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To: Interested Persons

Appropriate Dispute Resolution Guidelines

In September 2002 the National Energy Board released its Appropriate Dispute Resolution (ADR) Discussion Paper. The document outlined a possible approach for the design of the Board's ADR program.

The Board received written comments on the Discussion Paper from 17 parties and participated in 14 meetings with the public, industry, government and professional associations to share information and gather feedback on the ADR initiative. Through the consultation process, the Board has increased its understanding of how various dispute resolution approaches could be used effectively to meet the needs of various stakeholders. General agreement emerged on three themes as follows:

- **Pre-ADR planning is an important step in the decision-making process.** A pre-ADR planning session is a good opportunity to learn more about ADR approaches, clarify the issues in dispute, and make decisions about confidentiality, authority, costs and other issues that will result in an appropriate dispute resolution process customized for each situation. Following a pre-ADR session, parties can make an informed decision on whether or not to proceed with an ADR process.
- **Timing of ADR processes is a key factor.** Timelines should be set for the ADR process so that it does not extend the time required for regulatory processes to render a decision, unless agreed to by all parties.
- **The NEB should have staff trained in ADR skills and there should be an option to use external third parties as facilitators or mediators.** Parties indicated that they value the technical expertise that Board staff could bring to an issue and that they would expect the Board to have staff trained in ADR process skills. Parties also said that for some issues they may want to have Board staff involved, and for other issues, they may prefer to use an external neutral party.

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The attached ADR Guidelines reflect these comments and outline the approach the Board will use to add to the options available for resolving some issues, either within or outside the traditional regulatory process. The Guidelines are intended to be flexible, with parties participating in creating a resolution process that will meet their unique needs.

The Board acknowledges and values the contributions that parties have made to help shape the Guidelines. With on-going feedback from parties involved in ADR processes, the Board will assess the effectiveness of ADR approaches used and adjust the Guidelines as appropriate.

For further information about the Board's ADR Guidelines, contact Karla Reesor, ADR Coordinator (403-299-3867) or Lorna Patterson, Conflict Management Specialist (403-221-3010), or call 1-800-899-1265.

Yours truly,

A handwritten signature in black ink, appearing to read 'Michel L. Mantha', with a large, stylized initial 'M'.

Michel L. Mantha
Secretary

Attachment

National Energy
Board



Office national
de l'énergie

Appropriate Dispute Resolution

Guidelines – July 2003



Canada 

Appropriate Dispute Resolution

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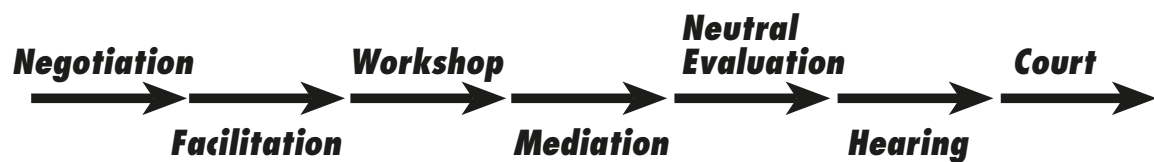
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1. What is ADR?

Appropriate (or alternative) Dispute Resolution (ADR) is generally viewed as a collection of tools and techniques that can be used to reach resolution on an issue as an addition to a traditional regulatory or litigated approach. The ADR techniques are a series of options: any option may be appropriate, depending on the circumstances. The National Energy Board (NEB or Board) has chosen “appropriate” dispute resolution to highlight the importance of using appropriate techniques in a given situation.

Range of Dispute Resolution Options



By choosing the negotiation, facilitation, workshop or mediation options, the parties involved are likely to have more ownership of the process and outcome, the process may be cheaper, and the relationship between the parties is more likely to be maintained or improved.

ADR is also viewed as a set of skills that help to promote collaborative interest-based outcomes rather than decisions based on parties’ “positions”. These listening and speaking skills can help to uncover parties’ underlying concerns, hopes, expectations and preferences which are not always apparent from parties’ initial statements and positions. Identifying the underlying interests provides a basis for finding a “win-win” outcome that better meets the parties’ needs.

The NEB intends to promote collaborative interest-based outcomes through the use of ADR skills and the increased use of facilitated meetings, workshops and mediations. A more detailed explanation of the ADR options, skills and terms is included as Appendix I.

2. What is the Board's objective for an ADR Program?

The NEB has five corporate goals:

- NEB-regulated facilities are safe and perceived to be safe
- NEB-regulated facilities are built and operated in a manner that protects the environment and respects the rights of those affected
- Canadians derive the benefits of economic efficiency
- The NEB meets the evolving needs of the public to engage in NEB matters; and,
- The NEB effectively leads its people and manages its resources.

In working towards its goals, the Board wants to ensure that there are fair and efficient processes in place for hearings, negotiations, facilitations and any other approaches that may be used to resolve issues. In that context, the Board's objective with respect to ADR is to lead and support innovative and effective approaches to manage issues and resolve conflict as an addition to our current regulatory processes.

3. Guiding Principles of the Board's ADR Program

Following are the principles of the NEB's ADR Program:

- ADR can be used as an option to resolve issues, either within or outside the regulatory process, should all parties make an informed decision to participate
- ADR processes will preserve the neutrality of the NEB
- ADR processes will be clear, accessible, flexible and responsive to parties and their needs
- Participants will be expected to act in good faith and with an open mind

4. ADR Opportunities

There are many issues that come to the Board where ADR processes could be considered. As a result of consultations, the following broad categories have been identified as potential opportunities for ADR:

Land issues

Issues could include: access to property, crossings concerns, restoration or reclamation, reparation for crop loss or other compensation issues.

Toll and tariff issues

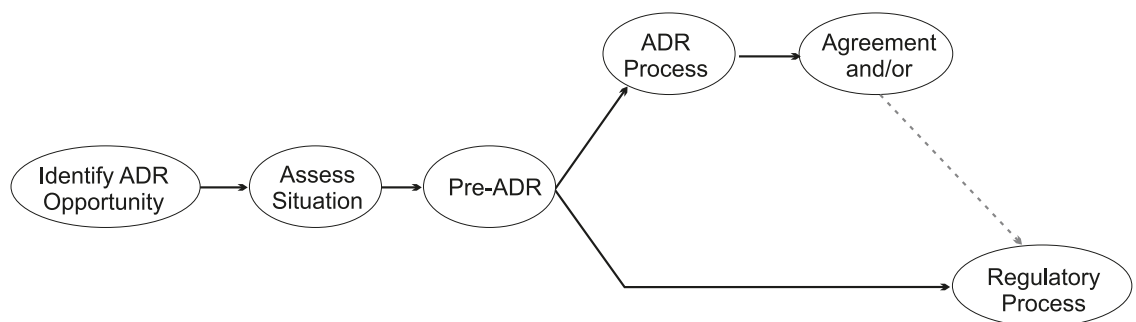
Issues could include: shipper or potential shipper complaints about access to pipeline capacity or annual toll applications.

Collaborative Processes

Issues could include: technical conferences within a regulatory process to increase understanding of issues; reviews of regulatory processes with parties outside the Board; regulation and guideline development; improving government to government relations (see Section 11).

5. How would an ADR process work?

An ADR process will begin when affected parties, or the Board, identify a situation where it might be beneficial to consider an ADR approach. In assessing the situation, Board staff and the parties will consider the nature of the conflict, the parties' relationship and the current status of the consultation/negotiations. The affected parties, the Board and perhaps external experts will participate in determining the best approach for resolving the issue.



In some cases, the parties involved may identify challenges for an ADR process and may be reluctant to commit to an ADR approach. Based on an initial assessment, if there is a chance that ADR techniques might be effective, Board staff may encourage parties to participate in a preliminary ADR session where they could discuss key process issues such as timing, information needs, confidentiality, ADR costs and the specific process needs of each party (see Section 6). The preliminary ADR session will be an opportunity for parties to collaboratively plan the ADR process that would address the substantive issues

to be discussed. During the preliminary ADR phase, parties could decide to proceed with an ADR process or choose another method (e.g. Board regulatory process) to resolve the issue. By participating in the preliminary session, parties would be better able to make an informed decision about whether to pursue the option of using an ADR process.

If the parties agree to proceed with an ADR process, they will set the details of the process themselves in the preliminary ADR session. With respect to timing, the goal is that any ADR process agreed to by parties would not unduly impact the time to a regulatory decision, unless parties agree to a different timetable that is acceptable to the Board. In other words, the ADR process would happen in parallel with the regulatory process unless the parties agree on a different approach that is acceptable to the Board.

6. The Preliminary ADR Session

- Participation in an ADR process will be voluntary. The Board recommends that parties participate in at least a preliminary ADR session.
- The preliminary ADR session will take place as soon as possible after parties agree to participate.
- Matters of confidentiality, documentation, disclosure, timelines and costs for the proposed ADR process will be explored and decided by parties in the preliminary session.
- An ADR expert will normally facilitate the preliminary ADR session. The facilitator could be an external mediator, trained NEB staff or someone else selected by the parties.
- All parties who have an “interest” in the dispute, and possibly their advisors or counsel, will normally participate in the preliminary session. NEB staff could also participate if the parties so desire.
- The arrangement for covering the costs of the preliminary ADR session (including travel, room rental, external facilitator or mediator) would be determined in advance of the session.
- For issues involving individual landowners and companies, the Board recommends that industry participants pay the reasonable costs of landowner participation in the session.
- For industry/industry issues, the Board recommends that industry participants share the costs of the preliminary ADR session.

7. ADR Session

The ADR session will take place according to the framework designed by the parties in the preliminary planning session with respect to confidentiality, documentation, disclosure, timelines and costs.

NEB staff could participate as facilitators or provide advice on technical or NEB process matters if the parties so desire.

8. ADR Agreements

In most cases, the parties' ADR agreements will not require Board approval. Where approval is required, the Board will ensure that agreements are consistent with the *National Energy Board Act* and other legislation. In such cases, the Board will have an obligation to take into account public interest considerations when deciding whether to approve the agreement.

In situations where parties reach agreement on issues which are outside the Board's jurisdiction, parties are strongly encouraged to address and document how those issues will be enforced.

9. Roles for the NEB

The NEB has conflict management specialists who have advanced training in facilitation, negotiation, ADR process development and coordination. In addition, some other individuals at the NEB are trained in providing facilitation and mediation services. The specialists, in conjunction with other trained staff will:

- Educate and inform parties about ADR;
- Assist parties in evaluating options for resolving issues;
- Facilitate sessions at the request of parties;
- Assist parties in identifying and selecting external ADR professionals;
- Track the status of ADR cases; and,
- Measure success and recommend changes to the ADR program.

10. Roles for Neutral ADR Professionals

ADR service providers are neutral, independent individuals or organizations who specialize in conflict management. They assist parties in designing and planning ADR processes and can provide coaching to participants in collaborative processes. Service providers also work with the participants to identify and agree on a mediator or facilitator for their ADR process.

Parties are encouraged to take advantage of all the resources available to them in resolving issues, including engaging ADR service providers, mediators or facilitators where it could be beneficial. If desired, NEB staff could assist parties in identifying neutral ADR professionals for a particular situation.

11. Other Potential Opportunities for Using ADR Tools and Techniques

The Board recognizes that some of the ADR tools proposed for resolving disputes have been, and could continue to be, useful in other areas. Regulatory development is one area that has been identified where opportunities exist for more collaborative processes to encourage early engagement of interested and affected parties in the development of NEB regulations, guidelines and policies. The development of guidelines and regulations is not considered a “dispute”. However, using a collaborative approach for regulatory development may help to ensure that stakeholders’ views are expressed and understood early in the development process. Ultimately, the collaborative approach may contribute to a more effective and efficient regulatory framework for stakeholders and the Board.

A preliminary planning session may be a useful technique to initiate a collaborative process. At the planning session, interested and affected parties could identify how they would like to be involved in the process and discuss scope, timing, approach and other process issues. Some of the face-to-face ADR tools, such as facilitated meetings or workshops, could be used to increase understanding among parties and gather ideas on a particular issue.

The authority to make decisions or recommendations to Parliament on the regulatory framework rests with the Board. A collaborative process among stakeholders may, however, better inform the Board’s decisions and recommendations.

ADR skills and techniques could be useful in other areas and the Board will be looking for opportunities to use ADR approaches as situations arise.

12. Evaluation and Additional Information

To ensure that the ADR options are and continue to be relevant, effective and efficient, the Board will monitor the success of situations where ADR techniques are used.

Evaluation criteria will include:

- Participant satisfaction with the process
- Satisfaction with the role of Board staff and ADR professionals
- Willingness to participate in another ADR process
- Participant satisfaction with the outcome

For information about the Appropriate Dispute Resolution program, contact NEB and ask for the program coordinator at (403) 292-4800, toll free 1-800-899-1265 or e-mail ADR-MRD@neb-one.gc.ca.

Appendix 1

The following is a brief description of some of the ADR terms:

- Negotiation:** Unfacilitated communication in which parties attempt to resolve a dispute or issue.
- Facilitation:** Coordinated, informal problem solving process involving a third party. The role of a facilitator is to encourage participation in the process by relevant parties, assist in their dialogue, and help the parties reach their own solutions.
- Interests/Positions:** Interests consist of a collection of values, beliefs, fears, concerns, principles, hopes and expectations that a person or group seeks to have met by an agreement. Once the interests of all parties are explored and understood, common interests are often discovered, providing the foundation for parties to build a solution that can satisfy interests they all share.
- A party's position is generally presented as what it wants, does not want, will do, or will not do. A party generally perceives this position as the solution that satisfies its own interests. Typically the parties have arrived at different positions because they have placed emphasis on differing interests.
- To create interest-based solutions, it is necessary to explore the interests of each party in order to understand why they form their positions and to uncover and identify interests that they share.
- Conferences/Workshops:** Structured, often multi-party, negotiations and discussions directly between parties with the objective of increasing understanding and/or resolving all or some of the issues; unresolved issues could be referred to another dispute resolution process; a facilitator could be involved.

Mediation:

A collaborative dispute resolution process in which the negotiations of two or more parties are assisted by a neutral and impartial mediator who has no decision-making authority and no “interest” in the outcome. It is the mediator’s job to help the parties increase their understanding of the other’s perspective and reach a mutually acceptable settlement.

Neutral Evaluation:

Jointly selected, neutral person provides a non-binding reasoned evaluation of a dispute; assessment is expected to have persuasive value for the parties.

Privacy and Confidentiality:

Privacy relates to the information that someone discloses about themselves or something. Confidentiality is the component of privacy that deals with what people do with the information they know about others. As related to ADR, discussions are usually private and confidential based on the premise that for mediation to work effectively, parties should engage in collaborative discussions and disclose all relevant information so that full understanding of each other’s objectives and interests can be achieved. This process should lead to solutions that will satisfy many of their important interests.

However, it is also recognized that information required by the regulatory process cannot be held confidential, such as that dealing with public safety, environmental protection, and resource conservation. Matters that the parties may decide could remain confidential include financial and contractual details, the conditions or circumstances under which a party would remove an objection, the mitigating measures an applicant would offer in order to have an objection removed, or individual health records.