this regard,

parties and tribunal members should not address each other by their first names. The tribunal should also ensure that only one person speaks at a time during the hearing so that the evidence can be presented in a coherent fashion. It is often helpful for the Chairman to have a gavel so that he can bring the hearing to order when necessary.

9.6.5.5 Dealing with Unruly Participants

The tribunal may at times find that it has to deal with the antics of an unruly participant. The participant may be a party, a witness, or a member of the public observing the hearing. The tribunal should not tolerate unruly, rude, or disruptive behaviour in the course of a hearing.

Where a member of the public becomes unruly, the Chairman of the tribunal may ask the individual to leave the hearing room. Parties, their counsel, and their witnesses cannot be asked to leave, however, without risking affecting the fairness of the proceeding. There are other means of disciplining these participants, however. Paragraph 15(2)(d) provides the tribunal with a powerful means of addressing unruly behaviour:

15(2)(d) subject to Paragraph (3) herein, at any stage of the proceedings, order to be struck out any complaint or notice of appearance on the grounds that the manner in which the proceedings have been conducted on behalf of the applicant or, as the case may be, respondent has been scandalous, unreasonable or vexatious;

Because the consequences of exercising the tribunal's authority under this provision are so grave, the tribunal should provide an unruly participant with a clear warning that the tribunal may invoke this authority should his behaviour not change.

9.6.5.6 Probity of Evidence

The tribunal is not bound by the formal rules of evidence that are applicable in the courts of law. (See Paragraph 12(1).) The tribunal's authority to regulate its own procedure implies that it has the authority to receive any and all evidence that it deems appropriate. As a general rule, the tribunal should admit all evidence into the hearing as long as it is relevant to the proceeding. However, although most, if not all, evidence should be admissible, the evidence should be weighted according to its credibility and relevance. Thus, not all evidence will be given the same weight. Evidence taken under oath, for example, will generally be weighted more heavily than evidence not so received where credibility is an issue. Similarly, while the tribunal may receive hearsay evidence, it may determine that this evidence will not be given much weight in its considerations since it is unreliable.

The tribunal should ensure that only relevant evidence is heard. At times, it may not be immediately clear how the testimony of a witness relates to the matters at issue in the hearing. The tribunal may address such a situation by advising a party that he will have a

limited amount of time to examine the witness and to demonstrate that the witness's testimony is relevant to the proceeding. A similar tactic may be used to manage submissions made by parties that do not appear to be relevant to the proceeding: the tribunal may advise the party that he has a fixed amount of time for his submission. This should provide an incentive for the party to use the limited amount of time available to focus on the most relevant matters in his submissions.

Box 18 – Relevance and Weight of the Evidence

In assessing evidence, a tribunal should consider both the relevance and weight of that evidence.

Relevance: The information which is offered must be capable, assuming it is true, of logically establishing some fact which the tribunal needs in order to determine the issues before it.

Weight: The tribunal must determine how much weight tendered evidence has. In other words, how much can the tribunal rely on the evidence to establish the matter it is submitted to establish?

Source: Robert W. Macaulay & James L.H. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002).

9.6.5.7 Record Keeping

It is prudent for tribunal members to keep good notes throughout the proceeding. This will help the members during their deliberations. Good notes are particularly important in complex, large, or lengthy proceedings. In some cases, the tribunal may decide to record the hearing, so that a transcript can later be made, if required for decision-making or appeal purposes.

The tribunal should also take care to ensure that a proper record of all documents entered into evidence is kept. Documents tendered into evidence should be assigned a number that is coded to reflect key information. One way of coding documents is described in Box 19 below.

Box 19 – Exhibit numbering

One method of identifying exhibits is suggested in a Canadian text on administrative tribunal hearings. It suggests that documents to be entered into evidence as exhibits could be assigned a five digit number that conveys key information about the documents. The document should be coded as follows:

- The first digit conveys that the document is an exhibit (therefore evidence) and not an interrogatory, undertaking, or other form of filing;
- The second digit represents the day of hearing. The days of hearing are usually numbered consecutively and not represented in the form of a calendar date;
- The third digit corresponds to the party who has presented the exhibited. There should be a list of the parties to the proceeding in which all parties are assigned a number;
- The fourth digit corresponds to the witness who has presented the exhibit. The tribunal should maintain a list of all the witnesses who appear before it during a proceeding. Each witness on this list should be assigned a number; and
- The fifth digit corresponds to the sequence of that exhibit.

Source: Robert W. Macaulay & James L.H. Sprague, Hearings before Administrative Tribunals, 2nd ed. (Toronto: Carswell, 2002).

9.7 Post-hearing Matters

9.7.1 Final Arguments and Reply

The hearing ends when all the parties have had the opportunity to make their submissions, including calling their witnesses and tendering evidence in support of their position. After the hearing ends, parties are typically given an opportunity to make final arguments. The final arguments may be made immediately after the hearing ends or after a short break to allow parties time to prepare. The final arguments may be oral or written. The tribunal may make a determination on how to receive final arguments based on what is necessary to ensure a fair process.

In some cases, the Applicant should be given an opportunity for a reply argument. If the Applicant has previously had the right of reply in the opening of the hearing and during the hearing, then the Applicant should usually be given the right of reply to final arguments. Replies should be limited to addressing matters raised in the final arguments of the Respondents. The Applicant may not use reply argument to make fresh points. If an Applicant breaches this rule, the Respondent is normally allowed to rebut fresh points raised in the reply argument.

9.8 Deliberations and Decision-making

Once the hearing has concluded and the parties have made their final arguments, the tribunal must begin the process of considering the evidence and formulating its decision. Paragraph 13(2) provides that “at the end of the hearing the decision of the tribunal shall

be by majority vote and may be given orally or reserved. The Chairman shall record and sign the decision of the tribunal.”

The process of deliberation and decision-making is normally completed in private. It may be helpful for the tribunal to begin the process of deliberation by summarizing the evidence of different parties. This allows the tribunal to reflect on the information that has been tendered into evidence, the main arguments advanced by each party, and the manner in which parties have responded to the arguments of each other. In so doing, the tribunal begins to develop proposals for a decision.

Box 20 – Burden of proof

Burden of proof

- 22 In an alternative dispute resolution process, save as in mediation and conciliation proceedings –
- (a) the burden of proof respecting each complaint or concern is on a balance of probabilities and rests with the party making the assertion; and
 - (b) the Commission or other relevant appointed dispute resolution body shall determine the accuracy and veracity of the information presented by the parties.

Source: Regulation 22, the DR Regulations

As deliberations proceed, tribunal members will develop and consider proposals for a decision. Initially, the tribunal may reach a decision in principle. At this point, a tribunal member or a staff member typically takes on the responsibility of drafting the decision. Paragraph 13(3) requires that the tribunal to provide reasons for its decision in a document that is to be signed by the Chairman. Accordingly, the draft of the decision should integrate reasons supporting the tribunal’s determinations.

Once the draft decision is complete, it should be circulated to the tribunal members for review. After reviewing the draft decision, edits may be made before the decision is finalized. Before the decision is published, it should be read by all members of the tribunal.

Box 21 – Drafting the decision

It is often helpful for the member responsible for drafting the decision to begin by creating a detailed outline for the decision. The outline should reflect the decision in principle to which the tribunal members have tentatively agreed.

One way of organizing a decision is as follows:

1. Overview of the case, including identification of the parties and the relief sought;
2. The facts of the case;
3. A description of the issues, and possibly the parties positions on the these issues;
4. The tribunal's analysis of the issues and decision on them; and
5. Reasons for the decision.

The decision should stick to the evidence tendered during the hearing. Determinations of the tribunal and its reasons should be communicated clearly, simply, and concisely.

Avoid quoting a witness unless there is absolute certainty of what the witness has said.

Circulate a draft of the decision to all tribunal members for comment. Ensure that the decision is read by all tribunal members before publishing the decision.

Tribunal members may not agree on what decision to make. The DR Regulations do not require unanimous decisions. Pursuant to Paragraph 13(1), decisions of the tribunal are determined by majority vote. It is not unusual for tribunals to make split decisions – in which the majority will make a binding decision for the tribunal, but a minority may dissent. In some cases, minority tribunal members will write reasons for their dissent.

The tribunal may receive assistance from the Commission staff in the decision-making process. The role of the staff in the decision-making process varies from tribunal to tribunal. Experienced staff and consultants can often provide valuable analysis and insights on the evidence, on the issues to be decided, and on the legal and policy considerations relevant to various options for a decision. However, the final decision must be that of the tribunal members, not their staff or other advisors.

Pursuant to Paragraph 13(4), where the tribunal makes an award for compensation or comes to any other determination by virtue of which one party is required to pay a sum to another party, then the decision document must also contain a statement of the compensation awarded or sum required to be paid. The decision must also contain either a table showing how the amount was calculated or a description of the manner in which it was calculated.

Once the decision is finalized, the Chairman must cause the decision to be recorded in the Register. The decision should be published simultaneously to the parties and to the public. Decisions are often published in an official gazette, in due course, but actual copies of the decision are normally served on the parties immediately after the decision is released. Commissioners and Staff can find helpful information on types of tribunal decisions by going to the International Telecommunication Union website (www.itu.int). In addition you should access the of websites of telecommunications regulators from a number of common law jurisdictions including the Canadian Radio-television and Telecommunications Commission (CRTC) (www.crtc.gc.ca), the Federal Communications Commission (U.S.) (www.fcc.gov) and the Office of Communications (U.K.) (www.ofcom.org.uk). Each regulator posts decisions that can be of assistance.

9.9 Review and variance of a decision by the NTRC

The tribunal has the authority to review and vary its own decision, either on its own motion or on the application of one or more of the parties. Paragraph 14 sets out the relevant tests for reviewing and varying a tribunal decision, as well as other important procedural matters:

- 14(1) Subject to the provisions of this paragraph, a tribunal shall have power, on the application of a party to the proceedings or of its own motion, to review any decision on the grounds that:-
- (a) the decision was wrongly made as a result of an error on the part of the staff of the Commission;
 - (b) a party did not receive notice of the proceedings leading to the decision;
 - (c) the decision was made in the absence of a party;
 - (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing; or
 - (e) the interests of justice require such a review.
- (2) The tribunal may only review a decision of its own motion if:-
- (a) it has sent notice to each of the parties explaining in summary form the ground upon which and reasons why it

is proposed to review the decision and giving them an opportunity to show cause why there should be no review; and

(b) such notice has been sent on or after the date of the hearing, but within fourteen days of the date on which the decision was sent to the parties.

(3) An application for the purposes of paragraph (1) herein may be made at the hearing. If no application is made at the hearing, an application may be made to the Chairman on or after the date of the hearing, but within twenty-eight days of the date on which the decision was sent to the parties. Such application must be in writing and must state the grounds in full.

(4) An application for purposes of paragraph (1) herein may be refused by the tribunal which decided the matter if in their opinion it has no reasonable prospect of success.

(5) On reviewing its decision the tribunal may confirm the decision or vary or revoke the decision; and if it revokes the decision, the tribunal shall order a re-hearing before either the same or a differently constituted tribunal.

9.10 Appeal of a tribunal decision

Parties to a proceeding may appeal a decision made by the tribunal to the Court of Appeal. The appeal must be made within six weeks after the date of service of a copy of the decision on the party.

10. Appendix I – Readings

10.1 Negotiation

Bazerman, M. & M. Neale, *Negotiating Rationally*, (New York: The Free Press, 1991)

Breslin J.W., & J.Z. Rubin, eds., *Negotiation Theory and Practice*, (Cambridge: Program on Negotiation Books, 1991)

Fisher, R. & W. Ury, *Getting to Yes: Negotiating Agreement without Giving In*, (New York: Houghton Mifflin, 1981)

Freund, J.C., *Smart Negotiating: How to make Good Deals in the Real World*, (New York: Simon & Schuster, Inc., 1992)

Lax, D.A., & J.K. Sebenius, *The Manager as Negotiator*, (New York: The Free Press, 1976)

Lewicki, R.J., A. Hiam and K.W. Olander, *Think Before You Speak: A Complete Guide to Strategic Negotiation*, (New York: John Wiley & Sons, Inc, 1996)

Lewicki, R.J., & A. Hiam, *The Fast Forward MBA in Negotiating and Deal Making*, New York: John Wiley & Sons, 1999)

Lewicki R.J., et.al, *Essentials of Negotiation, Third Edition*, (Toronto: Irwin/McGraw Hill, 2004)

Raiffa, H., *The Art and Science of Negotiation*, (Cambridge: Harvard University Press, 1982)

Zartman, W., ed., *The Negotiation Process: Theories and Applications*, (Beverly Hills: Sage Publications, 1978)

10.2 Mediation & Conciliation

Bowling D., & D. Hoffman, “Bringing Peace into the Room: The Personal Qualities of the Mediator and their Impact on the Mediation,” *Negotiation Journal*,(2000) at 5

Folberg, J., & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation*, (San Francisco: Jossey-Bass, 1984)

McFarlane, J., ed., *Rethinking Disputes: The Mediation Alternative*, (Toronto: Edmond Montgomery, 1997)

Moore. C.W., *The Mediation Process: Practical Strategies for Resolving Conflict, Second Edition* (San Francisco: Jossey–Bass, 1996)

10.3 Arbitration

Bernstein, R., *Handbook of Arbitration Practice*, (London: Sweet & Maxwell with The Chartered Institute of Arbitrators, 1987)

Coulson, R., "The Decisionmaking Process in Arbitration," *Arbitration Journal* Vol. 45 (1990) at 37

Marshall, E. A., *Gill: The Law of Arbitration, Third Edition*, (London: Sweet & Maxwell, 1985)

10.4 ADR

Bacow, L.S., & M. Wheeler, *Environmental Dispute Resolution*, (New York: Plenum, 1984)

Blake, R., Shepard, H., and Mouton, J., *Managing Intergroup Conflict in Industry*, (Houston: Gulf, 1964)

Carpenter, S.L., W.J.D. Kennedy, *Managing Public Disputes: A Practical Guide for Government, Business, and Citizens' Groups*, (San Francisco: Jossey-Bass, 2001)

Chornenki, G.A., *Bypass Court: A Dispute Resolution Handbook*, (Toronto: Butterworths, 1996)

Pirie, A.J., *Alternative Dispute Resolution: Skills, Science and the Law*, (Toronto: Irwin Law Inc., 2000)

Rosenberg, J., & J. Folberg, "Alternative Dispute Resolution: An Empirical Analysis," Vol. 46 *Stanford Law Review*, (1994) at 1487

Susskind, L., P. Levy & J. Thomas-Larmer, eds., *Negotiating Environmental Agreements*, (Thousand Oaks, CA: Island Press, 1999)

Susskind, L., S. McKernan, J. Thomas-Larmer, eds., *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Thousand Oaks: Sage Publications, 1999)

10.5 Regulatory Tribunal Process

Texts, manuals, and articles

Administrative Review Council (Australia), *A Guide to Standards of Conduct for Tribunal Members* (2001).

Administrative Review Council (Australia), *Legal Training for Primary Decision Makers: A Curriculum Guide* (2004).

Administrative Review Council (Australia), *Practical Guidelines for Preparing Statements of Reasons*, rev. (2002).

Council on Tribunals (UK), *Framework of Standards for Tribunals* (2002, updated 2006).

Council on Tribunals (UK), *Guide to Drafting Tribunal Rules* (2003).

Robert W. Macaulay & James L.H. Sprague, *Hearings before Administrative Tribunals*, 2nd ed. (Toronto: Carswell, 2002).

B.L. Strayer, "Good Agency Decisions: A Judge's Perspective" (1995) 1 *Administrative Agency Practice* 55.

Websites

Administrative Review Council: <http://www.ag.gov.au/www/arcHome.nsf/>

Council of Australasian Tribunals Inc.: <http://www.coat.gov.au>

Council of Canadian Administrative Tribunals: <http://www.ccat-ctac.org/>

Society of Ontario Adjudicators and Regulators: <http://www.soar.on.ca>

UK Council on Tribunals: www.council-on-tribunals.gov.uk

11. Appendix II - Exercises

11.1 Negotiation Template

Action	Description
Authority Issues	
Agency Issues	
Coalitions	
Ground Rules <ul style="list-style-type: none">• Behavioural guidelines• Procedural rules• Decision-making rules• Rules for media• Public participants	
Your needs goals, wants and desires	

Action	Description
The needs, goals, wants and desires of the other side	
BATNA – yours and the other side	
The minimum or Resistance point or Reservation point: estimation of walk-away point (For you and the other side)	
The maximum: what you hope to achieve – the Target point; the other side's	
Your opening position	

How successful you were: What worked what failed	
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11.2 Open Question Exercise

[Workshop Exercise]

11.3 Reflective or Active Listening Exercise

Use the skill of reflective listening to respond to the following remarks:

1. Our team's work was so creative and seamless that it earned every penny of the prize money.
2. I bought this software package hoping to have trouble-free accounting, but it's so hopelessly convoluted that I'm really just wasting my time.
3. No one spoke up when I proposed ending the mediation session early, but one of the parties wrote a very nasty letter to my boss complaining about my lack of commitment to my files.
4. Wait a minute. We spent all this time talking and sharing information, and now you tell me that you are not sure if you want to deal with me.

11.4 Reframing Exercise

Here a number of instances where you can try out the skill of reframing:

1. His office walls are decorated with the most revolting art.

2. They're proposing to rob me blind with this proposal.
3. Their revenue sharing ideas are ridiculous.
4. Let me know when you're finished!

11.5 A Negotiation Exercise

[Workshop Exercise]

11.6 Conducting a Tribunal – Simulation

[Workshop Exercise]

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