BC Tribunal Dispute Resolution

Needs Assessment Project

Alternative Dispute Resolution in Entitlement Tribunals:

A Policy Choice

by

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December 2007

Acknowledgements

This paper has been prepared with valuable support and insight from Professor Michelle LeBaron, Professor of Law and Director, Program on Dispute Resolution, Faculty of Law, University of British Columbia; and, much appreciated research assistance from Pat Pitsula, LLB.

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Executive Summary

There is a persistent perception that disputes involving claimants' entitlements to statutory rights and benefits cannot be negotiated at the tribunal level, that tribunals should not apply alternative dispute resolution (ADR) processes to these disputes, and that these disputes can only be appropriately resolved through adjudication. This paper examines the perception, and concludes that using ADR to settle entitlement claims is essentially a policy choice. Dispute resolution theory, statutory authority, government policy, and tribunal practice support this view, indicating that entitlement disputes can be adjudicated *or* resolved through ADR processes.

Referral decisions should be based on an assessment of the integrative potential of the dispute and many other considerations. Broad, principle-based criteria and potential success indicators are outlined to help determine the appropriateness of ADR, bearing in mind that each tribunal must develop its own referral criteria and processes. An approach to dispute system design is described that would help entitlement tribunals optimize their dispute resolution programs, including both adjudicative and ADR processes.

The viability of ADR in entitlement disputes is examined in the context of two key questions:

1. Can entitlement disputes be negotiated? This question requires exploration of dispute resolution theory, the statutory authority for dispute resolution processes, and tribunal practice.
2. Should entitlement disputes be negotiated? This question involves an examination of the 'appropriateness' of ADR in entitlement disputes. Assuming entitlement disputes can be negotiated, when does it make sense to do so?

An entitlement dispute before an administrative tribunal may be resolved by determining who is right (third party adjudication) or by reconciling the interests of the parties (problem-solving negotiation or other ADR process). The view that entitlement disputes can be resolved through interest-based ADR strategies is based on:

1. the precepts of dispute resolution theory, which provide that a negotiator may choose an integrative problem-solving approach to dispute resolution, even when the dispute presents in distributive, adversarial terms;
2. legislative authority and a tribunal's inherent control over its process in common law, which enables BC's entitlement tribunals to conduct dispute resolution processes;
3. extant government policy encouraging ADR; and
4. current tribunal practices, which support a spectrum of ADR processes, often to facilitate case management but also to resolve substantive issues.

This is not to say that all entitlement disputes should be 'negotiated'. Rather, it indicates that the integrative potential of each dispute should be explored, examining the range of ADR options before resorting to adjudication, to ensure that the resolution process is responsive, accessible and efficient.

Little has been written on the role of ADR in entitlement disputes. However, the general dispute resolution literature supports the view that, given the prospective benefits, entitlement disputes should be resolved through interested-based strategies where appropriate. This indication invites numerous questions turning on the meaning of 'appropriateness'; the central one being "when does it make sense to refer entitlement disputes to ADR?"

There is no standard test for determining the appropriateness of ADR. The dispute resolution literature, and, particularly, recent Australian research (the Mack Report)[1] into court-annexed dispute resolution programs, reveals that there is no single set of generally applicable, empirically validated, criteria to identify disputes that are suitable for ADR. The diversity of administrative agencies, disputes and disputants; and, the context dependency of dispute resolution processes, makes the task unrealistic and impractical. However, the research identifies numerous generic considerations that may have a bearing on the appropriateness of ADR in a particular context. Although many of these considerations were identified in the context of court-annexed dispute resolution programs, the administrative justice system in BC reflects the same kind of diversity, making the considerations useful in the tribunal sector.

[1] Mack, Kathy, 2003. *Court Referral to ADR: Criteria and Research* (National ADR Advisory Council and the Australian Institute of Judicial Administration Incorporated, Melbourne, Australia). See: www.nadrac.gov.au.

The broad considerations are distinguished according to principle-based criteria and indicators of success, which offer a basis for review and analysis in individual dispute resolution programs.

In order to determine when it makes sense to refer a dispute to an ADR process, the Mack Report, which is based on a comprehensive literature review, suggests that a court (tribunal) must:

1. identify its dispute resolution goals, determine what success means, and decide how it can be measured;
2. address a range of process issues, including who will be making the referral (raising the prospect of party choice), when the referral decision is made, and who the potential ADR service providers are; and,
3. develop its own referral criteria and dispute resolution processes in light of its goals, process parameters, and other considerations.[2]

This work can be completed in an organizational assessment and dispute resolution system design process that takes into account the broad substantive, procedural and other considerations identified in the dispute resolution literature.

Rather than debate the appropriateness of ADR in entitlement cases generally, the government and the entitlement tribunals should focus on optimizing tribunal dispute resolution programs, taking into account the tribunal's organizational culture, people, technology and mission; and, the context dependency of ADR. This approach acknowledges that tribunals and the ministry responsible for the benefit or entitlement program are best positioned to determine the appropriateness of ADR in any given case. However, it also assumes that the tribunals and their responsible ministries are willing to take the steps necessary to enhance their dispute resolution systems, offering both adjudicative and ADR processes where appropriate, in keeping with overarching government policy.

With this in mind, the Ministry of Attorney General may wish to consider implementing the dispute resolution component of its administrative justice reform strategy (encouraging early resolution through problem-solving and mediation) by working with tribunals (and their ministries) individually – using a structured

[2] ibid, p. 8.

organizational assessment and system design approach to create a responsive, accessible, and efficient dispute resolution system -- one tribunal at a time. A system design initiative would enable each tribunal to analyze and enhance its dispute resolution program, including a range of appropriate ADR options in keeping with the tribunal's unique mandate and characteristics.

In addition, the Ministry may wish to consider working with tribunals and their responsible ministries to:

1. Provide explicit statutory authority for dispute resolution processes to those tribunals without such authority; and
2. Encourage tribunals to make early dispute assessment (screening and streaming) a mandatory part of case in-take. Structured dispute assessment would require the parties to explore the integrative potential of their dispute before choosing adjudication. This would heighten awareness of resolution options and permit a joint referral decision, either to problem-solving ADR or an adversarial hearing.

In summary, this paper concludes that:

1. Dispute resolution theory supports the view that entitlement disputes can be adjudicated *or* negotiated -- ADR in entitlement tribunals is a policy choice.
2. The relevant legislation and common law governing entitlement tribunals provides authority for ADR, and government policy supports increased utilization of ADR.
3. Most entitlement tribunals support some form of ADR (commonly to identify issues, discern facts quickly and efficiently, remove procedural barriers, and expedite the process from intake to completion) and report that their dispute resolution programs are generally successful.[3]
4. Given the prospective benefits, entitlement disputes should be negotiated as a matter of policy, where appropriate. While ADR is not always appropriate, the integrative potential of entitlement disputes should be explored before referring a case to adjudication.
5. A primary barrier to utilization or increased utilization of ADR in entitlement tribunals is determining when ADR is appropriate.

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[3] Darling, Craig 2006. *BC Tribunal Dispute Resolution Needs Assessment Project: Initial Research and Preliminary Assessment* (BC Ministry of Attorney General, Victoria, BC).

6. There is no single test for appropriateness. However there are broad, principle-based criteria and indicators of success to help guide a determination. In addition, organizational and administrative issues may impact the appropriateness of ADR.
7. Tribunals must determine their own ADR referral criteria and processes.
8. A dispute system design initiative could provide a vehicle for government and tribunals to work together to optimize tribunal dispute resolution programs.

Introduction

This research is part of an ongoing project to assess the need to enhance or expand dispute resolution capacity in the BC administrative tribunal environment (the "needs assessment"). The needs assessment is a joint initiative of the Administrative Justice Office (AJO) and Dispute Resolution Office (DRO) of the Justice Services Branch, Ministry of Attorney General.

The initial research[4] identified perceived barriers to utilization or increased utilization of alternative dispute resolution (ADR) processes in the tribunal community, including a perception that disputes involving claimants' entitlements to statutory benefits cannot be negotiated.

Purpose

The purpose of this project was to:

1. research the law, legislation and policy governing the utilization of ADR in statutory rights and entitlement tribunals (e.g., tribunals responsible for adjudicating entitlement to rights or benefits under a statute)
2. based on the research, identify and examine barriers to utilization or increased utilization of ADR in BC statutory rights and entitlement tribunals, testing the presumption that 'rights and entitlement disputes cannot be negotiated', and
3. make recommendations to facilitate the increased utilization of ADR in BC statutory rights and entitlement tribunals.

Research Questions

The research questions were originally framed as follows:

1. What is a statutory right or entitlement dispute?
2. Which BC tribunals administer statutory rights and entitlement disputes?
3. What law, legislation and policy govern the utilization of ADR in statutory rights and entitlement tribunals in BC? (statutory provisions will likely vary by tribunal)
4. Are there legal, legislative or policy barriers preventing utilization or increased utilization of ADR in statutory rights and entitlement tribunals in BC? If so, how might these barriers be removed?

[4] Ibid.

5. What is the experience of other jurisdictions? Can that experience be applied in BC? Research examples of tribunals using ADR to resolve rights and entitlement disputes.

A primary barrier to utilization or increased utilization of ADR in entitlement tribunals is determining when ADR is appropriate. With this in mind, the fourth research question was reframed, creating three new questions to fully address the 'appropriateness' issue:

1. Can rights and entitlement disputes be negotiated (i.e., resolved through ADR processes)?
2. Should rights and entitlement disputes be negotiated?
3. What criteria indicate that a referral to a non-adjudicative dispute resolution process is appropriate?

These questions became the primary focus for research and analysis.

Approach

This research involved the following steps:

1. A literature search seeking to define entitlement tribunals, identify relevant legislation and policy, and discovering generic 'barriers' to ADR. The initial research revealed that little has been written on the challenges associated with ADR in entitlement tribunals, perhaps because the issue has been overlooked, or maybe because it is difficult to differentiate entitlement tribunals from other rights tribunals.[5] Consequently, the literature search was broadened to include tribunals generally and court-annexed ADR programs.
2. Addressing the preliminary research questions, including classifying BC administrative tribunals using a definition developed by Philip Bryden and William Black[6] to distinguish entitlement tribunals from others.
3. Reviewing enabling and other relevant legislation and policy to assess the viability of ADR in BC's entitlement tribunals.
4. Analyzing the 'appropriateness' issue and extrapolating broad considerations from the literature to guide a determination.
5. Assessing how to increase ADR utilization in light of the research.

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[5] For example, see Ellis, Ron, 2002. *Super Provincial Tribunals: A Radical Remedy for Canada's Rights Tribunals* 15 CJALP 15-50, p 35. Ellis argues that most administrative tribunals are 'rights' tribunals

[6] Bryden, Philip and Black, William, 2007. *Designing Mediation Systems for Use in Administrative Agencies and Tribunals – The BC Human Rights Experience* (Draft Chapter), p. 12.

To maintain consistency within the needs assessment project, this research was limited to the study sample identified by the AJO and DRO for the needs assessment ("the study sample"). The study sample includes:

- Agricultural Land Commission (ALC)
- Community Care and Assisted Living Appeal Board (CCALB)
- Employment Standards Tribunal (EST)
- Environmental Appeal Board (EAB) / Forest Appeals Commission (FAC)
- Farm Industry Review Board (FIRB)
- Financial Services Tribunal (FST)
- Forest Practices Board (FPB)
- Hospital Appeal Board (HAB)
- Human Rights Tribunal (HRT)
- Labour Relations Board (LRB)
- Mediation and Arbitration Board (MAB)
- Mental Health Review Board (MHRB)
- Passenger Transportation Board (PTB)
- Property Assessment Appeal Board (PAAB)
- Safety Standards Appeal Board (SSAB)
- B.C. Utilities Commission (BCUC)
- Workers Compensation Appeal Tribunal (WCAT)

Preliminary Questions

What is Alternative Dispute Resolution?

Alternative dispute resolution (ADR) means *any method of dispute resolution other than formal adjudication*. ADR involves a spectrum of mostly interest-based options ranging from informal problem solving to structured negotiation and mediation. Interest-based methods of dispute resolution encourage the parties to integrate their underlying concerns or interests to reach an agreement satisfactory to all.

ADR encompasses the definition of 'dispute resolution process' under the BC Administrative Tribunals Act (ATA).[7] Under section 1 of the ATA, a dispute resolution process means *a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute*.

The Dispute Resolution Office (DRO) of the Ministry of Attorney General has identified a range of processes that might comprise a public sector dispute resolution system.[8] The ADR processes are summarized in Table 1.

[7] RSBC, 2004.
[8] BC Ministry of Attorney General, Justice Services Branch *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems* (BC Ministry of Attorney General, Victoria, BC), p. 11.

TABLE 1

ADR PROCESSES

Process	Description
Negotiation:	any form of unfacilitated communication in which opposing parties discuss steps they could take to resolve a dispute between them. Negotiation can occur directly between the parties or indirectly through agents acting on behalf of the parties, such as lawyers.
Mediation:	a non-binding process in which a neutral, impartial third party with no decision-making authority attempts to facilitate a settlement between disputing parties. Mediation is generally a private dispute resolution process.[9]
Conciliation:	can range from an approach that is essentially mediation with a more interventionist third party or shuttle negotiations where the third party neutral shuttles between the disputants who are unwilling to meet in person.
Facilitation:	includes the use of techniques to improve the flow of information in a meeting between parties to a dispute, or in a decision-making meeting.
Joint fact finding:	involves disputants choosing a neutral fact finder who investigates, reviews documents, and interviews witnesses to determine the facts in a dispute.
Negotiated rule making or "reg-neg":	brings together representatives of various stakeholders to negotiate the body of a proposed rule or regulation. This method is used extensively in the U.S.
Shared decision making:	is a consensus based approach to dispute resolution in which those with authority to make a decision and those who will be affected by that decision are jointly empowered to seek an outcome that accommodates the interests of all concerned. Shared decision-making is used in multiparty public policy disputes.
Neutral evaluation:	is a process in which parties obtain from an experienced (and possibly expert) neutral third party a non-binding, reasoned evaluation of their case on its merits. The opinion or assessment is expected to have persuasive value, especially because the neutral third party is jointly selected.
Settlement conferences, case conferences and pre-trial conferences:	are case management processes that involve an informal dialogue between a tribunal member or members, legal counsel and/or the parties, leading up to a hearing. They tend to focus on either settlement or hearing. Objectives can include settlement of the dispute, expediting the disposition of the action, discouraging wasteful pre-trial activities, and improving efficiency of the hearing through more thorough preparation.

[9] ibid, p. 12. Mediation may be rights- or interest- based. "**Rights-based mediation** (also evaluative mediation) in which the dispute is analyzed in terms of opposing rights and duties. In this model, the mediator provides direction to the parties about appropriate settlement terms, but the focus of the sessions is still to identify who is right or wrong. **Interest-based mediation**, in contrast, involves framing the dispute not in terms of legal rights but rather in terms of the parties' underlying concerns, goals, and needs. These are the reasons behind the bargaining position of a party. The job of the mediator in this model is to help the parties avoid getting locked into inflexible positions while identifying the real issues and desires motivating a parties' bargaining stance. Positions, what parties say they want in a mediation session, and the underlying interests motivating those positions are often very divergent."

What is an entitlement tribunal?

For the purposes of this paper, an entitlement tribunal means *an arms-length, independent administrative justice agency that administers disputes over a claimant's eligibility for a benefit or entitlement*.

This definition is drawn from research by Philip Bryden and William Black. In their recent work on designing mediation systems in administrative agencies and tribunals, Bryden and Black classify tribunals according to their 'activities' (functions), drawing distinctions among the following four broad categories:

1. Activities involving the resolution of a dispute between two parties
2. Activities involving the administration of a complaint-based system of enforcement of regulatory standards
3. Activities involving the administration of a regime that determines a claimant's eligibility for a benefit or entitlement, and
4. Activities involving tribunal policy-making or rule-making.[10]

Bryden and Black distinguish entitlement tribunals from others on the basis that 'in most instances' the tribunal determines that the claimant either receives a benefit or does not receive it. The examples cited by Bryden and Black include determinations of entitlement to benefits or permissions such as social assistance, employment insurance, driver's licences, occupational or professional licences, workers' compensation or immigration and refugee status.

Bryden and Black acknowledge the difficulties in differentiating entitlement tribunals from other rights tribunals. They note that classification scheme is not "watertight" and "not every tribunal fits neatly into a single category".[11] Many tribunals have unique features and more than one function (e.g. investigation of complaints and adjudication). The administrative justice literature confirms this view, revealing little consensus on tribunal classification and no standard definition for an entitlement tribunal.

While the Bryden and Black definition is adopted for the purposes of this paper, to provide parameters for research and analysis, it can be argued that most

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[10] supra, footnote 8, p. 5.
[11] supra, footnote 8, p. 6.

administrative tribunals are 'rights' tribunals; that is, their dominant responsibility is to hear and decide disputes about the statutory rights or benefits of typically private sector individuals or corporations."[12] In this view, tribunal function is not a distinguishing characteristic for determining the appropriateness of ADR.

Which BC tribunals administer entitlement disputes?

Under the Bryden-Black classification scheme, seven of the eighteen tribunals included in the study sample can be categorized as entitlement tribunals. The tribunals where the determination of a claimant's eligibility for a benefit or entitlement appears to be a primary activity are the Community Care and Assisted Living Board (CCALB), Employment Standards Tribunal (EST), Hospital Appeal Board (HAB), Mental Health Review Board (MHRB), Passenger Transportation Board (PTB), BC Utilities Commission (BCUC) and the Worker's Compensation Appeal Tribunal (WCAT).[13] A summary description of each of these tribunals and its dispute resolution processes is included in Appendix 1 to this report.

Classifying the tribunals in the study sample confirmed the categorization challenges identified by Bryden and Black. It is evident that many of the tribunals in the study sample perform more than one function.

What law, legislation and policy govern ADR in BC's entitlement tribunals?

Authority for Dispute Resolution

Authority to conduct dispute resolution processes in BC administrative tribunals is found in section 28 of the Administrative Tribunals Act (ATA)[14] or the tribunal's enabling legislation. Indirect authority is found in section 11 of the ATA and the common law, which provides that an administrative agency is "the master of its own procedure", subject to legislative direction.[15] Generally, the legislation and the case

[12] supra, footnote 7, p.32.

[13] Although perhaps an entitlement tribunal under the definition, the Agricultural Land Commission (ALC) is excluded from this discussion because its dispute resolution mandate is limited to section 13 of the ALC Act, which has been applied only once.

[14] RSBC, 2004.

[15] See generally R.W. MacAuley, 1998. Practice and Procedure Before Administrative Tribunals, loose leaf (Carswell, Toronto, Ont) at 9-1, 9-13. *Prassad v. Canada*, [1989] 1 S.C.R. 560.

law are enabling; that is, they permit but do not require dispute resolution processes, leaving the decision to the tribunal.

Section 28 of the ATA provides that:

> 28. (1) The chair of the tribunal may appoint a member or staff of the tribunal or other person to conduct a dispute resolution process. [16]
> (2) If a member of the tribunal is appointed under subsection (1), that member, in addition to assisting in a dispute resolution process, may make pre-hearing orders in respect of the application but must not hear the merits of the application unless all parties consent.

Section 11 of the Administrative Tribunals Act provides that:

> 11. (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.
> (2) Without limiting subsection (1), the tribunal may make rules … (b) respecting dispute resolution processes.

Table 2 references the legislative authority for dispute resolution for each of the seven entitlement tribunals included in the study sample. Five of the seven have specific legislative authority to support dispute resolution under section 28 of the ATA. These include the Community Care and Assisted Living Board (CCALB), Employment Standards Tribunal (EST), Hospital Appeal Board (HAB), BC Utilities Commission (BCUC) and the Workers' Compensation Appeal Tribunal (WCAT).

TABLE 2

LEGISLATIVE AUTHORITY FOR DISPUTE RESOLUTION IN ENTITLEMENT TRIBUNALS

	Specific Legislation Authority	Section 28, Administrative Tribunals Act
CCALB	*Community Care and Assisted Living Act*, section 29;	Sections 1 to 20, 22, 24 to 42, 44, 47 (1) I and (2), 48 to 55, 57, 58, 60 and 61 of the *Administrative Tribunals Act* apply to the board.
EST	*Employment Standards Act, Part 12;*	Sections 1 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 40, 45, 46, 48, 49, 50 (2) to (4), 51 to 53, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the tribunal
HAB	*Hospital Act , section 46.*	Sections 1 to 20, 25 to 35, 37 to 39, 42, 44, 47 to 56, 57, 58, 60 (a), (b) and (d) to (f) and 61 of the *Administrative Tribunals Act* apply to the Hospital Appeal Board.

[16] A 'dispute resolution process' means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute (Section 1 of the ATA).

MHRB	Mental Health Act , section 25.	Sections 1 to 10, 11, 13 to 15, 18 to 20, 26 (5) to (7) and (9), 27, 30, 32, 35, 36, 38, 39, 40 (1) and (2), 44, 48, 49, 55 to 57, 59, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the board and members of review panels. Section 28 does not apply.
PTB	Passenger Transportation Act, Part 3.	The definitions of "appointing authority", "member", "privative clause", "tribunal" and "tribunal's enabling Act" in section 1 of the *Administrative Tribunals Act* and sections 2 to 10, 26, 30, 31, 41, 42, 44, 57, 58 and 61 of that Act apply to the board. Section 11 and 28 do not apply.
BCUC	Utilities Commission Act.	Sections 1 to 3 and 5 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission.
WCAT	Workers' Compensation Amendment Act (No 2), 2002;	Sections 1, 11, 13 to 15, 28 to 32, 35 (1) to (3), 37, 38, 42, 44, 48, 49, 52, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the appeal tribunal.

The Mental Health Review Board (MHRB) and the Passenger Transportation Board (PTB) do not have direct authority to establish dispute resolution processes under section 28. However, under section 11 of the ATA, the MHRB has the general power to control its processes and may make rules respecting practice and procedure including dispute resolution processes. Section 11 does not apply to the PTB but its enabling legislation provides the Board with authority to make rules respecting practice and procedure for all applications, appeals, submissions and hearings coming before the board and for all investigations (s. 7(1) (d)).

Even without explicit statutory authority to conduct dispute resolution processes, the common law provides an administrative agency with control over its processes.[17] Therefore, unless legislation prescribes otherwise, a tribunal can establish dispute resolution processes. For example, the PTB currently uses pre-hearing conferences only for administrative purposes (to organize for the hearing). However, relying on its implicit power under section 7(1) (d) of its enabling legislation or the Canadian common law, the PTB could conceivably use a pre-hearing conference or any other ADR process to facilitate settlement of one or more issues in dispute.

On this basis, all of the BC's entitlement tribunals are empowered to conduct dispute resolution processes. In practice, tribunals with implicit authority wanting to use ADR would likely seek the support of their ministry, since the common law power is subject legislative proscription.

[17] supra, footnote 17.

Government Policy

Recent public statements indicate a growing expectation within the Ministry of Attorney General that not only should BC's administrative tribunals be conducting ADR, they are ideally placed and should lead the way, setting an example for the use of ADR in other sectors of the justice system. On second reading of the Administrative Tribunals Act in May 2004, the Attorney General said that "The move to encourage alternative dispute resolution is an important part of rethinking the justice system, and administrative tribunals have an opportunity to show leadership in this regard."[18]

In May 2007, the Deputy Attorney General described a broad initiative aimed at reforming the administrative justice sector, indicating that "tribunals will need to re-examine their own processes and practises, to ensure that they are not simply a scaled down version of, but in fact are out front of the courts, in terms of developing and implementing opportunities for early solving of problems and resolution of disputes."[19]

The Ministry of Attorney General's ADR policy appears to embrace all administrative tribunals, including entitlement tribunals and may go beyond merely encouraging ADR in the tribunal sector. It might be characterized as a "presumptive" approach, which assumes that ADR should be used, absent compelling indications to the contrary.[20]

A key strategy in the Attorney General's administrative justice reform plan is to continue to encourage early dispute resolution through non-adjudicative problem-solving and mediation procedures when possible – utilizing adjudication only where no other option makes sense.[21] The anticipated vehicle for delivery of early resolution is ADR. The presumption is that increased utilization of ADR will create a more responsive, accessible, and efficient administrative justice system.

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[18] Hansard, May 18, 2004 at 11192
[19] Seckel, Allan, May 2007. *Earlier Solutions, Faster Justice: The Future of Administrative Justice in British Columbia*, p.12.
[20] supra, footnote 3, p. 13.
[21] ibid, p.12.

Can entitlement disputes be negotiated?

This paper takes the view that an entitlement dispute can be resolved either by determining who is right (third party adjudication) *or* by reconciling the interests of the parties (through ADR processes). This conclusion is based on: dispute resolution theory; legislative authority and a tribunal's inherent control over its process in common law; extant government policy encouraging ADR; and, current tribunal practices.

Dispute Resolution Theory:

The theoretical basis for ADR is found in the precept that the parties can decide how to approach their dispute. He or she can adopt either an *integrative*[22] or a *distributive*[23] dispute resolution strategy, choosing an interest-based, problem-solving approach, or a rights-based, adversarial approach. In the same manner, a tribunal tasked with the administration of disputes can choose between these alternatives, or combine them into a comprehensive dispute resolution system, as a matter of policy (assuming legislative authority for ADR). The 'combined' option is in keeping with the notion of proportionate dispute resolution, which assumes an array of dispute resolution options that the tribunal, or the parties, can choose between, depending on the circumstances.

Many practical factors will influence a decision to pursue an integrative or distributive outcome, including among others, the nature of the tribunal, scope of the dispute, type of disputants, and context. All of these matters are important and need to taken into account, but conceptually, it is a matter of perspective. Gordon Sloan, a leading ADR practitioner and educator, puts it this way:

> Some say the nature and scope of the problem defines and dictates which way to go. Others argue that it is up to the parties to decide which approach

[22] An integrative approach focuses on common interests and opportunities for joint gain, looking to solve the problem An integrative approach invokes 'interest-based' dispute resolution processes aimed at reconciling the needs, desires, concerns, fears (the interests) that underlie the positions taken by the disputants. Interest-based strategies range from informal problem-solving to structured negotiation and mediation. See: Sloan, Gordon and Chicanot, Jamie, 2003. *The Practice of Negotiation: Exploring Attitude, Process and Skills* (ADR Education, Victoria, BC), p.21.

[23] A distributive approach assumes that a dispute is solvable only through finite division and allocation – giving up and giving in (compromise) to meet objectives. It invites 'rights-based' resolution processes designed to determine who is right through adversarial negotiation or by deferring to a third party to decide (arbitration or litigation). See: ibid, p. 21.

to take based on the circumstances – the implication being that "integrative potential is in the eye of the negotiator.[24]

Generally, focusing on interests rather than rights (or power) tends to produce higher satisfaction with the outcome among all parties,[25] better working relationships, and less recurrence of disputes.[26] It also generally results in fewer costs in time and other resources consumed, and in opportunities lost.[27] Given the prospective benefits, all tribunals should explore the integrative potential of disputes before referring a case to adjudication.

Notwithstanding the well-established, conceptual basis for tribunal ADR and the inherent benefits, some argue that certain types of disputes are not amenable to ADR because they are fundamentally distributive in nature, so much so that the parties should not be allowed to explore the potential for an interest-based outcome. For example, it is sometimes argued that in an entitlement dispute, where a claimant is either entitled to a benefit or not, there is no room for an integrative solution and the dispute must be adjudicated.

This argument is based on the distributive premise that the 'problem' defines the approach to resolution. In this view, a claimant is either entitled or not, and the only way to make that determination is in a rights-based hearing. This argument has some intuitive appeal, assuming the dispute is truly one-dimensional, the facts are clear and the statute is capable of unequivocal interpretation. However, in reality, entitlement disputes are rarely straightforward. Often, there are numerous issues, complicated and clouded by a host of factors.

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[24] ibid, footnote 24, p.21.

[25] While research generally supports the conclusion that ADR results in higher levels of satisfaction, some suggest that ethnic, gender and cultural factors may have a bearing on satisfaction (see: LaFree, Gary and Rack, Christine (1996) 'The Effects of Participants Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases' 30 Law and Society Review 767: at 788-790).

[26] Supra, footnote 3, p. 26. NADRAC summarizes the mediation research generally as follows: "The research literature on mediation suggests that rates of agreements seem to be consistent across diverse forms of mediation and service types (about 50-85%), and that there is high client satisfaction rate with mediation. Mediation appears to work best where there are multiple (rather than single) issues. Outcomes are at least as positive for mandated as for voluntary referrals. There is low awareness of ADR, and low uptake of voluntary ADR. The long term impacts, substantive fairness and overall cost effectiveness of mediation are unclear." (National Alternative Dispute Resolution Advisory Council (NADRAC): para. 27)

[27] Ury, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, Jossey-Bass, San Francisco, 1988.

Bryden and Black seem to take the view that the problem dictates the approach, concluding that entitlement tribunals are "poor candidates for the use of mediation, at least in situations in which the agency is faced with a binary choice of concluding that the claimant is either entitled to the benefit being claimed or not."[28] The basis for this conclusion is that entitlement disputes do not lend themselves to compromise solutions. The conclusion seems to presume a rights-based negotiation process – an adversarial contest of wills involving position-taking and a series of reluctant concessions that may or may not result in agreement.

An integrative, interest-based approach looks at things differently by "framing the dispute not in terms of legal rights but rather in terms of the parties' underlying concerns, goals, or needs."[29] Negotiation is perceived as a problem to be solved rather than a battle to be won. An interest-based approach does not assume that rights must be compromised or abandoned but rather that the parties' interests can be accommodated in the context of their respective rights. In a tribunal context, the goal might be framed as "an agreement feasible under the law and agreeable among the parties".[30]

For example, a dispute over eligibility for a driver's licence could be dealt with in a distributive terms, resulting in a strict determination that, say, an applicant with a marginal vision-impairment is not entitled to a license. However, an integrative solution might accommodate the government's interest in maintaining public safety with the applicant's need to drive to work, by allowing a conditional license, based on the facts of the case; for example requiring that glasses be worn, or restricting driving to daylight hours. This approach could also accommodate government's need for consistency in the application of the statute, through policy or perhaps in an amendment to a regulation addressing the circumstances.

Bryden and Black qualify their conclusion regarding the mediation of entitlement disputes by acknowledging that mediation could be appropriate to determine eligibility for a statutory benefit or entitlement if:

- The benefits scheme contains room for intermediate levels of claimant success that can form the basis for a mediated solution

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[28] supra, footnote 6, p. 12-14.
[29] supra, footnote 10, p. 12.
[30] Law, David K, 1998. *ADR in Worker's Compensation* (RCWCBC) p. 16.

- The tribunal itself accepts the legitimacy of compromise solutions as a way of exercising its statutory mandate.[31]

These conditions invite an exploration of the integrative potential of the dispute.

Of course, ADR is not limited to mediation. Bryden and Black agree that other ADR options (like neutral evaluation) could play a useful role in entitlement cases, even if mediation is not seen as suitable in a particular case.

Just as a claimant's entitlement to a benefit can be adjudicated in a hearing, with a third party (the tribunal) reconciling general principles or standards (statutes and regulations) with the facts of the case, it is conceivable that willing parties could do the same through an ADR process, seeking to accommodate their respective interests in an mutually acceptable solution that satisfies statutory standards.

The argument that entitlement disputes must be adjudicated presumes that there are no circumstances in which the parties might resolve the matter themselves, with or without assistance. But, in reality, the parties to a dispute often settle between themselves or on the 'court-house' steps, confirming that an adjudicative hearing is not the only way to resolve entitlement disputes.

Dispute resolution and negotiation theory does not say that all entitlement disputes should be 'negotiated'. Rather, it suggests that the integrative potential of each dispute should be explored and a clear choice made as to which way to go, drawing on the range of ADR options to ensure that the resolution process is responsive, accessible and efficient.

Authority for Dispute Resolution

All of the entitlement tribunals in the study sample have authority to conduct dispute resolution processes, either directly under section 28 of the Administrative Tribunal Act (ATA), or indirectly under section 11 of the ATA or a tribunal's inherent control over its process in common law, supporting the view that BC's entitlement tribunals can conduct dispute resolution processes (See discussion on page 7).

[31] supra, footnote 8, p 13.

Government Policy

As described on page 10, the Ministry of Attorney General's policy encouraging ADR appears to embrace all administrative tribunals, including entitlement tribunals.

Dispute Resolution Practice

The BC Experience

Current practice in five of BC's seven entitlement tribunals illustrates how entitlement disputes can be resolved through ADR processes, including mediation.

The 2006 survey of tribunals in the study sample confirms that BC's entitlement tribunals employ a mix of non-adjudicative dispute resolution processes in their case management and dispute resolution systems. The survey results also indicate that ADR is used on an occasional and ad hoc basis in many tribunals, often to facilitate the management of cases towards adjudication, rather than to resolve substantive issues. For example, it appears that a pre-hearing conference is regularly used to narrow the scope of issues that go to hearing and less often as an opportunity for interest-based negotiation aimed at resolving the matter. So, while current practice suggests that entitlement disputes are being resolved through a variety of ADR processes, it also reveals that ADR is not highly sophisticated or well integrated in the dispute resolution systems of all entitlement tribunals.

On the other hand, indications are that ADR is integral to early dispute resolution efforts in many government agencies, prior to a formal determination that may be appealed to an administrative tribunal. For example, the Director of Employment Standards has authority to investigate complaints and seek settlement through mediation prior to making a determination. The steps in the complaint resolution process include: encouraging the parties to resolve the dispute without government intervention; attempting settlement through ADR; and, finally, if necessary, a determination (which can be appealed to the EST).[32] Although outside of the appeal

[32] Section 78(1) of the ETA 78 provides that the Director of Employment Standards may … assist in settling a complaint or a matter investigated under section 76. In practice, this means where the director has accepted a complaint, in accordance with s.76 of the Act, the matter will then be reviewed to decide if the matter should be mediated, adjudicated or investigated. When appropriate, the director will endeavour to assist the parties to settle any disputes directly between themselves (see ESB Interpretation Manual).

process, this and other examples[33] support the notion that entitlement issues can be negotiated.

Current ADR practice in BC's entitlement tribunals may be summarized as follows:

Community Care and Assisted Living Board:

The CCALB uses early screening, pre-hearing conferences and mediation during the course of case management to facilitate the settlement of issues in dispute without an adjudicative hearing.

Employment Standards Tribunal:

The EST uses early screening, settlement meetings and pre-hearing conferences to facilitate the settlement of issues in dispute without an adjudicative hearing. Rule 27 of the Tribunal's Rules of Procedure provides that:

> At any time during an appeal or reconsideration, the Tribunal may conduct a confidential and without prejudice settlement meeting to resolve one or more issues in dispute. The Tribunal may decide to conduct a settlement meeting on its own or when a party requests it.[34]

Demand for dispute resolution at the EST has declined since 2002[35] when the Employment Standards Branch revised its operating model to include mediation at the front end of its processes. If it appears the dispute can be resolved through mediation, a mediation session will be arranged, to be held in person or by teleconference

Hospital Appeal Board:

The HAB uses early pre-hearing conferences and settlement meetings to facilitate the settlement of issues in dispute without an adjudicative hearing. The HAB screens all cases for settlement opportunities. In addition, a dispute resolution process may be initiated with the consent of all parties.

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[33] The Office of the Registrar of Assisted Living also offers a complaint resolution process to facilitate early settlement. For example, the Registrar will attempt mediation prior to making a determination regarding a violation of health and safety standards at an assisted living facility.

[34] EST Rules of Procedure, Rule 27.

[35] 7.46% (58 files) of the files closed by the EST in 2001/2002 (158 files) were settled (EST Annual Report 2001/2002 (http://www.bcest.bc.ca/statistics/ar-fy02.pdf)). No cases went through a dispute resolution process at the EST in fiscal year 2004/05.

Mental Health Review Board:
The MHRB does not use dispute resolution processes, listing the following barriers to utilization of dispute resolution processes: limited demand, procedural barriers, no legislative authority, statutory times constraints, budget limitations, resource limitations and incompatibility with statutory mandate.

Passenger Transportation Board:
The PTB uses pre-hearing conferences for administrative purposes to narrow the scope of issues before going to hearing (i.e., to establish what a submitter and applicant are not in disagreement about), listing 'incompatibility with statutory mandate' as a barrier to increased utilization of dispute resolution processes.

BC Utilities Commission:
Since the inception of the Commission's Alternative Dispute Resolution process in 1994, many utility applications have been resolved using this alternative method of reviewing utility filings. The Commission continues to explore different methods of regulation that offer alternatives, or are complementary to its basic hearing structure. While not all applications made to the Commission are suited to the Alternative Dispute Resolution/Negotiated Settlement Process, a pre-hearing negotiation may be used to reach agreement on issues that traditionally would be examined at a public hearing.

Workers' Compensation Appeal Tribunal:
The WCAT uses settlement meetings, pre-hearing conferences and mediation to seek a consensual resolution to a dispute, between or among the parties to an appeal. Pre-hearing conferences are used most frequently to settle issues (i.e., to define and narrow the scope of issues to facilitate the hearing). Since December 2004, ADR has been limited to discriminatory action appeals (to settle the amount of an award after entitlement has been decided) and appeals from classification decisions.

Analysis of current ADR practice in the entitlement tribunals reveals that:

1. The pre-hearing conference appears to be the pre-dominant dispute resolution process used by the entitlement tribunals in the study group, followed by settlement meetings, early screening and mediation. The CCALB, EST and WCAT support mediation but, as noted above, the EST and WCAT rarely use it.

2. The dispute resolution processes in entitlement tribunals are voluntary, and usually initiated at the discretion of the chair/member, or on application by one or more of the parties, with the consent of the parties.
3. All five entitlement tribunals in the study sample using dispute resolution processes initiate case management by screening for settlement opportunities.
4. In some tribunals, pre-hearing conferences are convened for administrative purposes, and only incidentally to facilitate dispute resolution. For example, the PTB does not support dispute resolution processes, but convenes pre-hearing conferences to ensure that the parties are prepared for the hearing and, where possible, narrow the field of inquiry. While narrowing the scope of differences may reduce the number of issues at hearing (which could conceivably result in resolution without a hearing), settlement is not the primary objective.
5. Some of the entitlement tribunals in the study sample deal with relatively few, albeit complex, cases each year (e.g., CCALB (8), HAB (2), and BCUC (6)). For example, the Community Care and Assisted Living Board (CCALB) opened eight case files in 2005 and carried two over from previous years.
6. When asked to identify what may be preventing utilization or increased utilization of DR processes, four entitlement tribunals (CCALB, HAB, MHRB and WCAT) indicated that 'limited demand' (clients prefer hearings or are sceptical about settlement processes) is a barrier to increased utilization of dispute resolution processes. Three entitlement tribunals indicated that dispute resolution is incompatible with their mandate (MHRB, PTB, and WCAT). In addition to limited demand and incompatibility with mandate, the MHRB also cited procedural barriers, no legislative authority, statutory time constraints, and budget/resource limitations as barriers.
7. It is apparent that a number of government agencies are utilizing ADR prior to making a determination on entitlement and eligibility claims. This may have a bearing on the demand for ADR at the review and appeal level.

Entitlement Tribunals in Other Jurisdictions

A great deal has been written on the value and benefits of ADR in the administrative justice sector, but very little on determining the appropriateness of ADR in entitlement tribunals. While many administrative agencies in other jurisdictions support ADR, it is difficult at arms-length to differentiate entitlement tribunals from others, given the diversity among administrative agencies and the challenges associated with defining and classifying tribunals.

Time and budget constraints precluded exhaustive research, but indications are that courts and tribunals elsewhere face similar challenges in determining the appropriateness of ADR. The literature review revealed that there is no standard test for appropriateness; each tribunal must develop its own referral criteria and processes. With this in mind, the experience of individual tribunals elsewhere will be of limited benefit to individual tribunals in BC. However, the international research into court-annexed ADR programs reviewed in the next section of this paper is extremely helpful in identifying broad considerations to guide BC tribunals.

Should entitlement disputes be negotiated?

The general dispute resolution literature supports the view that, given the prospective benefits, entitlement disputes should be resolved through interested-based strategies where appropriate. This indication invites numerous questions turning on the meaning of 'appropriateness'; the central one being "when does it make sense to refer entitlement disputes to ADR?"

The Mack Report[36] posits that there is no standard objective test for determining the appropriateness of ADR. The process is subjective, context dependent, and dynamic. Depending on circumstances, the following factors may have a bearing on determining appropriateness:

1. the type of courts (or tribunals) and their processes
2. the nature and scope of the dispute
3. the disputants (and possibly legal counsel?)
4. the context
5. the ADR process
6. the meaning of "success" or effectiveness.[37]

Mack examines the premise that particular types of dispute can be regularly matched with a particular type of ADR process. Following an extensive literature review, she determines that no matter how the various elements are categorized, there are so many complex and dynamic qualities that go into the process of matching disputes to particular processes that searching for generally applicable criteria will not be useful. The study concludes that:

1. There is no single set of generally applicable, empirically validated, criteria to identify disputes that are suitable for ADR.
2. Each court (or tribunal) must develop its own referral process and appropriateness criteria according to its particular circumstances.[38]

However, the research reveals numerous generic considerations that may have a bearing on the appropriateness of ADR in a particular context.

Drawing on the Mack Report, this section outlines some of the key decision areas and lists general considerations that a tribunal may need to take into account when

[36] supra, footnote 3.
[37] supra, footnote 3, p. 55.
[38] supra, footnote 3, p. 8.

developing its own ADR processes and referral criteria. Although many of these considerations were identified in the context of court-annexed dispute resolution programs, the administrative justice system in BC reflects the same kind of diversity, making the considerations useful in the tribunal sector.

In order to determine when it makes sense to refer a dispute to an ADR process, the Mack Report suggests that a court (tribunal) must:

1. identify its dispute resolution goals, determine what success means, and decide how it can be measured;
2. address a range of process issues, including who will be making the referral (raising the prospect of party choice), when the referral decision is made, and who the potential ADR service providers are; and,
3. develop its own referral criteria and dispute resolution processes in light of its goals, process parameters, and other considerations, recognizing that ADR may not always be appropriate.[39]

Defining Goals

When designing a dispute resolution system, or making specific referral decisions (i.e., assessing appropriateness), tribunals need to ask:

- What goals does the ADR program seek to achieve?
- What measures are available to determine if the goals are met? What are the measures of success?

A tribunal dispute resolution program may have many goals, both complementary and competing. For example, goals might include:

- reducing delay, clear lists, reduce the backlog of court/tribunal
- assisting in management of cases (which implies a question about the objectives of case management)
- reducing cost (to parties; court; government; taxpayer)
- offering processes appropriate to the needs of the case/parties
- offering processes responsive to personal as well as business needs
- producing fair, equitable outcomes in all the circumstances
- achieving party satisfaction

[39] Supra, footnote 3, p. 15, citing Astor, Hillary, 2001. *Quality in Court Connected Mediation Programs: an Issues Paper* (Carlton: Australian Institute of Judicial Administration Incorporated).

- producing enduring agreements
- preserving ongoing relationships between the disputants
- protecting the interests of vulnerable third parties
- preserving and, if possible, increasing party respect for and confidence in the justice system
- encouraging parties to use alternative methods in the future
- encouraging parties to use ADR earlier, including pre-filing
- achieving moral education/transformation
- educating/encouraging/responding to needs of legal profession
- changing the legal culture[40]

Generally, a referral to ADR is appropriate when there are reasonable prospects for a successful outcome. In order to determine 'success', the outcomes must be measured against the ADR program's goals. For example, if a tribunal's goal is efficiency; its success might be measured in terms of speed of disposition, and cases that can be dealt with quickly would be appropriate for ADR. On the other hand, if the tribunal's goal is the achievement of social justice, different performance parameters would apply. Success might be measured in terms of decision transparency and other fairness criteria.

Other common indicators of success in the tribunal environment include: user satisfaction, rates of compliance, rates of settlement, nature of agreements, efficiency, or improvement in the post dispute climate.[41]

Process Issues

A variety of process issues will have a bearing on the appropriateness of ADR, and on the need for and nature of referral criteria.[42] Some of the key questions are:

1. Who will be making the referral decision?
2. When should the referral decision be made?
3. Who should the dispute be referred to?

[40] supra, footnote 3, p 15.
[41] supra, footnote 3, p 18.
[42] supra, footnote 3, p. 37.

The responses to these questions will affect the kind of criteria a tribunal might need as part of its ADR referral program.

Who will make the referral decision?

Criteria may be required to facilitate 'wise' referral decisions. The characteristics desired in the referral decision-maker might include: expertise, experience, understanding, training, good judgment, and commitment to ADR where appropriate.[43] Criteria may not be required if participation in ADR is mandatory or left to party choice.

A decision to refer a dispute to ADR could be made by the tribunal chair, a member, staff, the ADR provider, or the disputants (and/or their lawyers).

When should the referral decision be made?

Generally, the research implies that there is "no automatically right or wrong time for referral."[44] However, timing may be an important consideration depending on the tribunal's goals and the circumstances of the case. For example, a tribunal with client satisfaction and cost-effectiveness goals may make early referral a priority. On the other hand, where the goal is a high rate of settlement, later referral may be more effective because the parties have more information about the dispute and the alternatives. Other factors such as emotional readiness to settle or information needs may become criteria in a referral assessment. Timing is also significant in the sense that a dispute that is not amenable to one or another form of ADR at one stage may become more amenable at another time, or vice versa. This suggests the need for ongoing assessment of appropriateness.[45]

Who should the dispute be referred to?

ADR services may be provided in-house by tribunal members or staff or externally through individuals or organizations appointed by the tribunal; chosen by the parties from a court-accredited list; or, selected independently by the parties. Some argue that in-house programs are required to ensure:

- courts (tribunals) meet their obligations to provide public justice and to maintain their legitimacy;
- service quality is maintained;

[43] supra, footnote 3, p. 37, citing others.
[44] supra, footnote 3, p. 5.
[45] supra, footnote 3, p. 40.

- only suitable referrals are accepted (avoiding the fear that external providers dependent on referrals for income may be less discerning);
- flexibility in scheduling, which may impact ADR success.[46]

On the other hand, external providers may offer more experience and greater skill levels, assuming they understand the types of orders the tribunal can make to implement any negotiated outcomes.

Developing Specific Referral Criteria

As noted above, there is no single set of generally applicable, empirically validated, criteria to identify disputes that are suitable for ADR. The diversity of administrative agencies, disputes and disputants; and, the context dependency of dispute resolution processes, makes the task unrealistic and impractical. In order to determine the appropriateness of referral to ADR, a tribunal must develop its own referral criteria and dispute resolution processes depending on its goals, process parameters, and numerous other considerations.

The Mack Report identifies a number of broad considerations that may have a bearing on the appropriateness of ADR in a particular context. These factors can be classified as:

1. *Principle-based criteria*:[47] matters of principle indicating features essential to minimally fair process or to allow the ADR process to function at all; and
2. *Indicators of success*:[48] a variety of considerations thought to have a bearing on success.

These considerations provide a basis for review and analysis to help entitlement tribunals (and administrative tribunals generally) determine when ADR is appropriate. They may assist tribunals in designing their overall dispute resolution system (whether or not ADR generally?) or when making specific referral decisions in individual cases (whether or not ADR in this particular case?). They are presented below, together with other potentially relevant criteria derived from elsewhere in the dispute resolution literature.

It should be noted that:

[46] supra, footnote 3, p. 43, citing others.
[47] supra, footnote 3, p. 57.
[48] supra, footnote 3, p. 64

1. Not all of the factors are significant for all ADR processes. Not all of the considerations present barriers to all tribunals.
2. The list of considerations is meant to guide not prescribe. It is not a 'checklist' for application in any particular setting. The list should not be construed as exhaustive or determinative of appropriateness in a particular tribunal setting.

Principle-Based Criteria

The dispute resolution literature reveals important matters of principle which are thought to affect whether a court or tribunal should refer a matter to ADR, as a matter of principle.[49] These issues include:

1. *Capacity*: The parties to an ADR process must have the capacity to participate safely and effectively on their own behalf. In some contexts, this consideration includes aspects such as fear of violence by a party or an unmanaged mental illness or intellectual disability without appropriate advocacy.
2. *Power Balance*: Is power relatively balanced, taking into account cultural factors and information disparity? Will the assistance of a neutral third party help redress any apparent imbalance? The existence and nature of any power imbalance, and the extent to which any power imbalance can be redressed, is an important consideration in a referral decision. ADR may be appropriate where power is relatively balanced (or, where with the assistance of a mediator it would balance power as well as in an adjudication hearing). Information disparity may make ADR inappropriate as a matter of principle because of the power imbalance it creates.
3. *Legal Framework*: Statutes, regulations, court/tribunal rules and case law provide authority for ADR, and may also prescribe referral criteria to which courts (tribunals) must adhere. Compliance with the law, legislation and policy is presumed.
4. *Relative Costs*: The relative costs of ADR and adjudication (for the parties and tribunal), compared to the benefits of each, is an important consideration in most referral decisions. ADR is widely seen as less costly and quicker than adjudication, but this should not be presumed, since cost and time savings are usually only achieved if ADR results in resolution.

[49] Supra, footnote 3, p. 57.

5. *Cultural Factors*: Cultural factors need to be considered in a referral decision, as these may have a bearing on power balance and the parties' overall capacity to participate effectively in an ADR process.
6. *Flexibility*: The need for or possibility of more flexible resolutions may be a significant consideration in an ADR referral decision, particularly where the tribunal's goals reflect a problem-solving orientation.
7. *Public Interest*: In making an ADR referral, tribunals must consider the need to balance the public interest with the rights and needs of the parties involved. ADR may be appropriate when the circumstances of the dispute do not raise a broader systemic problem (possibly, most of the time); or, when the dispute does not affect the rights of others who may not be direct parties to the dispute. If the public interest is at stake, formal adjudication may be more appropriate. Alternatively, the ADR process could be designed to include and protect the public interest (for example, by appointing counsel to represent the public interest).

The 'public interest' criterion has been codified for US administrative agencies. The Administrative Dispute Resolution Act (Sec. 572. General Authority, enacted in 1990 and reauthorized in 1996) specifies that an agency shall consider <u>not</u> using a dispute resolution proceeding[50] if:

> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;
> (3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
> (4) the matter significantly affects persons or organizations who are not parties to the proceeding;
> (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and
> (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed

[50] Under the ADR Act, a "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate; "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds, or any combination thereof.

circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

These principle-based criteria, either individually or in combination, are seen as generally indicative of when ADR is not appropriate. For example, in British Columbia, the Dispute Resolution Office (DRO) uses largely principle-based criteria as the basis for advising that some disputes are best resolved by adjudication. In *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems*, the DRO advises that the following factors may indicate the need for an adjudicated decision:

- The dispute involves a decision over which a statutory decision-maker had no discretion. In some cases, in the presence of certain factors, a statutory decision maker is required to make a certain decision. On an appeal of that decision, mediation, for example, is pointless since there is no negotiable issue.
- A legal precedent is needed to govern similar cases in the future. However, many tribunals are not bound by precedent and so this factor may not apply.
- An issue of law, public policy or interpretation needs to be clarified on the record. The tribunal may desire an elaboration of a particular issue of law or policy and, in some cases, a hearing may be seen as the best way to accomplish that.
- Public access or participation in the decision or resolution is desirable and cannot be accomplished in the non-adjudicative process. It should be noted, however, the collaborative dispute resolution has been used very successfully in many multi-stakeholder processes involving broad stakeholder participation.
- People who are not parties to the dispute might be prejudiced by the outcome. One of the tenets of collaborative decision making is that the interests of those affected by the outcome should be represented at the table. If that is not possible, a hearing may be required.
- The constitutional validity of an act or law is challenged. Obviously, a tribunal is not going to submit questions of constitutional validity to a collaborative decision making process. However, getting parties around a table discussing their interests in the substance of the dispute can sometimes forestall constitutional or other challenges that may be being used in a tactical way.

- The case is genuinely frivolous or opportunistic—tribunals will not want to waste resources on attempting to settle with parties bringing truly frivolous or vexatious cases, particularly if the hearing process allows for some type of summary determination and dismissal.[51]

While generally indicative of inappropriateness, these principle-based criteria are not necessarily determinative. The circumstances of each case need to be considered in light many other factors (like the characteristics of the parties and the context), before deciding that a dispute must be adjudicated. For example, it might be argued that the 'public interest' is at stake in every instance of sexual harassment in the workplace, requiring a broad systemic examination of each case in a formal adjudicative hearing to help achieve social justice goals. Alternatively, where a hearing means a lengthy delay and the case is not distinguishable from others; and, 'earlier resolution, faster justice' is important to the parties and the tribunal, the efficiency goal may be determinative, resulting in a referral to ADR.

Indicators of Success

The following criteria are generally thought to be indicators of ADR success. Some of the considerations are supported by 'reasonably consistent' empirical research. The others are believed to be important but the relevant empirical research is seen as 'inconclusive or contradictory'.

Empirically based referral criteria:[52]

The Mack Report indicates that there is some reasonably consistent research which suggests that the following factors have a bearing on ADR success:

1. *Authority to Settle*: Will the decision-maker be at the table? The participation of a party or representative with authority to settle or to be bound by any outcome is seen as essential to the success of ADR in a wide variety of settings.
2. *Value Conflicts*: Can fundamental values be sufficiently reconciled to permit a negotiated outcome? Is agreement possible notwithstanding value differences? Where fundamental, non-negotiable values are in conflict, the relative cost of reaching agreement compared to the prospective benefits may limit the likelihood

[51] supra, footnote 10, p. 15.

[52] supra, footnote 3, p. 64.

of success. Adjudication may result in quicker disposition of the dispute but seldom will it resolve the underlying value conflict.

3. *Intensity of conflict*: Will the relationship between the parties permit the threshold level communication necessary to participate effectively in an ADR process? In some contexts, 'contentiousness' may have a significant bearing on ADR success, particularly where fundamental values or matters of principle are in dispute, as it will impact capacity to participate effectively. In other contexts, it may not be a factor. Generally, where the parties and their interests are so opposed that resolution appears unlikely (e.g., intense value conflicts), ADR is less likely to succeed. Where one or more parties are so entrenched in their positions that mediation is likely to lead to more, not less, frustration, ADR may not be effective. Dispute assessment involving all of the parties may help make this determination.
4. *Legal representation of the parties*: Will the parties be represented by legal counsel? Should they be? Legal representation may have a bearing on the prospects for success, depending on the attitudes, knowledge and skill of the lawyer. Where party capacity is an issue; fundamental values are at stake; or, the intensity of the conflict is high, representation may be an important criterion of success.
5. *Practitioner skill*: Can the participants be assured that ADR processes will be conducted by qualified practitioners? Some research suggests that practitioner skill and behaviour may have a more significant impact on success in court-connected ADR processes than any of the frequently identified criteria relating to party or case characteristics.

Referral criteria where empirical research is inconclusive or contradictory:[53]
These criteria are thought to be important but empirical research to date has not confirmed that they are consistent indicators of success:

6. *Type of case*: Generally, it appears that the type of case does not consistently correlate with the likelihood of success. There has been little research comparing success across case types, and what has occurred is inconclusive. Currently, there is insufficient evidence to suggest that certain types of cases are more amenable to ADR than others. The literature search did not reveal any empirical research involving statutory rights and entitlement cases.

[53] supra, footnote 3, p. 61.

7. *Disputes of fact*: Some commentators argue that 'factual complexity' may impair the prospects for successful ADR. Others maintain that this is not a significant factor in whether a case settles or whether an outcome is regarded as satisfactory. It may be a consideration in certain circumstances and could have a bearing on the type of ADR process utilized (e.g., an authoritative fact finding process rather than mediation).
8. *Amount in issue*: The research is inconclusive on this factor, with some studies finding a correlation and others finding no relationship.
9. *Multiple/complex issues*: The impact of multiple or complex issues on ADR success is unclear, although some suggest it is a reason to opt out of ADR.
10. *Multiple parties*: The research is inconclusive, although some studies indicate that multi-party disputes in the environmental context are amenable to resolution through ADR.
11. *Social Characteristics*: Generally, the literature suggests that demographic factors (sex, age, education, economic status, etc.) are not significant considerations in predicting the success of ADR. Some major research looking at community mediation in New Mexico found that some ethnic, gender and cultural factors had an impact on outcomes for ADR and litigation, underscoring the need to consider social and cultural context in dispute resolution system design.[54]

Organizational, Administrative and Other Considerations

In addition to the substantive and procedural issues discussed in the preceding sections, a number of environmental factors may have a bearing on the appropriateness of ADR in the tribunal context. These organizational and administrative issues present potential barriers to change, and so have a bearing on dispute resolution system design, if not individual referral decisions. For example, integrating ADR into an entitlement tribunal's dispute resolution program may be inappropriate if the agency lacks the resources to support the program.

Resource Constraints:

Limited time, budget, or expertise to design, implement and support a dispute resolution program are obvious barriers to change, which may influence decisions

[54] supra, footnote 27.

regarding the ‘appropriateness’ of ADR on either a systemic or individual case basis. Clearly, an ADR program must be sufficiently resourced.

Organizational Culture:

An individual or organization with an integrative problem-solving perspective will likely be more open to interest-based dispute resolute strategies. An organization with distributive outlook will be inclined towards rights-based strategies. This is a critical component of dispute resolution system design. ADR has to fit the organization as well as the dispute and the disputants. Cathy Costantino describes it this way:

> Organizations are made of people, culture, technology, and mission, and it is important to ensure that ADR design is congruent with all of these. … An organization that has a ‘warrior’ culture – a preference for adversarial methods of resolution – may be more likely to accept and use imposed [rights-based] methods of ADR (binding arbitration) than to relinquish disputes to facilitated [interest-based] methods (mediation). The same may be true of organizations whose mission is to enforce some regulatory scheme or ensure compliance with a particular set of standards [like entitlement tribunals].[55]

Costantino goes on to explain that “ADR methods that are congruent with the organization’s characteristics are more likely to be identifiable to disputants and be used by them recurrently.”[56]

A contrary organizational culture presents potential barriers to increased utilization, which may appear as inertia, or a lack of leadership or commitment. Qualifying or dismissive statements may be a proxy for unspoken resistance grounded in fear or suspicion. The BC Dispute Resolution Office advises that identifying the nature and sources of resistance makes it easier to address:[57]

Resistance can flow from …	May sound like …
Fear of the unknown	“It will be worse than what we already have.”
Investment in status quo / fear of loss of power	“That would never work with our disputes.”
Inertia	“We already do that.”
Reform fatigue/bunker mentality	“Here we go again. We tried that, it doesn’t work.”
Organizational culture	“We cannot settle a dispute without discovery.”
Personal options about dispute resolution	“Mediation is just a fad.”

[55] Costantino, Cathy and Merchant, Christina, 1996. *Designing Conflict Management Systems* (Jossey-Bass, San Francisco), p. 121
[56] ibid, p. 122
[57] supra, footnote 10, p. 8.

Limited Case Volume:

Case volume may have a bearing on a tribunal's perception of the need to expand or enhance dispute resolution processes. For example, the Hospital Appeal Board (HAB) opened just two case files in 2005, and the Community Care and Assisted Living Board (CCALB) dealt with a total of 10. At these volumes, the benefits of dispute resolution processes (e.g., time savings and cost effectiveness) may not outweigh the cost of integrating the processes into the case management system. Some tribunals may be just too small. On the other hand, it might be argued that with such low volume, every case should be dealt with in a non-adjudicative process. Of course, other considerations need to be taken into account, like in the case of the MHRB where tight statutory time constraints for resolution likely make ADR less appropriate. Should a tribunal that processes only a few cases annually be encouraged to enhance or expand their dispute resolution processes?

Limited Demand for ADR:

ADR is widely promoted as the dispute resolution method of choice, providing an opportunity for cheaper, faster, more durable and better outcomes. For these reasons, it is assumed that ADR should appeal to most, if not all, disputants.

However, in the 2005 survey of tribunals, five of the seven entitlement tribunals (CCALB, HAB, MHRB, and WCAT) identified 'limited demand' (clients prefer hearings or are sceptical about settlement processes) as a barrier to increased utilization. Scepticism and reluctance on the part of the clients may be indicative of misunderstanding of ADR or lack of awareness, which in turn suggests a failure in program design. A key element of ADR design architecture is to ensure that the disputants have the necessary knowledge and skill to choose and use ADR.[58]

Alternatively, reluctance to participate in ADR may emanate from a disputant's expectation for adjudication, or a genuine desire for a 'day in court' to be proven right.

[58] supra, footnote 56, p. 121.

Optimizing Dispute Resolution in Entitlement Tribunals

There is a widely-held perception among B.C.'s administrative tribunals that they are doing enough ADR.[59] On the other hand, there is a growing expectation within government that the tribunals should be doing more.[60]

A key strategy in the Attorney General's administrative justice reform plan is to encourage early dispute resolution through non-adjudicative problem-solving and mediation procedures – utilizing adjudication only where no other option makes sense.[61] The anticipated vehicle for delivery of early resolution is ADR. The presumption is that increased utilization of ADR will create a more responsive, accessible, and efficient administrative justice system. The challenge lies in determining "how much ADR is enough?" and "who should decide?"

Rather than debate the appropriateness of ADR in entitlement cases, the government and the entitlement tribunals should work together to optimize tribunal dispute resolution programs, taking into account the tribunal's organizational culture, people, technology and mission; and, the context dependency of ADR. This approach acknowledges that entitlement tribunals, and administrative tribunals generally, are better positioned than the legislature to determine the appropriateness of ADR in any given case. However, it also assumes that the tribunals (and their responsible ministries) are willing to take the steps and be provided with the resources necessary to enhance their dispute resolution systems, offering a mix of appropriate non-adjudicative and adjudicative processes, in keeping with overarching MAG policy.

With this in mind, the Ministry of Attorney General should consider implementing the dispute resolution component of its administrative justice reform strategy

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[59] supra, footnote 5.

[60] supra, footnote 20. On second reading of the Administrative Tribunals Act in May 2004, the Attorney General said that "The move to encourage alternative dispute resolution is an important part of rethinking the justice system, and administrative tribunals have an opportunity to show leadership in this regard." (Hansard, May 18, 2004 at 11192). In May 2007, the Deputy Attorney General initiated a broad initiative aimed at reforming the administrative justice sector, indicating that "tribunals will need to re-examine their own processes and practises, to ensure that they are not simply a scaled down version of, but in fact are out front of the courts, in terms of developing and implementing opportunities for early solving of problems and resolution of disputes."

[61] supra, footnote 21, p.12.

("encouraging early resolution through problem-solving and mediation") by working with tribunals individually – using a structured organizational assessment and system design approach to create responsive, accessible, and efficient dispute resolution system -- one tribunal at a time.

A system design initiative would enable each tribunal to analyze and enhance its dispute resolution program, including a range of appropriate ADR options in keeping with the tribunal's unique mandate and characteristics. Specifically, it would allow a tribunal to:

1. identify its dispute resolution goals, determine what success means, and decide how it can be measured;
2. address a range of process issues, including who will be making the referral (raising the prospect of party choice), when the referral decision is made, and who the potential ADR service providers are; and,
3. develop its own referral criteria and dispute resolution processes in light of its goals, process parameters, and other considerations.

Organizational assessment and system design would also provide a mechanism for government and tribunals to identify and deal with the organizational, administrative and other potential barriers identified on page 30.

An organizational framework for dispute system design is included as Appendix 2 to this paper.

Conclusions

The persistent perception that administrative disputes involving claimants' entitlements to statutory benefits cannot be negotiated and should not be referred to alternative dispute resolution (ADR) processes is not supported in dispute resolution theory or tribunal practice. Negotiation theory, statutory authority, government policy, and tribunal practice indicate that entitlement disputes can be adjudicated *or* resolved through ADR processes.

In summary:

1. Dispute resolution theory supports the view that entitlement disputes can be adjudicated *or* negotiated -- ADR in entitlement tribunals is a policy choice.
2. The relevant legislation and common law governing entitlement tribunals provides authority for ADR and government policy supports increased utilization.
3. Most entitlement tribunals support some form of ADR (commonly to identify issues, discern facts quickly and efficiently, remove procedural barriers, and expedite the process from intake to completion) and report that their dispute resolution programs are generally successful.[62]
4. Given the prospective benefits, entitlement disputes should be negotiated as a matter of policy where appropriate. While ADR is not always appropriate, the integrative potential of entitlement disputes should be explored before referring a case to adjudication.
5. A primary barrier to utilization or increased utilization of ADR in entitlement tribunals is determining when ADR is appropriate.
6. There is no single test for appropriateness. However there are broad, principle-based criteria and indicators of success to help guide a determination. In addition, organizational and administrative issues may impact the appropriateness of ADR.
7. Tribunals must determine their own ADR referral criteria and processes.
8. A dispute system design initiative could provide a vehicle for government and tribunals to work together to optimize tribunal dispute resolution programs.

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[62] Darling, Craig 2006. *BC Tribunal Dispute Resolution Needs Assessment Project: Initial Research and Preliminary Assessment* (BC Ministry of Attorney General, Victoria, BC).

Recommendations

The government and the entitlement tribunals should work together to optimize tribunal dispute resolution programs, taking into account the tribunal's organizational culture, people, technology and mission; and, the context dependency of ADR processes.

Generally, it is recommended that:

1. The Ministry of Attorney General consider implementing the dispute resolution component of its administrative justice reform strategy (encouraging early resolution through problem-solving and mediation) by working with tribunals (and their ministries) individually – using a structured organizational assessment and system design approach to create a responsive, accessible, and efficient dispute resolution system -- one tribunal at a time. A system design initiative would enable each tribunal to analyze and enhance its dispute resolution program, including a range of appropriate ADR options in keeping with the tribunal's unique mandate and characteristics.

Specifically, the Ministry of Attorney General, in conjunction with the responsible ministries, may wish to consider:

2. Providing section 28 statutory authority for dispute resolution processes to those tribunals without such authority. Although tribunals may be able to support ADR under section 11 of the ATA or the common law, explicit authority will avoid any debate over jurisdiction; lend legitimacy to dispute resolution processes; and, encourage consistent application of ADR processes.
3. Encouraging tribunals to make early dispute assessment (screening and streaming) a mandatory part of case in-take. Structured dispute assessment requires the parties to explore the integrative potential of their dispute before choosing adjudication. This would heighten awareness of resolution options and permit a joint referral decision, either to problem-solving ADR or an adversarial hearing.

Appendices

1. Entitlement Tribunal Dispute Resolution Processes (Summary Descriptions)

2. Organizational Framework for Dispute Resolution System Design

Appendix 1

Summary Descriptions

Entitlement Tribunal Dispute Resolution Processes

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1. **Community Care and Assisted Living Appeal Board 2**
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Notes

1. The information in this appendix was compiled from:

   - BC administrative tribunal websites, enabling legislation and other public sources.
   - a written survey of administrative tribunals conducted in February 2006.

   The information was assembled to provide an overview of the processes used by BC tribunals to facilitate the settlement of disputes. The summaries are intended as an initial reference and a departure point for discussion on specific issues. They should not be viewed as a comprehensive review of tribunal processes.

2. Some tribunal websites provide detailed information on dispute resolution processes while others provide little or no information. Similarly, enabling legislation varies in its description of the dispute resolution processes available to particular tribunals.

3. Further research and direct contact with the tribunals is likely required to address specific issues and clarify the extent to which dispute resolution processes are integrated into tribunal case management systems. Follow-up on specific issues through telephone or face-to-face interviews is anticipated.

4. The summary includes information on 7 BC administrative tribunals characterized as entitlement tribunals.

5. Under each tribunal heading, the tribunal's mandate, enabling legislation, case management process and dispute resolution process are described. In some cases, relevant sections of legislation, policy statements or procedural rules are appended.

6. Also included under each tribunal heading is a summary of the tribunal's responses to survey questions regarding criteria for evaluation, perception of client satisfaction, barriers to utilization, and self-assessment of dispute resolution processes.

7. For ease of reference in the digital version of this document, tribunal titles and references to enabling legislation are hyperlinked to the appropriate website or legislation (key CONTROL + 'click' to follow link). In some cases, key points for discussion are highlighted.

Community Care and Assisted Living Appeal Board

Mandate:
The Community Care Facility Appeal Board (CCALB) adjudicates disputes over the licensing of community care facilities, the registration of assisted living residences and the licensing of early childhood educators.

Enabling Legislation:
Community Care and Assisted Living Act, section 29; Sections 1 to 20, 22, 24 to 42, 44, 47 (1) (c) and (2), 48 to 55, 57, 58, 60 and 61 of the *Administrative Tribunals Act* apply to the board.

Case Management:
The CCALB hears appeals on decisions concerning the licensing of community care facilities, the registration of assisted living residences, and the certification of early childhood educators.

The CCALB uses early screening, pre-hearing conferences and mediation during the course of case management to facilitate the settlement of issues in dispute without an adjudicative hearing.

The chair may appoint a member or staff of the tribunal or other person to conduct a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute (Section 28, *Administrative Tribunal Act*).

Dispute Resolution:
The CCALB screens all cases for settlement opportunities. A dispute resolution process may be initiated on application by any one or more parties, with the consent of all parties. Settlement discussions are confidential and without prejudice to the parties in a subsequent hearing.

Under Rule 13 of the CCALB rules of practice and procedure the Board may conduct an Appeal Management Conference. The Board member or delegate appointed to conduct the Appeal Management Conference may "mediate issues on appeal" (see Rules for Appeals under the *Community Care and Assisted Living Act*).

In 2005, eight CCALB cases went through a dispute resolution process and four were settled.

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The CCALB response indicates that:

1. The CCALB does not evaluate the effectiveness of its dispute resolution processes.
2. The CCALB believes that its clients are generally ‘satisfied’ with its dispute resolution processes.
3. The CCALB describes its dispute resolution processes as ‘adequate’ and that the only barrier to increased utilization is limited demand.
4. The CCALB is interested in learning about the dispute resolution processes used by other tribunals.

Employment Standards Tribunal

Mandate:
The Employment Standards Tribunal (EST) is an independent agency and the only body with the legal authority to hear and decide appeals of determinations made by the Director of Employment Standards. A determination is any decision made by the Director of Employment Standards under section 22(2), 66, 68(3), 69(6), 73, 76(2), 78(3), 79, 83(2), 85(1)(f), 100 or 119 of the Employment Standards Act.

Enabling Legislation:
Employment Standards Act, Part 12; Sections 1 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 40, 45, 46, 48, 49, 50 (2) to (4), 51 to 53, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the tribunal.

Case Management:
The EST hears appeals of determinations made by the Director of Employment Standards.

The EST uses early screening, settlement meetings and pre-hearing conferences to facilitate the settlement of issues in dispute without an adjudicative hearing.

The chair of the tribunal may appoint a member or staff of the tribunal or other person to conduct a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute (Section 28, Administrative Tribunal Act).

Dispute Resolution:
The EST screens all cases for settlement opportunities. In addition, Rule 27 of the EST Rules of Practice and Procedure provides that:

1. At any time during an appeal or reconsideration, the Tribunal may conduct a confidential and without prejudice settlement meeting to resolve one or more issues in dispute. The Tribunal may decide to conduct a settlement meeting on its own or when a party requests it.
2. The Tribunal may appoint a member or other person to conduct a settlement meeting.
3. If a member conducts a settlement meeting and the appeal or reconsideration is not settled, the member will not decide the merits of the appeal or reconsideration unless all parties consent.
4. Unless all parties consent, a person must not disclose or be compelled to disclose to any other person any documents produced or statements made during a settlement meeting.

In 2002, the Employment Standards Branch revised its operating model to include mandatory mediation at the front end of its processes. Therefore, the demand for dispute resolution at the EST has declined. No cases went through a dispute resolution process in fiscal year 2004/05.

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The EST response indicates that:

1. The EST evaluates the effectiveness of its dispute resolution processes on the basis of settlement rate and time savings.
2. The EST believes that its clients are generally 'very satisfied' with the tribunal's dispute resolution processes.
3. The EST describes its dispute resolution processes as 'more than adequate', noting that demand has declined since the Employment Standards Branch began requiring mediation at the front end of its processes.

Hospital Appeal Board

Mandate:
The Hospital Appeal Board (HAB) hears appeals filed by medical or dental practitioners regarding:

- a decision of a hospital's board of management that modifies, refuses, suspends, revokes or fails to renew a permit to practise medicine or dentistry in a hospital; or
- the failure or refusal of a hospital's board of management to consider and decide on an application for a permit.

Enabling Legislation:
Hospital Act , section 46. Sections 1 to 20, 25 to 35, 37 to 39, 42, 44, 47 to 56, 57, 58, 60 (a), (b) and (d) to (f) and 61 of the *Administrative Tribunals Act* apply to the Hospital Appeal Board.

Case Management:
The board meets to deal with appeals as they arise (see section 46, *Hospital Act* for general procedure).

The chair of the HAB may appoint a member or staff of the tribunal or other person to conduct a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute (Section 28, Administrative Tribunal Act).

The HAB may affirm, vary, reverse or substitute its own decision for that of a board of management. The decision of the Hospital Appeal Board is final and binding.

Dispute Resolution:
The HAB uses early pre-hearing conferences and settlement meetings to facilitate the settlement of issues in dispute without an adjudicative hearing.

The HAB screens all cases for settlement opportunities. In addition, a dispute resolution process may be initiated with the consent of all parties.

Settlement discussions are confidential and without prejudice to the parties in a subsequent hearing. Notes or records kept by a person appointed by the HAB to conduct a 'dispute resolution process" in relation to a proceeding are inadmissible in HAB proceedings (s. 46.1(5), Hospital Act).

The HAB opened 2 case files in 2005. Both went through a dispute resolution process and one was settled.

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The HAB response indicates that:

1. The HAB does not evaluate its dispute resolution processes.
2. The HAB doesn't know the level of 'client satisfaction' with its dispute resolution processes.
3. The HAB describes its dispute resolution processes as 'adequate'.
4. The HAB lists 'limited demand' and 'low case volume' as barriers to increased utilization of dispute resolution processes.
5. The HAB advises that it is 'unlikely' that it would increase its utilization of dispute resolution processes if the barriers noted in item 4 were removed, noting that it uses a dispute resolution process where appropriate.

Mental Health Review Board

Mandate:
The Mental Health Review Board (MHRB) determines whether or not a psychiatric patient should remain involuntarily in the custody of the mental health facility or hospital.

Enabling Legislation: Mental Health Act , section 25.

Case Management:
Mental Health Review Panels are convened at the request of an involuntarily admitted patient or someone on his/her behalf.

Review panels are made up of an appointee of the health facility to which the patient whose case is under review is admitted; a person appointed by the patient; and one member, designated as chair, selected from a pool appointed by the Minister of Health.

The member appointed by the patient's health care facility must be a physician licensed to practice medicine in British Columbia; the member appointed by the patient may not be a member of the patient's family.

Review panels hear evidence from the facility and from the patient.
"Mental Health Review Panels adjudicate disputes between detained psychiatric patients and the physicians who are detaining and treating them involuntarily under the Mental Health Act. For those detained patients who decide to apply for a hearing, we must deploy three-member review panels (legal, medical and community members) to every part of the province within 14 and 28-day statutory time limits. A review panel decides promptly after a hearing whether the patient should continue to be detained, and has no other jurisdiction (for example, it cannot make conditional discharge orders). The Panels typically do no advance file reviews, evidence accumulates in the medical record right up to the minute the hearing starts, and most oral hearings are concluded wtihin 2 to 3 hours.

Many cases settle before hearing (about two thirds) with either the patient withdrawing their application (historically about half) or the psychiatrist either releasing the patient or changing their status to voluntary. I can't see how we could intervene early and effectively with ADR techniques such as pre-hearing conferences without expending as much effort as we do now for the actual hearings, if not more to meet even shorter time limits, and I don't know how welcome such an effort would be (facilities already feel pressed accomodating case presentations at hearings on top of their treament caseloads;and I expect the effect of ADR efforts on the therapeutic alliance between doctor and patient would be a sensitive matter). I don't know how we could ascertain whether a useful ADR program could be developed without very labour-intensive efforts, and even then, I'm not sure what it would look like or how it could be accomodated in the larger mental health system without fundamental changes in the way we have always operated so far."

Dispute Resolution:
The MHRB does not use dispute resolution processes.

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The MHRB response indicates that:

1. The MHRB lists the following barriers to utilization of dispute resolution processes: limited demand, procedural barriers, no legislative authority, statutory times constraints, budget limitations, resource limitations and incompatibility with statutory mandate.
2. The MHRB advises that it would 'possibly' utilize dispute resolution processes if the barriers noted in item 1 were removed.

Passenger Transportation Board

Mandate:
The Passenger Transportation Board (PTB) is a licensing board that makes decisions on applications for special authorizations to operate passenger directed vehicles and inter-city buses in British Columbia. The PTB also makes decisions on appeals of administrative penalties (including fines and licence suspensions) that have been imposed on an operator by the Registrar, Passenger Transportation.

Enabling Legislation:
Passenger Transportation Act, Part 3. The definitions of "appointing authority", "member", "privative clause", "tribunal" and "tribunal's enabling Act" in section 1 of the *Administrative Tribunals Act* and sections 2 to 10, 26, 30, 31, 41, 42, 44, 57, 58 and 61 of that Act apply to the board. Section 28 does not apply.

Case Management:
The Registrar of Passenger Transportation accepts applications to operate commercial passenger vehicles. Applications requiring special authorization are forwarded to the PTB for a decision, and if approved by the Board, a licence may be issued by the Registrar. The Registrar is also responsible for enforcement and compliance for the Passenger Transportation Act, including complaints.

Certain sanctions imposed by the Registrar may be appealed to the PTB within 30 days of the licence holder receiving notice of the sanction being imposed by the Registrar. In any case where a sanction imposed by the Registrar is subject to appeal to the Board, the Registrar is obligated to advise the person of the appeal option.

Dispute Resolution:
The PTB uses pre-hearing conferences to narrow the scope of issues before going to hearing (i.e., to establish what a submitter and applicant are not in disagreement about).

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The PTB response indicates that:

1. The PTB does not evaluate its dispute resolution processes (i.e., pre-hearing conferences).
2. The PTB believes that its clients are generally 'satisfied' with its dispute resolution processes.
3. The PTB describes its dispute resolution processes as 'adequate'.
4. The PTB lists 'incompatibility with statutory mandate' as a barrier to increased utilization of dispute resolution processes.

5. The PTB advises that it is ‘unlikely’ that it would increase its utilization of dispute resolution processes if the barrier noted in item 4 was removed, noting that its function is licensing.

Utilities Commission

Mandate:
The British Columbia Utilities Commission is an independent regulatory agency of the BC Government that operates under and administers the *Utilities Commission Act*. The Commission's primary responsibility is the regulation of British Columbia's natural gas and electricity utilities but it also regulates intra-provincial pipelines and universal compulsory automobile insurance.

Enabling Legislation:
Utilities Commission Act. Sections 1 to 3 and 5 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission. applies.

Case Management:
The Commission is responsible for ensuring that customers receive safe, reliable and non-discriminatory energy services at fair rates from the utilities it regulates, that shareholders of these utilities are afforded a reasonable opportunity to earn a fair return on their invested capital, and that the competitive interests of B.C. businesses are not frustrated. It approves the construction of new facilities planned by utilities and their issuance of securities. The Commission's function is quasi-judicial and it has the power to make legally binding rulings. Decisions and Orders of the Commission may be appealed to the Court of Appeal on questions of law or jurisdiction.

The Commission also reviews energy-related matters referred to it by Cabinet. These inquiries usually involve public hearings, followed by a report and recommendations to Cabinet. In addition, under Part 7 of the *Pipeline Act*, the Commission establishes tolls and conditions of service for intraprovincial oil pipelines. The Commission also has responsibilities under the UCA for electricity transmission facilities and energy supply contracts, matters that are likely to become more active as the reorganization of the energy industry proceeds.

The Commission considers major applications through public hearings. Such applications include revenue requirements, rate design, certificates of public convenience and necessity (for significant new facilities or additions by utilities), and major energy projects or reviews assigned by the Lieutenant Governor in Council. Hearings may also be initiated by the Commission in response to a complaint by a customer or an affected third party.

The Commission receives complaints from utility customers who are unable to resolve disputes with their respective utilities without assistance. The Commission is available to assist the public in the resolution of complaints with utilities in the following areas:

- Utility Practices / Procedures
- Customer Billings

- Service Disconnections
- Gas Mains / Powerline Extensions
- Third-Party Billings
- Easement / Right-of-Way Maintenance
- Meter Reading and Estimates

Prior to accepting a complaint, the Commission must be satisfied that the customer has made a serious attempt to settle the dispute with the utility. While many complaints are successfully resolved between the customer and the utility, the Commission is available to assist in the resolution of unresolved disputes.

If a customer is not satisfied with the Commission's handling of a complaint, he or she may contact the Ombudsman's Office to review the process used.

The Ombudsman has the authority to review the processes used by the Commission, including the process for resolving complaints. The Ombudsman may recommend reconsideration of a matter rather than order change.

Dispute Resolution:

Alternative Dispute Resolution/Negotiated Settlement Process
Since the inception of the Alternative Dispute Resolution process in 1994, many utility applications have been resolved using this alternative method of reviewing utility filings.

This process has led to a significant decrease in the number of oral public hearing days and related costs. Guidelines outlining the Negotiated Settlement Process were issued by the Commission in January 1996 and updated in October 2000.

The Commission continues to explore different methods of regulation that offer alternatives, or are complementary to its basic hearing structure. While not all applications made to the Commission are suited to the Alternative Dispute Resolution/Negotiated Settlement Process, a pre-hearing negotiation may be used to reach agreement on issues that traditionally would be examined at a public hearing. As a result, the settlement of certain issues can significantly reduce hearing time and costs.

See: Negotiated Settlement Process

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The BCUC response indicates that:

1. The BCUC evaluates its dispute resolution processes on the basis of time savings, cost effectiveness and client satisfaction. The effectiveness of each and every

Negotiated Settlement Process (NSP) is reviewed by Commission or the panel assigned to consider the application before a decision is rendered to ensure, among other things, that the NSP was conducted appropriately and that the proposed resolution is in the public interest.

2. The BCUC believes that its clients are generally ‘satisfied’ with its dispute resolution processes.
3. The BCUC describes its dispute resolution processes as ‘more than adequate’.

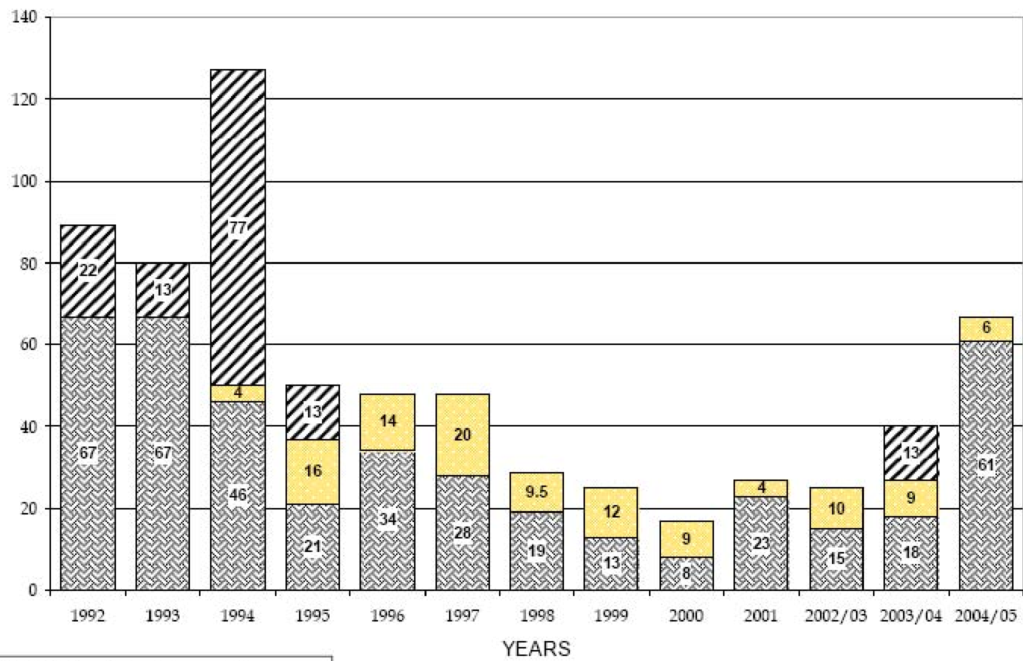
Reference:

Statistics: Hearing and Alternative Dispute Resolution Days (Fiscal 2004/05)

The Negotiated Settlement Process is part of the Commission’s efforts to improve the quality and efficiency of regulation.

Use of the Negotiated Settlement Process, which is also referred to as Alternative Dispute Resolution, requires considerable work before, during and after the negotiations. Revised "Negotiated Settlement Process: Policy, Procedures and Guidelines" were issued on January 23, 2001 (Letter No. L-3-01). Alternative Dispute Resolution, the use of formulas for setting ROEs, and multi-year performance based settlements have all contributed to the declining trend in the number of hearing days.

Matters referred to the Commission by the Lieutenant Governor in Council, such as the Kemano Completion Project and the Heritage Contract Inquiry, can have a dramatic affect on the number of hearing days; for example, in 1994 the Kemano Completion Project was reviewed over 77 hearing days and the Heritage Inquiry was reviewed over 13 days.



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2000
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2002/03
2003/04
2004/05
YEARS

LGIC Appointed Hearing Days
ADR Days (commenced in 1994)
Commission Hearing Days

Workers Compensation Appeal Tribunal

Mandate:
The Workers' Compensation Appeal Tribunal (WCAT) is the final level of appeal in the workers' compensation system of British Columbia. It is independent of the Workers' Compensation Board (WCB). The other component of the system is the internal WCB Review Division.

Enabling Legislation:
Workers' Compensation Amendment Act (No 2), 2002; Sections 1, 11, 13 to 15, 28 to 32, 35 (1) to (3), 37, 38, 42, 44, 48, 49, 52, 55 to 58, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the appeal tribunal.

Case Management:
The WCB Review Division provides the first level of review for most WCB decisions concerning compensation, vocational rehabilitation, assessments, and occupational safety and health. For some types of decisions, the Review Division decision is final.

WCAT hears appeals from many types of Review Division decisions. It also hears appeals directly from decisions of WCB officers concerning discriminatory action complaints and decisions of WCB officers where a party has specifically applied for reopening of a claim.

The chair of the WCAT may establish any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to the appeal tribunal, including employing voluntary alternative dispute resolution (ADR) processes [s. 234(2)(d)(iii)].

Dispute Resolution:
The WCAT uses settlement meetings, pre-hearing conferences and mediation to seek a consensual resolution to a dispute, between or among the parties to an appeal. Representatives from the Board may also be involved in the ADR process where appropriate.

Pre-hearing conferences are used most frequently to settle issues. Mediation is used rarely, generally in the area of discriminatory action appeals (where there are two parties) to settle the amount of an award but only after a WCAT panel has decided entitlement.

The WCAT screens all cases for settlement opportunities. A dispute resolution process may be initiated on application by any one or more parties or by the Chair/Member, with the consent of all parties.

Since December 3, 2004, alternative dispute resolution (ADR) has been limited to discriminatory action appeals under section 240(1) and appeals from classification decisions under section 37(2). It is unlikely that WCAT will utilize ADR to address

compensation entitlement issues (although pre-hearing conferences are sometimes used to settle issues).

If ADR is undertaken but does not result in a consensual resolution, WCAT will proceed to adjudicate the appeal. Unless the parties otherwise agree, evidence or records from an ADR process which does not produce a consensual resolution will be destroyed and will not be placed on file. The appeal will be assigned to a WCAT panel which did not have any involvement in the ADR process in the particular case.

Where a consensual resolution is achieved by the parties, a settlement agreement will be drafted by the parties' representatives, or the mediator may assist in preparing the written agreement after the parties have reached settlement.

The settlement agreement will be reviewed by a WCAT panel, to ensure it is not inconsistent with the WCA. The panel will dispose of the case through a final order, confirming that a consensual settlement was reached which is lawful under the Act.

Survey of Tribunal Dispute Resolution Capacity:
In February 2006, the Administrative Justice (AJO) and Dispute Resolution (DRO) Offices conducted a survey of tribunals in their dispute resolution needs assessment study sample. The survey explored the tribunals' perceptions of client satisfaction, barriers to utilization, and the adequacy of dispute resolution processes. The WCAT response indicates that:

1. The WCAT does not evaluate the effectiveness of its dispute resolution processes.
2. The WCAT believes that its clients are generally 'satisfied' with its dispute resolution processes.
3. The WCAT describes its dispute resolution processes as 'adequate', noting that: "We have not developed alternative dispute resolution processes at WCAT with respect to most appeals. It does not lend itself well to our subject area because we do not typically have inter-party disputes. Further, it is the Workers' Compensation Board that must implement our decisions. For alternative dispute resolution to be successful used to resolve cases, as opposed to just settling issues, the Workers' Compensation Board would need to agree to the process. This type of dispute resolution does not lend itself to questions of statutory entitlement."

Reference:

WCAT Manual of Rules of Practice and Procedure (MRPP)

6.00 ALTERNATIVE DISPUTE RESOLUTION

As of December 3, 2004, ADR at WCAT has been limited to discriminatory action appeals under section 240(1) and appeals from classification decisions under section 37(2). It is unlikely that WCAT will utilize ADR to address compensation entitlement issues.

The chair may establish any rules, forms, practices and procedures required for the efficient and cost effective conduct of appeals to the appeal tribunal, including employing voluntary ADR processes [s. 234(2)(d)(iii)].

A WCAT panel may recommend to the parties to the appeal that an alternate dispute resolution process be used to assist in the resolution of an appeal [s. 246(2)(g)]. The purpose of ADR is to seek a consensual resolution to a dispute, between or among the parties to an appeal. Representatives from the Board may also be involved in the ADR process where appropriate.

ADR is used by WCAT on a limited basis. When ADR will be appropriate will be determined by WCAT based on the particular circumstances of the issue under appeal, and the willingness of the parties of interest to attempt to achieve a consensual resolution. ADR may be requested by a party or recommended by a WCAT panel.

If ADR is undertaken but does not result in a consensual resolution WCAT will proceed to adjudicate the appeal. Unless the parties otherwise agree, evidence or records from an ADR process which does not produce a consensual resolution will be destroyed and will not be placed on file. The appeal will be assigned to a WCAT panel which did not have any involvement in the ADR process in the particular case.

Where a consensual resolution is achieved by the parties, a settlement agreement will be drafted by the parties' representatives, or the mediator may assist in preparing the written agreement after the parties have reached settlement.

The settlement agreement will be reviewed by a WCAT panel, to ensure it is not inconsistent with the WCA. The panel will dispose of the case through a final order, confirming that a consensual settlement was reached which is lawful under the Act. The terms of the settlement will be recorded on the Board file, but need not be contained in the WCAT decision to be published on the internet.

The final consensual settlement and the WCAT decision will both be placed on the Board file. Unless the parties otherwise agree, records concerning the process used to reach the agreement will be destroyed and will not be placed on file.

Where ADR is attempted but is unsuccessful the chair may, where necessary, extend the time for the making of a WCAT decision on the basis of the complexity of the proceedings in the appeal [s. 253(5)(a)].

Appendix 2

An Organizational Framework
for
Dispute System Design

An Organizational Framework for Dispute System Design

A dispute resolution system design initiative is often a response to a presenting problem in an organization's dispute resolution system. The problem may be characterized in terms of cost, time, lack of durability, dissatisfaction with outcome, effect on relationships or impact on organization mission but, in one way or another, the organization sees a problem that demands resolution. A system design approach requires the organization and its stakeholders to stand back from the presenting problem, assess the whole system, discuss the need for change, decide on improvements and implement the necessary changes together. This section describes the framework developed by Costantino and Merchant[1] for organizing and completing these tasks.

Recognizing that there is no universally correct way to design and improve a dispute resolution system, the design framework should not be viewed as prescriptive. Instead, it should be seen as a guide to help organizational leaders and system designers' plan and organize an approach tailored to meet specific projects.

Preparation

The first step in a dispute system design process is to ensure that the organization is ready to conduct an examination of its dispute resolution system and make an informed decision about the need for change. Preparation will likely include:

- gathering information
- identifying prospective participants
- organizing management and administrative support
- assembling a budget
- ensuring political commitment to the process (including necessary policy direction), and
- anticipating the need for third party assistance (internal expert vs. external consultant).

Objectives

[1] Costantino and Merchant, 1996. Designing Conflict Management Systems (Jossey Bass, San Francisco).

- To include organizational leaders and key stakeholders in defining the nature and scope of the dispute system design work.
- To establish an open, problem-solving approach to the system design work.

Rationale

To ensure "buy-in" and commitment, organizational leaders and key stakeholders must "own" the design process from the start. Shared ownership will ensure commitment to the process and increase the likelihood that changes will be implemented and actually used.

Steps

The preparation stage generally includes the following steps:

1. Engage critical stakeholders in generating information about how the organization is managing its disputes.
2. Provide an opportunity for the stakeholders to determine whether such information indicates the need for any change in the dispute resolution system.
3. Educate stakeholders about the critical ingredients for a successful design effort.
4. Reach agreement between organizational leaders and system designers on how the process of exploring potential changes in the dispute resolution system will unfold.
5. Determine how changes will be implemented.
6. Reach understanding on how an interest-based, shared decision-making approach to the design process will proceed (procedural rules to guide the design process, including who needs to be involved and how they will be involved).
7. Get commitment to proceed (or not).
8. Identify design team.

Assessment

Given a commitment to proceed, the next step is a joint assessment of the organization and its disputes. The process generally includes an overall look at the organization's mission and conflict culture, the nature and number of disputes, dispute resolution methods and results.

Objectives

- To focus the design process on the “big picture”, exploring what is happening in the dispute resolution system as a whole.
- To tailor the design process to the organization.

Rationale

The assessment will inform the design process about the organization’s mission (what does the organization do and why does it do it?), conflict culture (how the organization views disputes and how it makes decisions about disputes) and sources of organizational power. This allows for the development of a design that is congruent with and tailored to the specific organization and its stakeholders.

Steps

1. Identify the individuals in a variety of roles currently involved in identifying, investigating and resolving the various types of disputes in the system.
2. Interview the stakeholders to get their input on current practices, including what is working and what is not.
3. Gather results into a manageable and identifiable set of observations about the current state the dispute system (working well, not working well, number and nature of disputes and their costs, history of resolution processes, and opportunities to improve).
4. Present observations to the stakeholders (internal and external) for confirmation, clarification, or revision.
5. Prepare and present a conflict management system design proposal to the organizational leadership that
    - addresses the unmet needs of the organization and its stakeholders and points out how changes will further the organizational mission (may take the form of a pro and con analysis of various applications of interest based resolution processes to the issues presented)
    - identifies possible pitfalls and resistance
    - outlines implementation options.
6. Seek buy-in and commitment of organizational leadership and stakeholders to general nature and overall scope of change.

DESIGN

In this stage, the participants in an interest-based design process identify and explore opportunities to include or improve alternative dispute resolution mechanisms in their dispute resolution system.

Objective

The design stage focuses on the organization's disputes and methods of resolution.

Rationale

This stage examines the potential to build dispute resolution capacity in the organization using alternative dispute resolution (ADR) methods. It looks at the whether, when and how of any new conflict management system.

Steps

Whether to use ADR:

1 Develop guidelines for whether ADR is appropriate.

2 Tailor the ADR process to the particular problem.

Costantino and Merchant pose the following questions as a basis for determining whether to use ADR:

- What if anything is missing in these disputes?
- Do all stakeholders express dissatisfaction and frustration?
- How do stakeholders express this dissatisfaction?
- Is an ADR process a possible and appropriate way to address the concerns expressed?
- If so, what type(s) of ADR is/are appropriate?
- Would such ADR steps or processes be a good "fit" with the goals of the organization (mission) and the technology of doing its work (culture)?[2]

When to use ADR:

3 Build in preventive methods of ADR

4 Make sure the disputants have the necessary knowledge and skill to choose and use ADR.

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[2] Ibid, p. 118.

Costantino and Merchant suggest the following questions to help the participants determine when to use ADR

- At what stage of the dispute is there a gap or complaint?
- Can an interest-based process be introduced at that point in the existing procedure?
- Would such an addition address the concern expressed?
- If an ADR step is introduced at that time, what is the likely effect on subsequent stages of the existing dispute resolution system? Would ADR enhance or diminish the possibility of satisfactory resolution?
- Have preventive forms of ADR (such as shared decision-making) been attempted with regard to these disputes — before they arise?
- For both prevention and new ADR steps, will disputants have the necessary skills and knowledge to use ADR effectively to resolve disputes at that stage?[3]

How to use ADR:

5 Create ADR systems that are simple to use and easy to access and that resolve dispute early, at the lowest organizational level, and with the least bureaucracy.

6 Allow disputants to retain maximum control over the choice of ADR method and selection of neutral wherever possible.

Training and Education

Negotiation training (skill development) and education (building a knowledge base) are an integral part of the design or redesign of a conflict management system. The negotiation training curriculum for the Ministry of Attorney General Dispute Resolution Office appears in Appendix 3 to these materials.

Objective

To ensure that stakeholders have a sound skill and knowledge base to use new dispute resolution tools.

Rationale

Stakeholders need to know how to access the system, to understand the ADR options available to them, and to have some level of confidence in using the ADR processes they choose.

Steps

[3] Ibid, p. 119.

1. Assess training and education needs.
2. Involve stakeholders in the development of an ADR training and education strategy, allowing them the opportunity to identify their concerns, to develop delivery options that address those concerns and to participate in joint problem solving and decision-making about different aspects of the strategy.
3. Design training and education programs.
4. Implement training and education programs.

IMPLEMENTATION

The new or redesigned conflict management system can be implemented in a number of ways including, for example, in a pilot project, in phases, or simply as needed. As with the other design stages, the process should be open and inclusive, with the participants selecting the appropriate approach for their circumstances. Costantino and Merchant advocate a pilot program approach in their model.[4]

Objective

To introduce the changes to the conflict management system, using a pilot program approach

Rationale

Pilot testing affords the design team, the organizational leadership and participant stakeholders the opportunity to test the reliability of their information, their design and planning — at relatively low cost and low risk.

Steps

1. Design pilot program (assuming decision not to implement immediately on a large-scale and permanent basis).
2. Implement pilot program
3. Evaluation pilot
4. Expand the pilot program

EVALUATION

Objective

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[4] Ibid., pp. 150-167.

To determine if the dispute resolution system is working in terms of administration and results.

Rationale

As a primary method of feedback, evaluation is the means by which the system clarifies its goals, and measures progress towards the achievement of those goals.

Steps

1 Clarify goals

2 Determine methodology

3 Establish baseline

4 Implement system

5 Chart progress

6 Modify system

7 Measure results.