NWT BOARD FORUM

TRAINING FOR CO-MANAGEMENT BOARDS IN THE NWT

ADMINISTRATIVE LAW REFERENCE GUIDE

2017

DISCLAIMER

This guide has been produced for educational and training purposes only and is not intended as a source of legal advice. Its contents have been developed to address the unique interests and needs of Northern Tribunals. The guide is not a comprehensive review of Administrative Law or its principles. Readers with specific matters or issues of concern are advised to consult legal counsel.

Contents

List of Figures

List of Tables

Introduction

ABOUT THE NWT BOARD FORUM

The purpose of the NWT Board Forum is to give organizations involved in land use planning, environmental assessment, land and water regulation and resource management an opportunity to learn from one another and to coordinate activities. The Forum is intended to improve and maintain effective lines of communication between its members, resolve common issues, and share expertise. It also provides industry, government and other organizations with a structured forum to engage and interact with the NWT's Co-management Boards.

The NWT Board Forum is made up of the Chairs of NWT resource management Boards and committees set up by NWT Aboriginal rights agreements to co-manage lands and resources in the geographic areas covered by those agreements. Indigenous and Northern Affairs Canada (INAC), the Government of the Northwest Territories (GNWT), the Office of the Regulator of Oil and Gas Operations (OROGO) and the National Energy Board (NEB) also participate in the Forum as they share regulatory responsibilities in the NWT with the Boards and committees.

The NWT Board Forum, in cooperation with the INAC Governance and Partnerships Branch, has used its collective interests to enhance the functioning of NWT Boards and committees by developing training programs, templates for strategic and business plans and orientation materials, including this Guide and associated training course, for Board/committee members.

For more information: http://www.nwtboardforum.com/

nwt board forum
Resource Management Information for the NWT

BOARD FORUM TRAINING: ADMINISTRATIVE LAW

The purpose of this training course is to ensure that NWT Board Forum members and staff have the knowledge and tools required to make effective and independent decisions that meet the requirements under administrative law.

Learning objectives:

By the end of this course, you will be able to:

- Describe the meaning and importance of administrative law and how it relates to Co-management Boards in the NWT
- Recall the three key principles of the duty to be fair and how they are incorporated into the work of Co-management Boards – including how to distinguish bias and conflict of interest to remain an impartial decision-maker
- Apply knowledge and tools to make good decisions – including understanding the application of the rules of evidence, using facts to make decisions, managing the record and writing effective decisions
- Serve as an effective and responsible Board member

Who is this for?

- Board members, Board staff, Government representatives, those involved in land and resource management Boards

Why is this important?

- NWT's Co-management Boards are Administrative Tribunals, which means they must abide by specific principles and procedures under administrative law. Board members make important land and resource management decisions and with that comes a number of responsibilities, including the duty to be fair.
- This Guide and associated course focuses on **Administrative Law**

Administrative Law materials for Board members and staff include:

- Administrative Law Reference Guide (this document)
- In-Person and Online Administrative Law Training

NWT Board Forum provides other training materials and courses on key topics for Board members and staff throughout the year.

Co-management Boards are Administrative Tribunals, which means they must abide by specific principles and procedures under administrative law.

ABOUT THIS REFERENCE GUIDE

This Reference Guide provides an overview of administrative law as it pertains to Boards and committees involved in resource management in the NWT. It includes the basic concepts of administrative law, and provides guidance to Board members on how to make effective decisions that meet the requirements under administrative law.

The Guide can be used on its own and as a reference tool for the associated training courses. The Guide does not need to be read sequentially. It is broken down into two main parts:

PART 1: Understanding the Concepts of Administrative Law

PART 2: Making Good Decisions

By the end of this course, you will be able to:

- ✓ Describe the **meaning and importance of administrative law** and how it **relates to Co-management Boards in the NWT**
- ✓ **Recall the three key principles of the duty to be fair** and how they are incorporated into the work of Co-management Boards – including how to distinguish bias and conflict of interest to remain an impartial decision-maker
- ✓ **Apply knowledge and tools to make good decisions – including understanding the application of the rules of evidence, using facts to make decisions, managing the record and writing effective decisions**
- ✓ **Serve as an effective and responsible Board member**

Guide Legend

SYMBOL	DESCRIPTION
	**Key term** – Where you see a book, you will find a definition of a key term or important terms pertaining to the section you are reading.
	**More information** – Where you see a magnifying glass, you will find links to supporting materials and resources.
	**Important point** – Where you see an exclamation point, you will find information that is vital to your understanding of the subject matter.

As this Guide provides only an overview, links to supporting materials and resources are provided throughout the document. NWT Board Forum also provides additional information on certain topics on its website (www.nwtboardforum.com) and upon request. Additional resources and training on specific topics within this Guide may be developed in the future by the NWT Board Forum.

CONTENTS OF THE ADMIN LAW REFERENCE GUIDE

This training has been developed by the following people and organizations:

Willms & Shier Environmental Lawyers LLP
www.willmsshier.com

John Donihee
(613) 217-8521 / jdonihee@willmsshier.com

Charles Birchall
(613) 761-2424 / cbirchall@willmsshier.com

Stratos Inc. (Sustainability consultancy)
www.stratos-sts.com

Julie Pezzack
(613) 241-1001 / jpezzack@stratos-sts.com

Jane Porter
(613) 241-1001 / jporter@stratos-sts.com

Preface: Overview of Land and Resource Management in NWT

In the Northwest Territories, the negotiation of regional land claim agreements has resulted in different types of land ownership and an integrated and coordinated regulatory system of land, water and resource management.

Learn more about land and resource management in the NWT and the governance of NWT Co-management Boards by taking the NWT Board Forum's **Board Orientation training course**. The Orientation Reference Guide and online course can be found here: http://www.nwtboardforum.com/Board-forum/Board-forum-training/#orientation

BACKGROUND ON LAND CLAIMS IN NWT

Land claim negotiations over the past 30 years have led to the creation of four distinct Land Claim Agreements in the NWT, each with its own resource management system and own set of management institutions. The following settled land claims and land claims under negotiation exist in the NWT. Some areas within the NWT do not have settled land claims.

Settled

- Inuvialuit Final Agreement (1984)
- Gwich'in Comprehensive Land Claim Agreement (1992)
- Sahtu Dene and Métis Comprehensive Land Claim Agreement (1993)
- Tłı̨cho Land Claims and Self-government Agreement (2005)

In Process

- Dehcho
- Akaitcho
- NWT Métis Nation
- (Note: there is a separate process for the Acho Dene Koe First Nation which was previously part of the Dehcho process)

By guaranteeing consultation and participation in the land and resource management regulatory system, modern treaties give Aboriginal groups in the NWT a significant say in land, water and environmental management. Through the signing of these agreements, new laws came into force or were revised and Co-management Boards and other management bodies were established or were provided with additional authority over land, water and environmental management.

The intent of modern treaties is to clarify how renewable and non-renewable resources will be managed by different land owners, how and by whom resource development will be managed and regulated, and how parties will work together when making decisions related to the resources of the NWT.

Modern treaties also include chapters on Economic Measures which ensure, among other things, that governments proposing economic development programs within a region must consult with the governing body or bodies of that region.

In areas of the NWT where modern treaties have not yet been reached, there are original, or "historic" treaties in place. Treaties 8 and 11 in the southern part of the NWT and the rights outlined in them are constitutionally recognized and protected through Section 35 of the *Constitution Act*, as are all Aboriginal rights and treaties in Canada.

Modern treaties give Aboriginal groups in the NWT a significant say in land, water and environmental management.

- **Land claim agreements are a fundamental underpinning of the integrated resource management system**
  - Key principles of resource management that Board members put into practice are based on these land claim agreements
- **The land and resource management system is set out in the land claim agreements**
  - This is a fundamental difference from other jurisdictions. In NWT, these land claim agreements dictate what is in the legislation.

KEY TERM

Comprehensive land claim agreements are negotiated in areas of the country where Aboriginal rights and title have not been addressed by historic treaties or other legal means, or where there remains outstanding disagreement around the terms of those treaties. In the NWT, comprehensive land claim agreements are modern treaties between Aboriginal groups, Canada and the territorial government. They are negotiated to deal with the uncertainties and disagreements that exist around the original historic treaties. In areas where both an historic treaty and a modern treaty exist, some rights from the historic treaty are maintained, while others are exchanged for rights in the modern treaty. This is clearly described in the modern treaty. Agreements may also include provisions relating to Aboriginal self-government, or provide for future negotiations of self-government.
Source: https://www.aadnc-aandc.gc.ca/eng/1100100027668/1100100027669

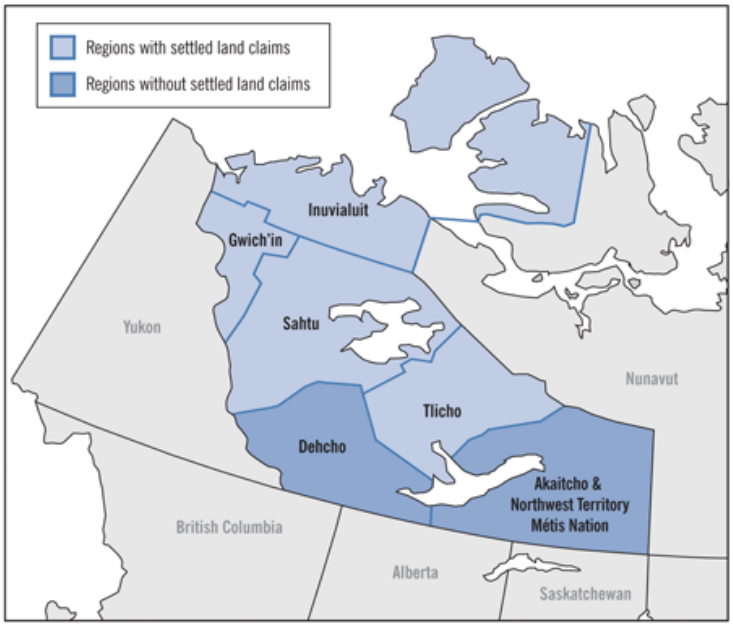


Figure 1: Regions in the NWT with and without settled land claims

LAND AND RESOURCE MANAGEMENT IN THE NWT

The regulatory regime for land and resource management in the NWT is very different from most of the regulatory regimes in southern Canada. The regulatory regime established in the NWT is part of a broader integrated resource management system as defined in land claim agreements and which involves Crown and private land management, land use planning, permitting and licencing, environmental assessment, and wildlife and renewable resource management.

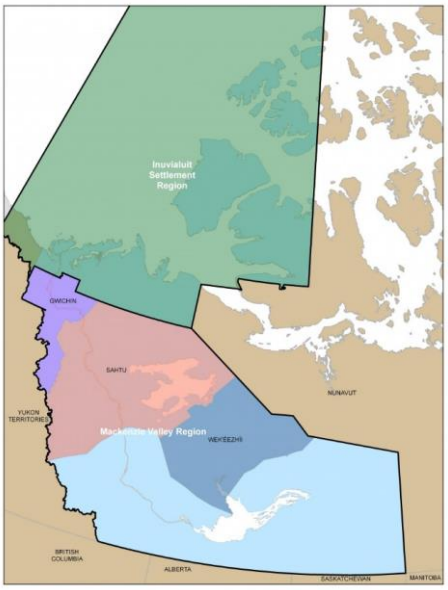


Figure 2: Map of NWT regions

There are two separate jurisdictions of land management in the NWT:

- **The Inuvialuit Settlement Region** (ISR) *Inuvialuit Final Agreement (1984)* (IFA)
- **Mackenzie Valley Region** *Mackenzie Valley Resource Management Act* (1998) (MVRMA)

The ISR and the Mackenzie Valley are governed by different statutes and have established Co-management Boards to perform regulatory, advisory, planning, and environmental assessment functions related to resource management.

There are two principles fundamental to the northern regulatory system for land use management, as outlined in the *Mackenzie Valley Resource Management Act* (MVRMA) and the *Inuvialuit Final Agreement* (IFA):

1. **Integrated and coordinated system**
   - The regulation of land, water and wildlife in the settlement area and in adjacent areas should be **coordinated**
   - An **integrated** system of land and water management should apply to the Mackenzie Valley and the Inuvialuit Settlement Region

2. **Based on the principles of co-management**
   - **Co-management** of resources between governments and Aboriginal groups

Integrated and Coordinated System

Land and resource management in the NWT is a web of interrelated areas. The four main categories to be considered are:

1. Land and resource ownership and access
2. Land use planning
3. Environmental assessment, land and water regulation, issuance of authorizations
4. Wildlife and renewable resource management

*Inspection and enforcement is presently the responsibility of the federal and territorial governments.

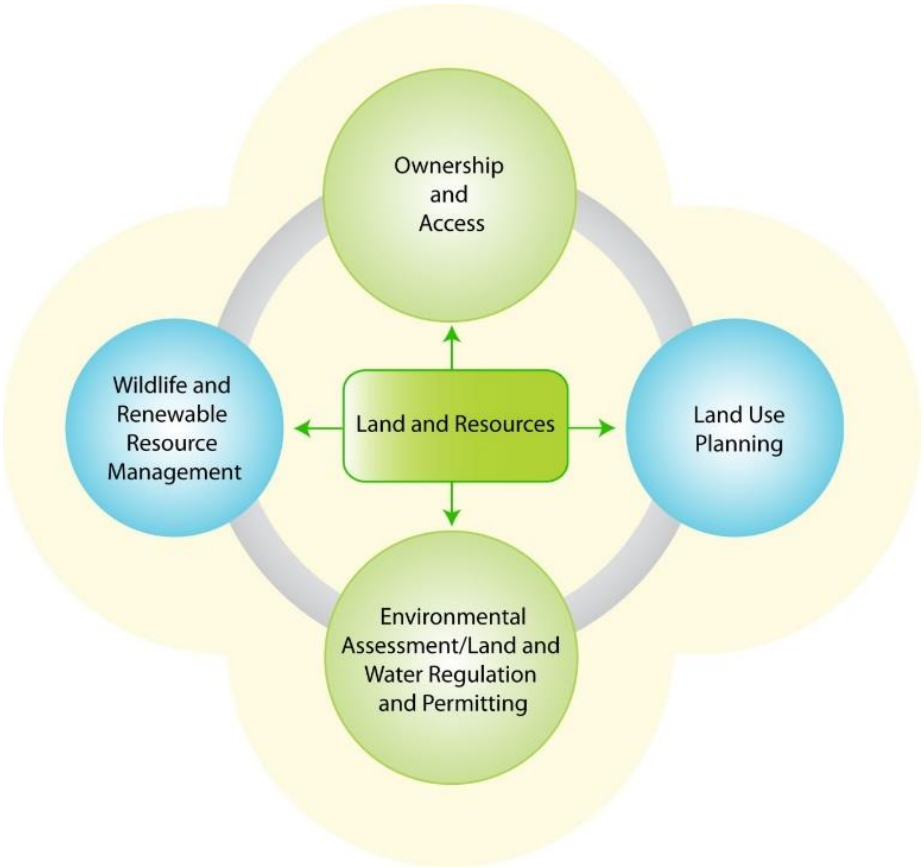


Figure 3: Overview of land and resource management in the NWT

Co-management

KEY TERMS:

Co-management: Co-management has come to mean institutional arrangements whereby governments and Aboriginal groups (and sometimes other parties) enter into formal agreements specifying their respective rights, powers and obligations with reference to the management and allocation of resources in a particular area of crown lands and waters. (Source: Royal Commission on Aboriginal Peoples, 1997)

Co-management Boards are comprised of members who are nominated or appointed by the territorial, federal and Aboriginal governments and Land Claim beneficiaries, which means that decision-making about land, resources and the environment is shared.

Co-management in the Mackenzie Valley

In 1998, the MVRMA established a number of independent Boards that were designed to run the various stages of the environmental impact assessment, regulatory and land use planning processes. Although the federal government enacted this piece of legislation, it resulted from land claim negotiations. This legislation gives Aboriginal people of the Mackenzie Valley, NWT, a greater say in resource development and management through the establishment of independent Co-management Boards. Aboriginal land claim organizations nominate half of the Board members, and the federal and territorial governments nominate the other half of the Board members.

Mackenzie Valley Resource Management Act (MVRMA)

The *Mackenzie Valley Resource Management Act* was developed as a result of the Gwich'in and Sahtu Final Agreements. **The MVRMA has created and given Co-management Boards the authority to carry out land use planning, regulate the use of land and water and, if required conduct environmental assessments and reviews of large or complex projects.** The MVRMA also provides for the creation of a Cumulative Impact Monitoring Program (the NWT CIMP) and an environmental audit to be conducted once every five years.

In general, the following Boards were created:

- Mackenzie Valley Environmental Impact Review Board
- Mackenzie Valley Land and Water Board
- Gwich'in Land and Water Board
- Sahtu Land and Water Board
- Gwich'in Land Use Planning Board
- Sahtu Land Use Planning Board

- Wek'eezhii Land and Water Board
- Gwich'in Renewable Resources Board*
- Sahtu Renewable Resources Board*
- Wek'eezhii Renewable Resource Board*

(The Renewable Resource Boards were not technically created under the MVRMA, but in the claims themselves.)

The MVRMA is made up of seven parts:

- Part I: **General Provisions Respecting Boards**
- Part II: **Land Use Planning**
- Part III: **Land and Water Regulation**
- Part IV: **Mackenzie Valley Land and Water Board**
- Part V: **Mackenzie Valley Environmental Impact Review Board**
- Part VI: **Environmental Monitoring and Audit**
- Part VII: **Transitional Provisions, Consequential Amendments, and Coming Into Force**

Co-management in the Inuvialuit Settlement Region:

The Inuvialuit Final Agreement (IFA) provides for the establishment of a number of implementing bodies to support implementation of the Agreement:

- Inuvialuit Arbitration Board
- Inuvialuit Regional Corporation
- Fisheries Joint Management Committee
- Wildlife Management Advisory Council - NWT
- Wildlife Management Advisory Council - North Slope
- Inuvialuit Environmental Impact Screening Committee
- Inuvialuit Environmental Impact Review Board
- Inuvialuit Game Council

The parties also oversee the implementation of the IFA through the Inuvialuit Final Agreement Implementation Coordinating Committee, which forms the primary interface for the overall treaty relationship. The Inuvialuit, Canada, and GNWT are currently negotiating an Inuvialuit self-government agreement.

The co-management system in the Western Arctic of the NWT and Yukon North Slope is composed of one Inuvialuit Board and several Co-management Boards. Government and Inuvialuit interests are equally represented in each group. Impartial, non-government persons acceptable to both government and the Inuvialuit, chair each of the Co-management Boards.

The Joint Secretariat – Inuvialuit Settlement Region was established to provide technical and administrative support to the Inuvialuit Game Council, the Environmental Impact Screening Committee, Environmental Impact Review Board, Fisheries Joint Management Committee, and Wildlife Management Advisory Council (NWT). A Secretariat office for the Wildlife Management Advisory Council (North Slope) is located in Whitehorse, Yukon.

Overview of NWT land and resource management Boards

There are several governing bodies and regulatory organizations that have different mandates and responsibilities for certain areas in the NWT. The term 'Boards' refers to institutions of public government, and co-management and advisory bodies. Today, there are 13 public Boards involved in making decisions over the land, water and resources in the NWT:

1) 9 Boards in the Mackenzie Valley
2) 2 Inuvialuit Boards and 1 Screening Committee
3) 1 Surface Rights Board that applies throughout the NWT

They are responsible for preliminary screening of development proposals, environmental assessments and impact reviews, land use planning, wildlife management and the issuance of water licences and land use permits. Most have members nominated by Aboriginal organizations, the Government of Canada, and the GNWT.

The number of Boards and their mandate varies amongst the Settlement Areas. This table summarizes the various management Boards by claim area:

<table>
<tr><td></td><td>Inuvialuit Settlement Region</td><td colspan="5">Mackenzie Valley</td></tr>
<tr><td>Activity</td><td>Inuvialuit Final Agreement</td><td>Gwich'in Final Agreement</td><td>Sahtu Final Agreement</td><td>Tłı̨cho Final Agreement</td><td>Dehcho Process</td><td>Akaitcho Process (South Slave)</td></tr>
<tr><td>Land Use Planning</td><td>(See note 1)</td><td>Gwich'in Land Use Planning Board (GLUPB)</td><td>Sahtu Land Use Planning Board (SLUPB)</td><td>Tłı̨cho Government (See note 1)</td><td>Dehcho Land use Planning Committee (See note 2)</td><td>-</td></tr>
<tr><td>Land</td><td>(See note 3)</td><td rowspan="3">Gwich'in Land and Water Board (GLWB)</td><td rowspan="3">Sahtu Land and Water Board (SLWB)</td><td rowspan="3">Wek'èezhìi Land and Water Board (WLWB)</td><td colspan="2" rowspan="3">Mackenzie Valley Land and Water Board (MVLWB) (also responsible for transboundary projects across the Mackenzie Valley)</td></tr>
<tr><td>Water</td><td>Inuvialuit Water Board (IWB)</td></tr>
<tr><td>Preliminary Screening</td><td>Environmental Impact Screening Committee (EISC)</td></tr>
<tr><td>Environmental Assessment</td><td>Environmental Impact Review Board (EIRB)</td><td colspan="5">Mackenzie Valley Environmental Impact Review Board (MVEIRB)</td></tr>
<tr><td>Fisheries</td><td>Fisheries Joint Management Committee (FJMC)</td><td rowspan="2">Gwich'in Renewable Resources Board (GRRB)</td><td rowspan="2">Sahtu Renewable Resources Board (SRRB)</td><td rowspan="2">Wek'èezhìi Renewable Resources Board (WRRB)</td><td>-</td><td>-</td></tr>
<tr><td>Wildlife and Forestry</td><td>Wildlife Management Advisory Council (WMAC) – NWT and North Slope</td><td>-</td><td>-</td></tr>
<tr><td>Surface Rights</td><td colspan="4">NWT Surface Rights Board</td><td colspan="2"></td></tr>
</table>

Notes:

1. The Inuvialuit Settlement Region and Wek'èezhìi Management Area do not have formal Land Use Planning Boards but there is provision in each of the claims to undertake land use planning. In the Inuvialuit Settlement Region there are Community Conservation Plans.
2. The Dehcho Land Use Planning Committee was established under the Dehcho First Nation Interim Measures Agreement, not the MVRMA.
3. The GNWT Department of Lands issues land use permits for projects located on crown land and the Inuvialuit Land Administration (ILA) for projects located on Inuvialuit Private Land.

Part 1:

Understanding the Concepts of Administrative Law

Chapter 1: Introduction to Administrative Law for Co-management Boards in the NWT

Co-management Boards are Administrative Tribunals, which means they must apply specific operating principles and procedures pursuant to administrative law.

This chapter will provide a brief overview of the key principles of administrative law that will be further elaborated upon throughout the Guide.

By reading this Chapter, you will be able to:

- ✓ Describe the purpose of administrative law
- ✓ Identify the key elements of administrative law
- ✓ Explain 'natural justice'
- ✓ Provide an overview of the role, composition, and jurisdiction of Co-management Boards in NWT

Chapter Breakdown:

1.1 OVERVIEW OF ADMINISTRATIVE LAW

1.1.1 What is administrative law?

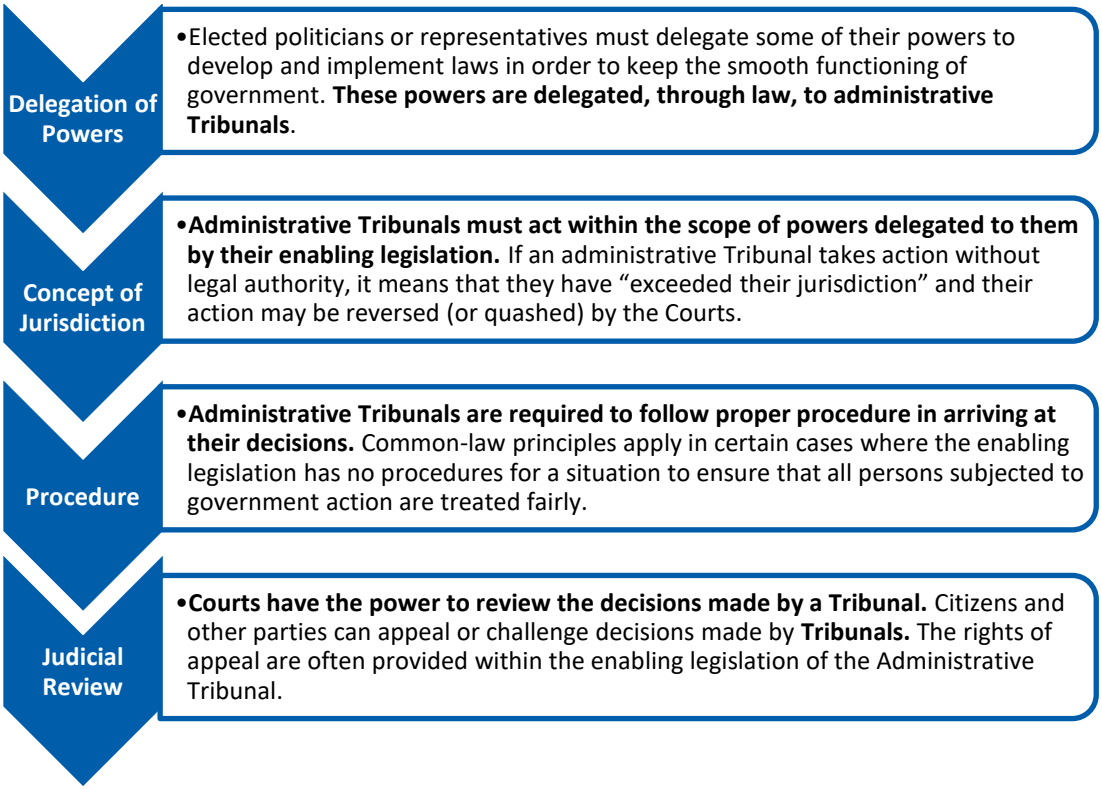
Three basic areas of public law that deal with the relationship between the government and its citizens:

1. **Criminal law** (deals with offences and their punishment)
2. **Constitutional law** (deals with the interpretation and application of the Constitution of Canada by the Courts and defines the relationship between various branches of government, as well as between federal, provincial and territorial governments; it also limits the exercise of governmental power over individuals through the protection of human rights and fundamental freedoms)
3. **Administrative law** (deals with the actions and operations of Tribunals, agencies, Boards and government)

(Visit the Department of Justice web page for more information on Canada's system of justice: http://www.justice.gc.ca/eng/csj-sjc/just/02.html)

Administrative law focuses on the conduct of administrative decision-makers such as Tribunals, agencies, Boards, commissions or ministers, and the manner in which Courts can review their decisions. It ensures that the action of these administrative decision-makers is fair and legal – if it seems that it is not, citizens have the right to challenge or appeal decisions through the Courts

Four key elements of administrative law will be covered in more depth in this Guide.



What is natural justice?

Natural justice is based on two fundamental rules: (1) no decision is valid if it was influenced by any financial consideration or other interest or bias of the decision maker; (2) no accused, or a person directly affected by a decision, shall be condemned unless given full chance to prepare and submit his or her case and rebuttal to the opposing party's arguments.

These principles apply to decisions of all governmental agencies and Tribunals, and judgments of all Courts, which may be declared to be 'of no effect' if found in contravention of natural justice.

Source: Business Dictionary http://www.businessdictionary.com/definition/natural-justice.html

1.2 CO-MANAGEMENT BOARDS – ADMINISTRATIVE DECISION-MAKERS

NOTE: This section provides a snapshot on how administrative law applies to NWT Co-management Boards. All of the information here is elaborated on throughout Chapters 2 - 7.

1.2.1 What are Co-management Boards?

All of the Co-management Boards responsible for land and resource management in the NWT (i.e., the regional land and water Boards, review Boards, land use planning Boards, fisheries/wildlife and forestry Boards) are Administrative Tribunals.

Administrative Tribunals are established under federal, provincial or territorial legislation or land claims to implement legislative policy. They are established by law as administrative decision-makers or advisors. A Tribunal's public decision-making is a legal process conducted in a specific legal context. Courts ensure that Administrative Tribunals observe the limits on their authority and exercise their authority in an acceptable manner. See Chapter 2 (Tribunals and Jurisdiction) for more detail on Administrative Tribunals.

Parliament or the Legislature may amend a Tribunal's powers and procedures when necessary and can even get rid of a Tribunal if it no longer serves a public purpose. Because of land claims this is not generally the case for Co-management Tribunals.

1.2.2 Who sits on Co-management Boards?

Each Board in the NWT has its own composition, however, each NWT Board is made up of individuals that have been either:

- Directly appointed by the Minister of Indigenous and Northern Affairs Canada (INAC)
- Nominated or appointed directly by regional Aboriginal land claim organizations or governments
- Nominated by a territorial government (GNWT or Government of Yukon)

The composition and total number of members on the Boards depends on the provisions specified in the relevant land claims and legislation. In general, half of the appointed Board members are selected from Aboriginal land claim organization or government nominations and the other half from Federal or territorial government nominations. The chairperson is appointed by INAC from persons nominated by a majority of the members or directly appointed by the Minister.

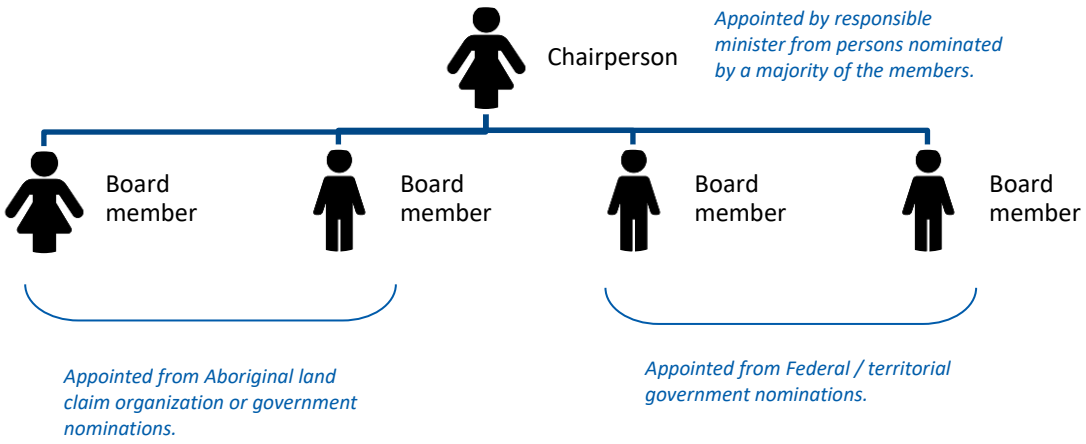


Figure 4: Example of an NWT Board's composition

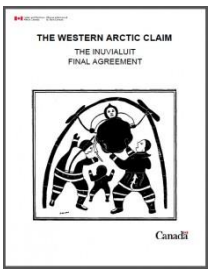
The composition of the Boards brings together two world views of equal value. Ideally, the co-management approach enables a shared or balanced outcome, where traditional Aboriginal knowledge is factored in and weighted equally with western science in the making of resource management decisions.

1.2.3 Where do NWT's Co-management Boards get their jurisdiction and authority?

The powers of Administrative Tribunals are set out in federal and territorial legislation and land claims and the details are addressed by enacting a statute or law which is known as the **"enabling statute".**

The enabling statute for Co-management Boards in the NWT vary according to the jurisdiction and the Board's mandate. They include:

In the Inuvialuit Settlement Region (ISR), Tribunals derive their jurisdiction:



- Directly from land claims agreements and settlement legislation (legislation has not been enacted – also the case for the Renewable Resource Boards in the Mackenzie Valley)
    - Amendments to land claims agreements are possible but not common so the purposes and powers of the Boards set up by the Inuvialuit Final Agreement (IFA) have been quite stable for over 30 years.

In the Mackenzie Valley, Tribunals derive their jurisdiction from:

- Land claim and self-government agreements with the Gwich'in, Sahtu and Tlicho
- Land claim agreements and settlement legislation for the Renewable Resources Boards, and
- Through the Mackenzie Valley Resources Management Act - the MVRMA.
    - Amendments to the MVRMA must be consistent with these land claim agreements and be prepared in consultation with the Aboriginal land claim organization or government.

1.2.4 What are Co-management Boards responsible for?

Co-management Boards in the NWT are responsible for:

- **Making recommendations and decisions**
- **Managing and being accountable for the Board's finances**
- **Ensuring the Board is functioning as an effective organization**
- **Being accountable for the organization as a whole**

Decision-making is a key part of what Co-management Boards in the NWT do on a regular basis. Whether it is about deciding if a company should receive a water license, or deciding if there will be significant environmental impacts from a proposed development – decision-making is a fundamental responsibility of Board members.

As an Administrative Tribunal, Co-management Boards need to be sure that their decision-making follows the proper procedures under administrative law.

Chapter 2: Tribunals and Jurisdictions

Administrative Tribunals (also called agencies, Boards, commissions) make decisions based on powers established by statute or land claim and act in the public interest in various roles as advisors and decision-makers. This Chapter provides an overview of Administrative Tribunals, including their roles, powers, and jurisdiction and how the Courts can be involved to review their decision-making.

By reading this Chapter, you will be able to:

- ✓ Describe the role of Administrative Tribunals and the types of functions they serve
- ✓ Describe the concept of jurisdiction as it relates to Administrative Tribunals
- ✓ Describe the role that the Courts have in reviewing Administrative Tribunals' actions

Chapter Breakdown:

2.1 ESTABLISHMENT, ROLES AND USE OF TRIBUNALS IN CANADA

2.1.1 What are Administrative Tribunals and how are they established?

Administrative Tribunals are "statutory delegates" – meaning that their authority is prescribed by the statute (and land claims in the case of many Co-management Boards) that establishes them and their activities can be reviewed by the Courts. Parliament or the Legislature may amend a Tribunal's powers and procedures when necessary, and can eliminate a Tribunal if it no longer serves a public purpose (with the exception of those specific Tribunals established through land claims).

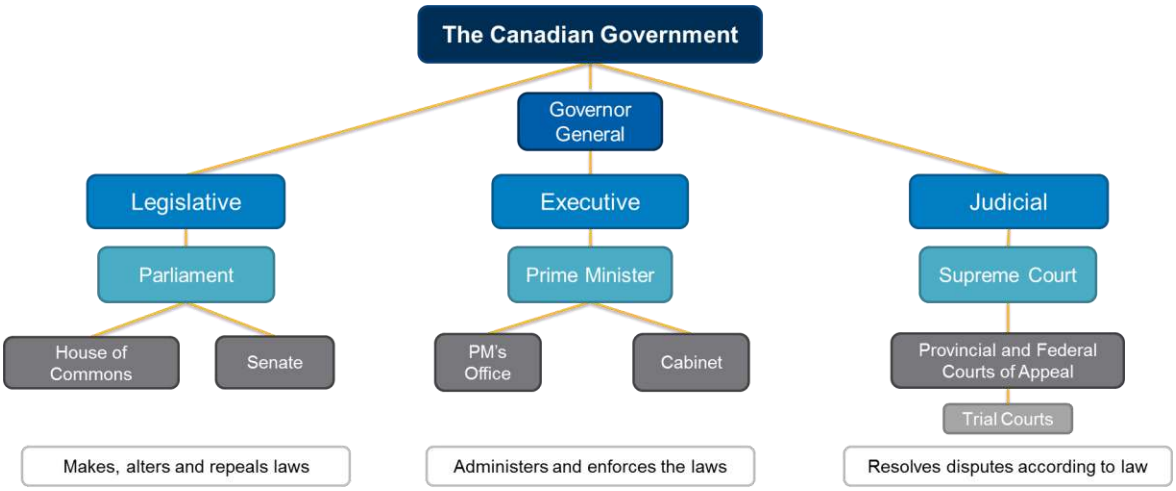


Figure 5: Branches of the Government in Canada

The Parliament of Canada and the provincial and territorial legislatures both have the authority or jurisdiction to make laws. Parliament can make laws for all of Canada, but only about matters the Constitution assigns to it. A provincial or territorial legislature can only make laws about matters within the province's or territory's borders.

2.1.2 What do Administrative Tribunals do?

Administrative Tribunals play a key role in Canadian society as they are an important part of the way in which certain decisions are made in Canada. Administrative Tribunals make decisions based on powers established by statute and land claims. Tribunals act in the public interest in various roles as advisors and decision-makers. Every jurisdiction in Canada has established Administrative Tribunals.

Mr. Justice Cory of the Supreme Court of Canada commented on the widespread use of Tribunals as follows:

> *"Administrative Boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end.* ***Hospital and medical Boards*** *regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains.* ***Marketing Boards*** *regulate the farm products we eat;* ***energy Boards*** *control the price and distribution of the forms of energy we use;* ***planning Boards and city councils*** *regulate the location and types of buildings in which we live and work. In Canada, Boards are a way of life. Boards and the functions they fulfill are legion."*
>
> Newfoundland Telephone v. Newfoundland (Public Utilities Board) [1992] 1 SCR 623 at 634

Examples of roles that Administrative Tribunals perform include:

- Research and recommendation (e.g., law reform commissions)
- Rule-making and policy development (e.g., the Canadian Radio-Television and Telecommunications Commission and provincial securities commissions)
- Grant allocation (e.g., the Canada Council and regional development agencies);
- Adjudication (e.g., labour relations Boards, municipal Boards and human rights Tribunals);
- Standard setting (e.g., environmental assessment Boards, workers' compensation Boards and health and safety commissions).

2.2 POWERS OF A TRIBUNAL

2.2.1 Tribunal jurisdiction

The concept of jurisdiction is a key principle in the legal framework for Tribunals, as it both allows Tribunals to act and controls their actions. **One of the important functions of Tribunals is the duty to act fairly and exercise discretion appropriately** (refer to the definition of natural justice from section 1.1).

The basic framework for how a Tribunal conducts its business includes:

1. Respecting the principles and rules of procedural fairness or natural justice
2. Following and adhering to its powers as set by enabling legislation

Tribunals have no inherent authority. Any power exercised by a Tribunal must be derived in one way or another from the statute which established it. The legislative branch of government has authority to delegate powers. Almost all of the laws passed by Parliament or the Legislatures delegate certain powers, duties or authority to someone: a Minister, Judge, civil servant, a Board, Tribunal or someone else. Many of the limits placed on Tribunal actions are focused on jurisdiction.

The actions of a Tribunal must be directly based on the powers delegated to it. These powers may be express or implied.

Tribunal Powers	Description
Express powers	Written in legislation (worded in terms of "the Tribunal can do xyz") e.g. The power to issue, suspend or cancel licenses or to conduct an environmental assessment
Implied powers	Unwritten e.g. Taking necessary actions to satisfy a Tribunal's statutory mandate through interpreting it's enabling legislation Generally more difficult to recognize, requires some background knowledge to fully understand the powers

A Tribunal may also be granted the authority to exercise discretion in certain circumstances. Check-in with legal counsel for advice. A **breach of the duty of fairness** and an **abuse of discretion** are both characterized by the Courts as situations where the Tribunal has **"lost jurisdiction."** There may also be substantive failures to act within jurisdiction **based on errors of law** made by a Tribunal. Where a decision by a Tribunal is made without jurisdiction, it is invalid or even void.

2.3 TRIBUNALS, GOVERNMENT AND THE COURTS: A QUESTION OF INDEPENDENCE

As indicated, Administrative Tribunals are creations of and part of the executive branch of government. **While they do not enjoy the constitutional protections enjoyed by the Courts, nevertheless these Tribunals often make quasi-judicial decisions and the Courts have established a framework of procedure (natural justice/fairness) that ensures the integrity of such decisions.** Quasi-judicial means having powers and procedures resembling those of a Court of law when resolving disputes (i.e. they need to objectively determine facts and draw conclusions), however, they are not presided over by judges and are different from Courts.

The government often establishes a Tribunal to ensure an "arm's length" process that leads to decisions that are well reasoned and publicly accepted. These goals cannot be met if government is free to interfere with Tribunal process. This issue is a difficult one: **How can government protect the public interest, ensure that Tribunals make quality decisions and meet its obligations to taxpayers with timely and efficient decisions?**

Courts have been clear about their view of Tribunal independence.

The Supreme Court of Canada said the following on this issue in 2001 in a case called Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch). *Emphasis added for the purposes of the Guide*.

> *"It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or Tribunal is determined by its enabling statute."*
>
> *"The principle reflects the fundamental distinction between Administrative Tribunals and Courts. Superior Courts, by virtue of their role as Courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial Courts..."*
>
> *"Administrative Tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a Tribunal to discharge the responsibilities bestowed upon it..."*
>
> *"While Tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular Tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected."*

There has been a lot of academic and other commentary, including by the Courts, on the question of Tribunal independence. Some issues relate to security of tenure for members, funding for the Tribunals operations and for members and staff salaries, etc.

All of these practical concerns can contribute to an environment where a Tribunal is made painfully aware of whether the government approves of its actions or not. Notwithstanding these concerns, Canadian law does not at this time provide any firm protection for Tribunal independence. That said, it would be completely improper for government to interfere directly in the specific process and deliberations of a Tribunal. **Thus, Tribunals do exercise independence in their decision-making process.**

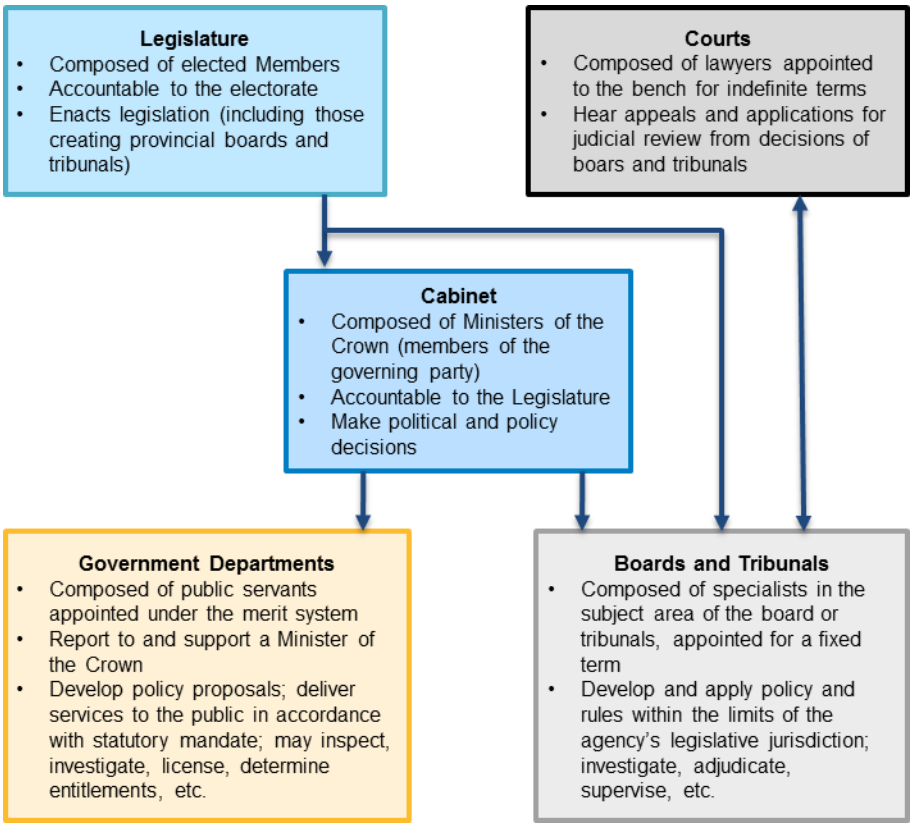
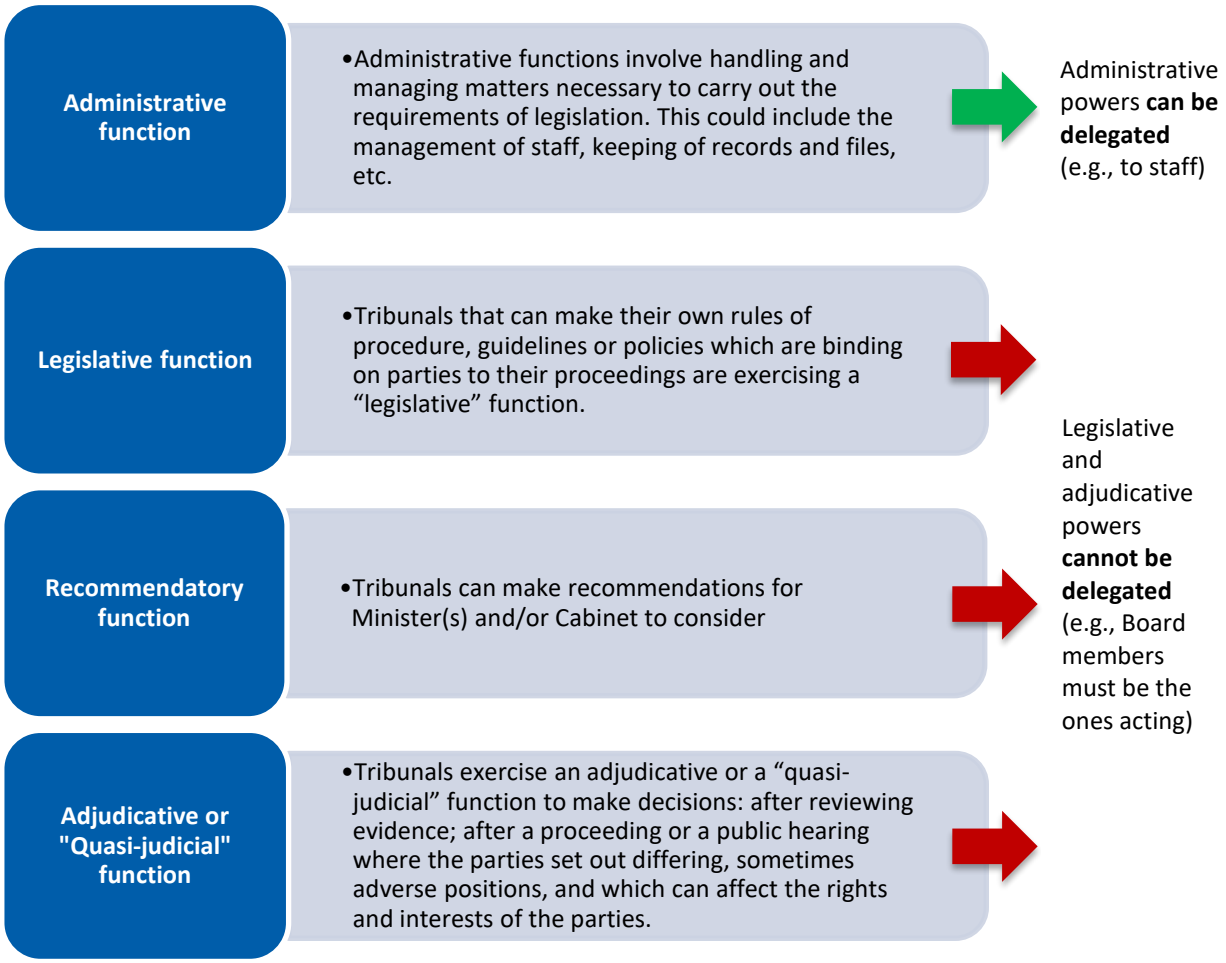


Figure 6: Administrative Tribunals within the Canadian government system.

2.4 TRIBUNALS – FROM ADMINISTRATIVE TO QUASI-JUDICIAL FUNCTIONS

The jurisdiction granted to Tribunals by statute varies depending on the purposes for which Parliament or the Provincial or Territorial Legislature created them. Therefore, the authority of Tribunals varies as well. **Depending on its legislation, a Tribunal may exercise a variety of functions ranging from recommendatory, to administrative, to legislative, to adjudicative – with most Tribunals exercising more than one type of function depending on the circumstances.**



Some Tribunals exercise all of these types of functions at one time or another, while others do not have the jurisdiction or authority to undertake all of them. The only way to tell what a Tribunal may do is by careful review of the statute or land claim which establishes the Tribunal.

The types of functions exercised also depends on the type of decision required of the Tribunal. Administrative and legislative functions are primarily for Tribunal governance. In regions with more development activity other functions may predominate.

Generally, all Boards exercise the Administrative and Legislative functions. All Boards, particularly the Renewable Resource Boards (who do not need to conduct public hearings) exercise the recommendatory function. And for the most part, only the Mackenzie Valley Environmental Impact Review Board and the Land and Water Boards exercise the adjudicative or 'quasi-judicial' function the most as they often require more formal processes due to the decisions they need to make and the requirement for public hearings.

Characterizing the nature of the power exercised by a Tribunal is important because it relates to the:

- Tribunal's authority to delegate its powers
- Type of procedure which the Tribunal should use to make a decision

- Remedies which may be available if the Tribunal's actions are challenged in Court

Administrative functions can be sub-delegated, which means that they can be given to others, whereas legislative and quasi-judicial powers cannot be sub-delegated. The Tribunal or Board members themselves must exercise these powers.

The type of function a Tribunal is exercising at any one time affects the procedural safeguards needed to ensure that parties are treated fairly. **Even administrative powers must be exercised fairly** (as per the *Nicholson* case – see 3.1.1 and Appendix A.). **However, the more a Tribunal function involves decision-making that affects rights or has serious implications for a party, the greater are the procedural safeguards that may be required and likely may include the need for a hearing. The result is a sliding scale of procedural requirements.** Tribunal members and staff must be aware that fairness requirements can change during a proceeding. A Tribunal must be ready to adapt the Tribunal process to meet these legal requirements.

The Supreme Court of Canada addressed this issue of the sliding scale of procedural requirements in a case called *Baker v Canada*. The Court found:

"The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected…… [Several] factors are relevant to determining the content of the duty of fairness:

1. The nature of the decision being made and process followed in making it;
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectations of the person challenging the decision;
5. The choices of procedure made by the agency itself.
   This list is not exhaustive."

To read a more detailed summary of the legal rules on procedural fairness that emerged from the *Baker v. Canada* case, visit Appendix A.

2.5 GROUNDS FOR JUDICIAL REVIEW

2.5.1 Judicial review of administrative actions

The decisions of Administrative Tribunals can be reviewed by the Courts. This is called judicial review and is part of the checks and balances in Canada's justice system.

Challenges to the decision of a Tribunal

A party to a proceeding, who is aggrieved by a Tribunal decision, may apply to the appropriate Court to review the Tribunal's decision or to review the process through which the decision was reached. Once litigation begins, a Tribunal definitely needs the assistance of legal counsel.

It is important to have some general knowledge of the reasons for which Tribunal decisions may be challenged. **A Court may decide to intervene based on a claim that a Tribunal:**

- **is found to have made an error of law or jurisdiction** (absence of jurisdiction or failure to achieve it, loss of jurisdiction through abuse of discretion such as improper intentions, bad faith, no evidence, error in law, etc.); or
- has conducted a process that **was not fair** (breach of rules of fairness or natural justice)

The Courts' role in judicial review

The Court's role in judicial review is to review the decision and the process used by the Tribunal. It is not in the business of re-deciding the case that was before the Tribunal and substituting its views for those of a Tribunal. Consequently, Courts generally do not substitute their views of the facts found during the course of a Tribunal decision. However, a Court may send the matter back to the Tribunal and may order the Tribunal to re-hear the matter or to reconsider an issue if it finds the process was not fair or an error of law or jurisdiction was made.

The record documents the information or evidence (written, oral or visual) the Tribunal receives for consideration in a proceeding. The record forms the basis for the Tribunal's decision-making. No new information will be accepted for consideration in a proceeding after the record is closed, unless there is a clear decision by the Tribunal to reopen the record.

The review proceeds on the basis of **the record** that was before the Tribunal when it made its decision. The review allows the Courts to ensure that statutory delegates, like Tribunals, act within their jurisdiction and that the administrative processes established work fairly.

Administrative Tribunals exist in a complex legal environment and the judicial review cases decided by the Courts provide essential guidance on a variety of matters important to the management and operation of Tribunals. **Tribunals whose decisions are overruled by the Courts should not be concerned as long as they take advantage of the learning opportunity offered by the experience.**

In a judicial review, the Tribunal itself is not before the Court. Even if the Tribunal is represented by legal counsel in the judicial review, the role of Tribunal counsel will likely be limited. The Tribunal does not get to re-argue its position. Its reasons for decision must suffice.

2.5.2 Where does judicial review take place?

As described earlier, Administrative Tribunals derive their powers from enabling statutes. Those statutes could be federal, provincial or territorial. Where and how the judicial review occurs depends on the source of the enabling statute.

The diagram below provides a more detailed outline of Canada's Court system than Figure 5.

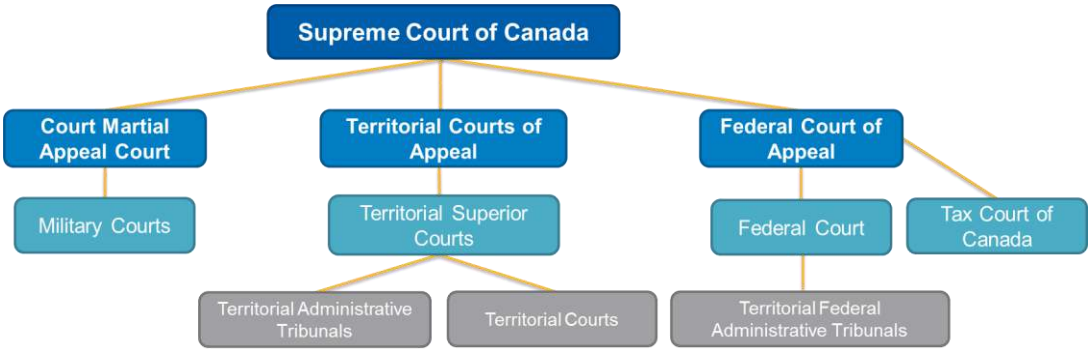


Figure 7: Outline of Canada's Court System

Where does judicial review take place for Co-management Boards?

Mackenzie Valley	Judicial review of the MVRMA Boards takes place in the **Supreme Court of the Northwest Territories** pursuant to s. 32 of the MVRMA.
Inuvialuit Settlement Region and Renewable Resource Boards	Judicial review would take place in the **Federal Court**.

2.5.3 Importance of strong decision making: Good reasons may prevent judicial review

If the Tribunal has not clearly explained its reasoning for its decision, a party may try to have the decision overturned in a judicial review.

In a judicial review, **no additional information about how or why the Tribunal made its decision can be provided. The "reasons must speak for themselves."**

If there is a challenge of the Tribunal's jurisdiction, it is helpful if the Tribunal has indicated in its decision that it considered the question and has explained why it had the jurisdiction. If the Tribunal has related the facts to the statutory requirements in reaching its decision, then this should be easily explained in the reasons for the decision. Similarly, any procedural matters that were addressed during the hearing should be explained. For instance, if evidence was ruled inadmissible or an application for an adjournment was denied, a brief explanation should help to avoid the ruling subsequently being challenged.

If the decision is explained clearly, systematically and logically, the Courts will not lightly interfere with the Tribunal decision.

2.6 STANDARD OF REVIEW

One of the first questions addressed by the Court in a judicial review relates to the "standard of review" to be applied to a Tribunal's decision. This is a critical decision because it determines whether the Tribunal decision will be granted any deference or not.

- **Does the decision have to be correct?**
- **Should there be some deference given to the decision?** (i.e. could the Court yield its judgment to that of the Tribunal?)

Courts generally review questions of law or jurisdiction, decided by a Tribunal, on the "correctness" standard. In such a case the Tribunal has to make a decision which is consistent with the way the Court would interpret the law.

In reviewing challenges to matters not decided on a correctness standard, the Court only requires that the Tribunal decision be reasonable – even if the Court would not have come to that decision itself.

Sometimes Parliament or the Legislature attempts to limit the scope of the Courts' review of Administrative Tribunal actions. Statutory provisions doing this are called privative clauses. Such clauses must be expressly stated in the statute creating an Administrative Tribunal. Over time different formulations of these clause have resulted. One kind states that all or certain decisions of that Tribunal are final and conclusive and not subject to judicial review. The purpose of a privative clause is to prevent any appeal.

The presence of a privative clause in a Tribunal's enabling legislation can also affect how the Court reviews matters within the Tribunal's discretion.

- A strong privative clause may prevent the Courts' consideration of certain matters in a Tribunal's decision
- A weak privative clause provides less protection

As an example, the Inuvialuit Water Board's (IWB) enabling legislation is the *Waters Act* (S.N.W.T. 2014) which empowers it to issue water licences in the ISR region of the NWT. The privative clause in the *Waters Act* is worded against an appeal, but allows for judicial review.

> *A determination made under this section is final and binding and, except for judicial review, is not subject to appeal or to review by any Court. s. 92(5).*

2.7 CONCLUSION

Key points from this chapter include:

- A key concept in dealing with the authority of Administrative Tribunals is jurisdiction. Jurisdiction (in the statute) sets out the scope of powers that a Tribunal can exercise. Tribunals may perform various functions ranging from administrative to recommendatory to quasi-judicial in the conduct of their business.
- Tribunals are creations of government. They are not independent like Courts except in the course of making their decisions.
- Courts may review and control actions of Tribunals through judicial review and by reference to the jurisdiction granted in the statute which established the Tribunal.
- A privative clause may provide partial protection for a Tribunal undergoing a judicial review.

Chapter 3: The Duty to Be Fair

In order to maintain public confidence in the justice system, a Tribunal's decision-making process must be conducted fairly. This session will lay out the procedures that must be followed in order for the process to be considered fair.

By reading this Chapter, you will be able to:

- ✓ Outline the elements of the duty of fairness
- ✓ Identify the steps that must be taken to ensure that affected parties know the case to be met
- ✓ Know how to satisfy the affected party's right to be heard
- ✓ Understand Board procedures, rules and policies with respect to fairness

Chapter Breakdown:

3.1 OVERVIEW

3.1.1 Elements of the duty of fairness

There must be "fairness" in a Tribunal's decision-making process. This is required to maintain public confidence in the justice system. As you may recall from Chapter 1, "natural justice and fairness refer to *procedures* (i.e., what procedures must be followed in a process in order for that process to be considered fair)" and to the impartiality of the decision-maker.

Unfortunately, knowing what is fair is not always simple. Each case is different. Procedural fairness will be determined on the basis of the power being exercised, the affected party, the consequences of the intended action, and logistical realities such as the time-consuming nature of the procedures.

Background on the duty to be fair

The **duty to be fair** has been articulated in a Supreme Court of Canada case called *Nicholson v Haldimand-Norfolk Reg Police Commrs* (or "the Nicholson case"), [1979] 1 SCR 311. The decision is a landmark case in which the Court set out the grounds for Court intervention on procedural grounds. The Court stated that procedural fairness exists on a continuum and that parties are entitled to a certain degree of it based on the setting and their circumstances. Prior to this decision, procedural fairness only applied to Tribunals that were classified as "judicial" or "quasi-judicial" - in other words, before this case, natural justice rules applied to decisions made by quasi-judicial Tribunals but not to recommendatory or administrative decisions.

The content of the general "duty of fairness" was further clarified by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, where the Court set out a test for determining when certain procedural protections are required. The Supreme Court of Canada affirmed the general duty of procedural fairness required of every public authority making an administrative decision which affects the rights, privileges or interests of an individual.

Visit Appendix A. for more background on the legal rules that emerged from the *Nicholson* and *Baker v. Canada* cases.

Sources and principles of the 'duty to be fair'

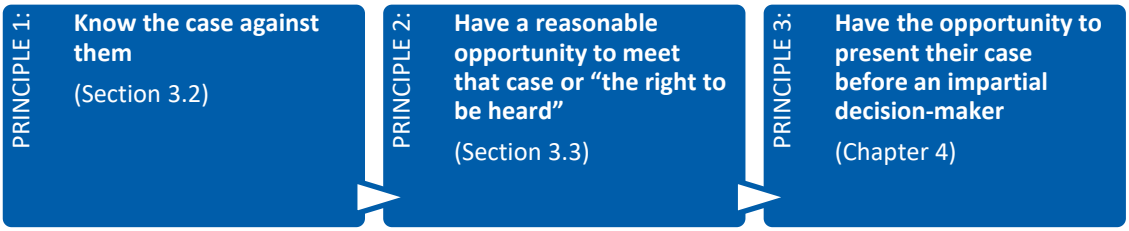
The overarching goal of the principle of natural justice and fairness is that a decision-making process is fair. There are **three sources** of fairness:

Table 1: Sources of fairness.

Source of Fairness	Explanation
1. What Parliament says is "fair"	• Legislation itself may **oust or modify** natural justice/fairness by providing for a different procedure • The Supreme Court of Canada has said that the legislation must require **express language** in order to oust the rule of natural justice/fairness

2. What the decision-maker promised	• Decision-makers must **be careful in what they promise**, as once a promise is made, the Courts may say that he/she has a duty to uphold it (a.k.a. legitimate expectations) • If an individual is promised a specific procedure prior to the decision and relies on that promise, **Courts will uphold the promise**, even if the procedure would otherwise not be required by law
3. "Fair" as otherwise determined by the Courts	• Where Parliament does not provide procedural guidance, **the Courts will apply the case law and expect that principles of fairness will be adhered to**: ○ An individual must know the case against him or her ○ An individual has the **right to be heard** prior to any decisions being taken ○ The decision-maker(s) must be **impartial/unbiased**

The duty to be fair is based on the principles that persons potentially affected by a Tribunal's decision should:



A Tribunal's procedures should make provision for all of these requirements (see subsequent sections for examples of procedures to meet these principles).

3.1.2 What if a decision is not fair?

If the process a Tribunal used to make a decision is deemed not to be fair it means:

- That the process failed in some way
- That the Tribunal did not give proper consideration to the rights and interests of the parties appearing before it.

If the Tribunal is challenged successfully by way of judicial review on a fairness question, the most likely remedy to be imposed by the Court is "*certiorari*" or quashing of the decision. **The effect is to wipe the decision out and force the Tribunal to begin its process all over again**.

A breach of the rules of fairness is considered a jurisdictional error and if a decision is quashed, the Tribunal must start over.

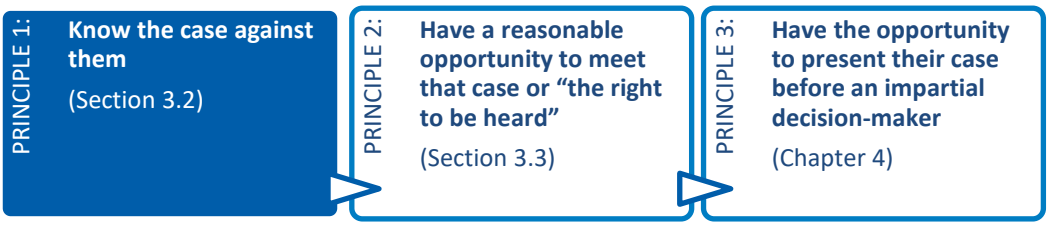
The duty to be fair results in scrutiny of both the process used by a Tribunal and the conduct of the decision-makers themselves.

3.1.3 Tribunals and discretion

Legislation cannot foresee all of the facts or circumstances to be decided upon. **The law grants Tribunals "discretion" to apply legislation and Rules of Procedure to situations as they arise.** However, this does not mean a Tribunal can do whatever it wants. The Tribunal must still apply discretion within the "rule of law" and in accordance with its jurisdiction and meet the requirements of fairness.

3.2 KNOWING THE CASE TO BE MET

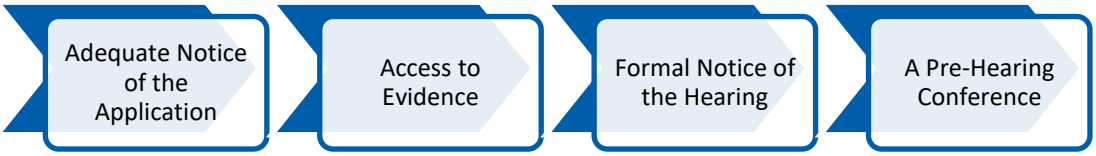
Knowing the case to be met is the first principle of the duty to be fair.



3.2.1 What is meant by "knowing the case?"

Several steps should be taken to ensure a potentially affected party knows the case he or she must meet. In other words, a person that will be affected by a decision that is requested of the Board has the right to know what the case involves and what the consequences could be for them.

In general, the affected party should have:



Adequate Notice of the Application

The Tribunal must establish a formal circulation list or list of affected parties (those involved in the hearing), which is usually compiled into Distribution List. The Tribunal must then ensure that the affected party receives adequate notice of the application to be considered by the Tribunal. Often, the application form (for a permit or license) will ask the applicant what steps have been taken to **contact potentially affected parties and to identify their concerns**. The Tribunal (usually at the staff level) can direct that such interaction take place before the application is considered complete. Legislation and regulation requirements as well at the Tribunal's own public engagement guidelines should be followed.

Access to Evidence	The Tribunal should provide parties and interveners an opportunity to review the submissions, technical reports etc. of the proponent and other parties.
Formal Notice of the Hearing	When the Tribunal is satisfied that the affected parties know the case they would have to meet, and the parties have had the chance to put their own evidence/case forward, then formal notice of the hearing is given. Notice of other important procedural steps should be given to the affected parties.
A Pre-Hearing Conference	The Tribunal may hold a prehearing conference to identify more clearly the issues of concern.

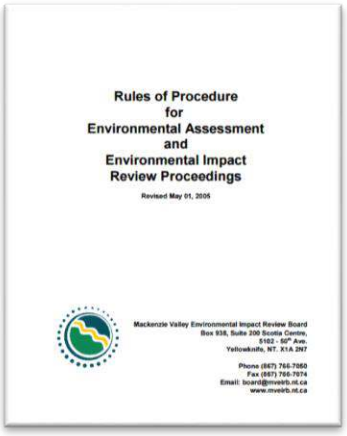
How much notice and process is enough?

Not all proceedings have hearings. If proceedings have hearings, the length of the hearing process depends on a number of factors including the complexity of the matter, the quality and extent of the evidence and the legal issues to be addressed.

3.2.2 Co-management Board procedures and rules, policies and fairness

Most Co-management Boards in the NWT have their own Board procedures, rules and policies that help guide the process and ensure that the first principle of duty to be fair of "knowing the case to be met" is appropriately satisfied.

The Mackenzie Valley Environmental Impact Review Board has Rules of Procedure to explain how the Review Board will run environmental assessments and environmental impact reviews. The Rules also explain the roles and expectations of others involved in these proceedings.



Rules of Procedure
for
Environmental Assessment
and
Environmental Impact
Review Proceedings

Revised May 01, 2005

Mackenzie Valley Environmental Impact Review Board
Box 938, Suite 200 Scotia Centre,
5102 - 50th Ave.
Yellowknife, NT. X1A 2N7

Phone (867) 766-7050
Fax (867) 766-7074
Email: board@mveirb.nt.ca
www.mveirb.nt.ca

Notice and Participation in Proceedings

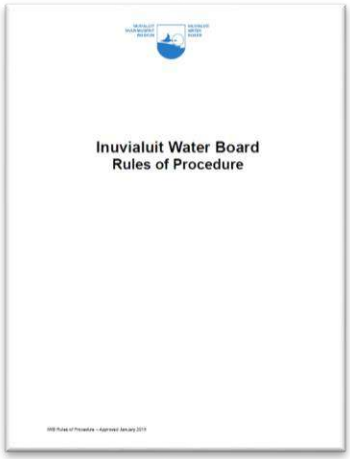
1. The Review Board will, upon receipt of a referral for environmental assessment or upon ordering an environmental assessment or an environmental impact review, publish a public notice of the proceeding. The notice will include a brief description of the development proposal and will identify the staff contact within the Review Board for the proceeding.

2. Subject to Rule 21, any member of the public may provide written information or comments to the Review Board at any time during a proceeding. Parties to a proceeding will be given the opportunity to respond to such information or comments before the conclusion of the proceeding.

3. Any party may participate in a proceeding on its own behalf and is encouraged to do so. Parties represented by a contact person or counsel will notify the Executive Director of the identity of their representative. If a change in representation takes place, the Executive Director must be informed as soon as practicable.

4. All Review Board proceedings are public unless otherwise ordered by the Review Board.

Similarly, the Inuvialuit Water Board has its own Rules of Procedure covering a range of provisions.



Inuvialuit Water Board
Rules of Procedure

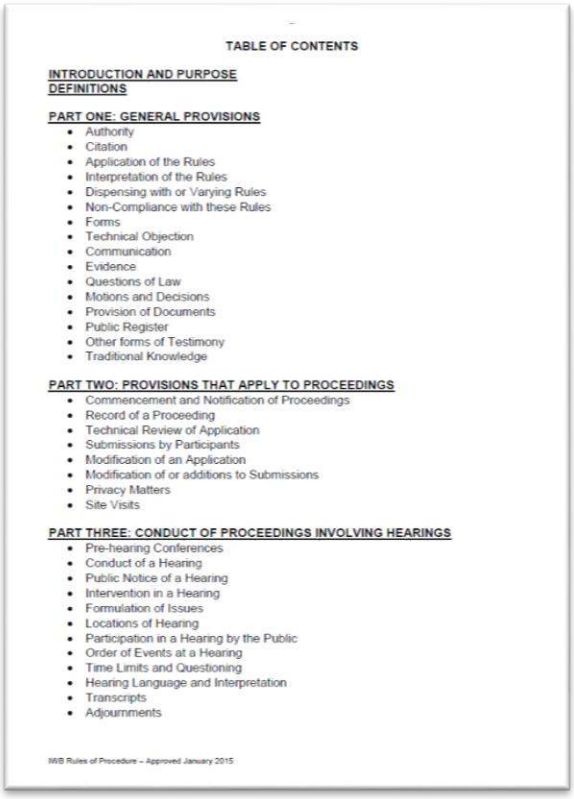


TABLE OF CONTENTS

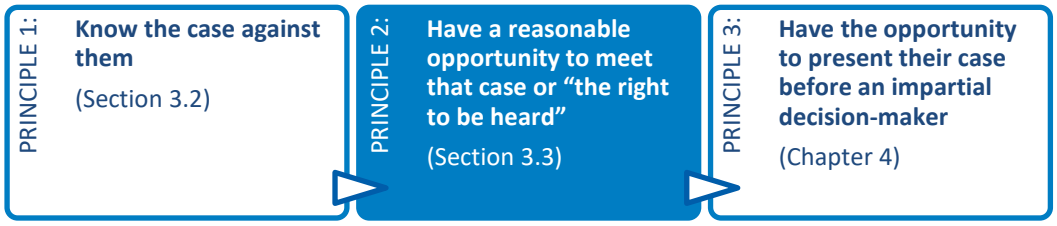
IWB Rules of Procedure – Approved January 2015

KEY TERMS

- **Procedures:** A procedure is a specified series of actions or operations that should be executed in a consistent manner in order to obtain the same result under the same circumstances (e.g. consistency and predictability). A procedure is often a defined sequence of tasks, steps, or decisions. Under the MVRMA, Board bylaws are for internal or corporate governance. Boards have the authority – all Tribunals do – to set out their own procedures once a proceeding is initiated. They do this with work plans which are updated and modified as required.
- **Rules of Procedure:** Most Boards have authority to make "Rules of Procedure" for the conduct of its proceedings under their enabling statutes.

3.3 PROVIDING A REASONABLE OPPORTUNITY TO MEET THE CASE

Having a reasonable opportunity to meet that case or "the right to be heard" is the second principle of the duty to be fair.



3.3.1 What is meant by "a reasonable opportunity to meet the case against you"?

The ways in which a Tribunal may provide a person with a reasonable opportunity to meet the case, or "the right to be heard," turns on a number of factors including:

- The nature of the issue
- The likely effect on the person (minimal or significant?)
- The scope of the Tribunal's decision-making (i.e., discretionary vs mandatory)

Depending upon the nature and effects of the issue, the right to be heard may be satisfied with the filing of written submissions (a written hearing) or may require an oral or public hearing. The choice of procedure (written versus oral hearing) must be appropriate to the interests affected. If the potential consequences to the affected party are significant, the Tribunal's process may want to consider both written submissions and a hearing.

Interpretation and the 'right to be heard'

The right to a fair hearing includes the right to be understood and to understand what is going on. At the very least, this right includes the opportunity to follow or understand the hearing and to make arguments before the Board.

The right to be heard therefore includes the right to an interpreter, as understanding what is being said is an element of natural justice and fairness. **Interpreters are therefore not only a courtesy**, but may be a necessary component of the right to be heard, which is why they are often provided at hearings by Northern Tribunals.

The right to be heard has been satisfied only once the person has had the opportunity to:

- Know the case against them
- Dispute, correct, or contradict anything which is unfavorable to their position
- Present the supporting evidence and arguments for their case

Official languages

The *Federal Official Languages Act* states that a person has a right to use either of Canada's official languages (English and French) in any federal Court. The "federal Court" is a definition that includes a Tribunal carrying out adjudicative functions and which is established by or pursuant to federal legislation (i.e., MVRMA) and/or land claim agreement implementation legislation.

Tribunals may direct a party involved in a hearing to arrange for the translation of any documents into or from French or an Aboriginal language(s). The Tribunal usually directs the proponent to pay for the costs of translation, and can stipulate the number of translated copies of a document to be provided. Where appropriate and necessary, simultaneous oral interpretation into an Aboriginal language, or from an Aboriginal language into English, or interpretation from or into French, will be arranged by the Tribunal.

3.4 CONCLUSION

Key points from Chapter 3 include:

- In order to maintain public confidence in the judicial system, fairness is necessary during the Tribunal's decision-making process.
- There are three principles of the duty to be fair:
    - An individual must know the case against them
    - An individual has the right to be heard prior to any decisions being made
    - The decision-maker(s) must be impartial/unbiased
- A breach of the rules of fairness is considered a legal error, resulting in the decision being quashed (wiped out) and the Tribunal starting over.
- In order to satisfy an affected party's right to know the case to be met, they must be provided: adequate notice of the application, access to the evidence, formal notice of the hearing, and (in some instances) a pre-hearing conference.
- In order to satisfy an affected party's right to a reasonable opportunity to meet the case (the right to be heard), they must have the opportunity to not only know the case to be met, but also to:
    - Dispute, correct, or contradict anything which is unfavourable to their position
    - Present the supporting evidence and arguments of their case
- An interpreter is not a Courtesy, but may be essential in providing a fair decision-making process.

Chapter 4: The Impartial Decision-Maker

One of the essential elements of the duty to be fair is impartiality. Tribunal members must be unbiased and avoid conflicts of interest. Otherwise, a decision may result in the decision being reviewed by the Courts (judicial review), the disqualification of a Tribunal member, and/or the decision being quashed (rejected).

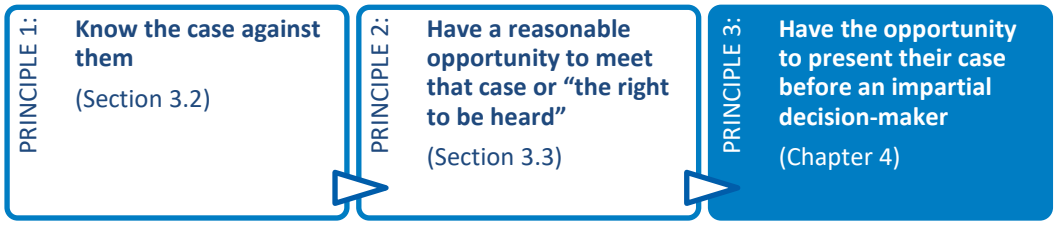
By reading this Chapter, you will be able to:

- ✓ Outline what makes an impartial decision-maker
- ✓ Explain bias and conflict of interest in the context of a Tribunal's duty to be fair, Tribunal members' ethics and Tribunal governance
- ✓ Distinguish bias from conflict of interest
- ✓ Know how to identify and respond to bias
- ✓ Understand the ways in which Northern Tribunals may avoid introducing bias and conflict of interest

Chapter Breakdown:

4.1 WHAT IS MEANT BY AN "IMPARTIAL DECISION-MAKER"?

Once the affected party has been made aware of the case he/she must meet, and has been given a reasonable opportunity to be heard, **the third crucial element of the duty to be fair is that the decision-maker is independent and impartial**. The parties have a right to an impartial decision-maker, meaning that Tribunal members must therefore be free of bias and conflicts of interest in making their decisions.



The principles of impartiality:

1. Members who participate in a Tribunal's decision must be those members of the Tribunal who **actually heard all the evidence and the arguments** of the parties
2. **Decision-makers must be present for the entire time** the parties put forward evidence and arguments, and
3. A Tribunal may have advisors, including staff, who assist with the decision-making process but those **advisors may not act in a way that is beyond their advisory role.** Those Tribunal members who hear the case must be free to decide it.

Tribunal members are to be individually free from bias and conflict of interest in making their decisions.

Remember, the duty to be fair results in scrutiny of both the process used by a Tribunal and of the conduct of the decision-makers themselves as set out in the box below. The public, communities, developers and other participants in Tribunal proceedings can be adversely affected when the process is not fair. Because Administrative Tribunals play an important role in the legal decision-making system, it is highly important for the public to have confidence in the impartiality of decision-making.

The Principles of Impartiality

1. Only those who have heard the evidence and arguments can make decisions
2. A Tribunal member must be present for the entire time evidence and arguments are put forward
3. Advisors may not act in a way that is beyond their advisory role

4.2 GENERAL FRAMEWORK FOR THE RULES ON BIAS AND CONFLICT OF INTEREST

The rules addressing bias and conflict of interest may come from either common law (case law) or from Parliament or the Legislatures (statutes). If these rules conflict, the statutory rules will prevail.

For example, s. 16 of the MVRMA prohibits a Board member from acting while in a "material conflict of interest." Thus, to participate in a decision, a member of an MVRMA Board must be free of conflict of interest. **Being a beneficiary in a land claim, however, is not a material conflict of interest (s. 16(2) MVRMA)**. The MVRMA has thus eliminated the possibility that an allegation of conflict can be raised simply because a Board member is a beneficiary in a land claim. This is an important provision in a co-management system because some members who sit on Co-management Boards are, by design, beneficiaries of land claims.

The NWT has a *Conflict of Interest Act* which applies to members of Boards, councils and municipalities. Members who contravene the *Act* are subject to removal and to fines. These remedies go beyond those available in common law.

4.3 CONFLICT OF INTEREST

Board members must be careful to avoid conflicts of interest. **Material conflicts of interest are situations where a Board member or their immediate family may stand to benefit directly or indirectly from the Board's decision** (e.g., direct financial or personal interest in a matter before the Board). Board members must disclose any potential conflicts or any circumstances which might result in an apprehension of bias as soon as the member is aware of a potential conflict of interest and, in any event, in advance of a member's participation in the hearing process.

The *NWT Conflict of Interest Act* even requires disclosure of conflicts that arise within a limited period after a decision (s. 2(2)). There is also a federal *Conflict of Interest Act* which might apply to members of federal Tribunals, because many of the Northern Tribunals have been created under federal statutes.

4.4 DISTINGUISHING BIAS FROM CONFLICT OF INTEREST

The rule against bias also means that a Tribunal must only base its decision on admissible evidence. It applies to all Administrative Tribunals, but how it will affect a Tribunal will depend on the circumstances. In general, a conflict of interest is more straightforward to determine than bias, however, because the Courts have set a high standard, applying the rule against bias requires more caution.

Even if a decision-maker does not think he or she has bias, if a reasonable person might think there is bias, it's still a problem because it affects the public's perception and confidence in the system. This is known as the **apprehension of bias**. The reach of the "apprehension of bias" concept is much wider than that of a conflict of interest.

In *McKenzie v Canada* (Canadian Human Rights Commission) McNair, J. stated that bias is "an attitude or state of mind" but that the real question, in a legal context, is whether the circumstances point, both realistically and substantially to either the real likelihood or a reasonable suspicion of bias (i.e., to an apprehension of bias).

The Court cannot look into a Tribunal member's mind to determine the presence of bias, so the Court must answer by inference, drawn from the circumstances or by the outward appearance of the decision-making process.

KEY TERMS:

Conflict of interest arises when a Board member exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.

Bias occurs when a predisposition or prejudice is expressed by a member of the Board, consciously or unconsciously

Apprehension of bias occurs when a reasonable person might think there is bias, which could still affect the public's perception or confidence in the system

4.5 BIAS

4.5.1 Categories or types of bias

Brian Crane, a senior partner practicing constitutional, administrative and aboriginal law at Gowling WLG (Canada) LLP, has suggested in his article *Identifying the Forms of Bias* that the following types of bias can be identified from the case law:

Table 2: Categories of bias.

Types of Bias	A predisposition or prejudice…
Institutional Bias	• Due to the practices and procedures under which the Tribunal operates
Pecuniary Bias	• Due to a member's financial interest in the outcome of the case
Other relationships	• Due to an actual personal or business involvement between parties
Pre-judgement	• Due to a member consciously or subconsciously making a perceived judgement prior to hearing the case
Interference with the Hearing	• Due to other, apparently non-personal actions taken by the member (e.g. participation in decision-making without hearing the evidence)

It is important to note while these categories are helpful for understanding and determining bias, a Court is not constrained by any categories. The facts which may lead a Court to a finding of bias are varied.

4.5.2 Apprehension of bias and the test for bias

The first test for bias is whether there is **actual bias**. Actual bias will be determined on the basis of the actions of Tribunal members.

The general law applies a broader test to Tribunal actions however. The test for apprehension of bias is whether a **reasonable and properly informed person** would form a "reasonable apprehension of bias."

The test for **reasonable apprehension of bias** was originally set out by Justice de Grandpre of the Supreme Court of Canada:

"What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he/she think that it is more likely than not that the [Board member], whether consciously or unconsciously, would not decide fairly?"

Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369

Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)

- Supreme Court of Canada dealt with **allegations of bias** arising because a Commissioner commented to the media on matters before the Board
- Court's **test for fairness** in this context was to ask whether a reasonably informed bystander would think that the Commissioner was biased
- Evidence needed to make out an apprehension of bias must only show a **reasonable likelihood of bias** and can be based on appearances
- In *Newfoundland Telephone*, the Supreme Court established a **"sliding scale" bias test**
  - The test is most lenient for Tribunals involved in legislative and policy making activities and most stringent when Boards are involved in adjudicative activities
  - When the decision-maker has an adjudicative function, (makes decisions which may affect the legal rights and interests of a party based on choosing between different points of view) the stringent standard is imposed

The stringent standard set out in *Newfoundland Telephone Co. v Newfoundland* would likely apply to most Tribunals that make decisions affecting the rights and interests of parties. When a Tribunal is dealing with an application which will lead to a hearing, the test applied is whether there is likely to be a reasonable apprehension of bias and this application is more strict as the hearing approaches. Tribunal staff actions can also result in a finding that an apprehension of bias exists. Tests applicable to the activities of staff are generally the same as those applied to Tribunal members.

See Appendix A. to read more about the *Newfoundland Telephone Co. v Newfoundland* case, which established the test for apprehension of bias.

4.5.3 Bias arising from involvement of others in Tribunal decisions

"He or she who hears must decide"

One of the central rules of administrative decision-making is that the decision-maker cannot delegate his or her duty to make a decision. It is necessary that a Tribunal's decisions be made only by those members who participated in the proceeding: "He or she who hears must decide."

Decisions must be made by Tribunal members themselves, not by staff, counsel, or others.

The bias of decision-makers can arise when their views are affected by consultation with others before a decision is made, either before or after a hearing. This problem resulted in the quashing of a Yukon Territory Water Board decision in 1982. The Board had held consultations with the applicant before the hearing, of which no notice was given. The applicant also offered technical assistance to the Board before the hearing.

Staff and Legal Counsel can help with decision writing **as long as the Tribunal makes the decision. The key point is that the decision must be made by the Tribunal itself, not by others.**

4.5.4 Bias in a Tribunal: Objections and waiver

What happens if a party raises a bias objection to a Board member?

If a party to a proceeding wants to raise a bias (or an apprehension of bias) objection related to a particular Tribunal member, that party should raise the objection as soon as possible. It is best if the party raises the objection either before or during the hearing to avoid the extra cost and delay if it is raised afterwards and the hearing is declared void. If the party delays in making an objection, the right to object may be found to have been waived, or given up, by that party.

Legal writers do not agree on all the aspects of waiver of bias but they do agree that:

1. A party can only waive his or her right to object on basis of bias if the party making the bias allegation has full knowledge (or the means of full knowledge) of the potential bias situation; and
2. The party must have the opportunity to object

A party can either expressly waive the right to object to bias or the party's waiver can be implied by a failure to object at the earliest opportunity.

4.5.5 Response to bias challenge

A Tribunal member who has been challenged on grounds of bias should address the matter before the hearing commences or continues.

After raising the objection, the party making the objection should continue to participate in the hearing. The party does not need to repeat the bias objection and the party's continued participation does not indicate acceptance or waiver of the bias. The party who has raised the issue of bias before the Tribunal can later raise it on appeal or judicial review.

Tribunals must be proactive in dealing with bias objections. **They should establish a process to determine whether an apprehension of bias, or actual bias exists before proceeding further and before any decision-making takes place. A Tribunal must err on the side of caution, given that a member must step down if there is any reasonable likelihood of conflict or bias.**

4.5.6 Bias and conflict: Tribunal governance

Concepts of bias and conflict are applicable to a Tribunal's internal governance, not only to its public decision-making. In this regard, Co-management Boards are no different than corporate Boards. Bylaws and the code of conduct established for a Board or Tribunal must address the possibility of conflict and bias.

Problems can arise when bias or conflict issues are clear to the Tribunal but a member refuses to declare the problem and step aside. This issue is particularly sensitive in the co-management context where quorum requirements mandate a certain number of government and Aboriginal nominees in order for the Tribunal to make a valid decision.

- Where Tribunal Counsel is available, a member should always be encouraged to seek advice on such issues in confidence.
- Where a problem is evident but is not acknowledged, the Tribunal must act to protect the integrity of its proceeding and reputation.
- If, on the advice of Counsel, the Tribunal determines that a real problem exists, it has the authority to prevent a member from participating in a decision where bias or a conflict of interest exists.

Bylaws and the code of conduct established for a Tribunal must address the possibility of conflict and bias.

The Tribunal should make sure that its bylaws and Code of Conduct address these issues and ensure that the orientation and training of Tribunal members include such matters.

4.5.7 Effects of a conflict of interest or bias

Disqualification of a member / rejected decision

As indicated, if a Board member is disqualified for bias after a decision has been made, the decision is quashed, or rejected. The loss of a Tribunal member may mean the loss of quorum or an adjournment. These matters should be addressed as early as possible in a proceeding.

Judicial review

An allegation of a conflict of interest or bias could give rise to an application for judicial review of the Tribunal's decision. (Refer back to section 2.5 in Chapter 2 for more information on judicial review.)

Courts can provide a range of remedies upon a successful application for judicial review. In a case of conflict of interest or bias, the remedy is *certiorari* or quashing the Board's decision. In other words, the decision is held to be void and the proceeding must be restarted from the beginning. The new decision must be made in this case without the participation of the member with the conflict or bias. This result is likely to mean significant delay and expense for all concerned. **Thus, if a Tribunal member acts while in conflict or while subject to an apprehension of bias and the Tribunal's decision is successfully challenged, the whole proceeding is invalidated. In addition, after such a ruling by the Court, the renewed proceeding will have to take place without the participation of any member held to be biased.**

An example of the effect of bias can be found in the recent National Energy Board (NEB) ruling in TransCanada's Energy East pipeline application. The NEB panel recused themselves when the media published a story that two of three panel members met privately with a consultant employed by the Applicant and discussed the pipeline. The meeting was part of a broader consultation with community and business leaders, however, the new NEB panel voided all previous decisions of the prior NEB panel.

4.6 UNIQUE CIRCUMSTANCES OF NORTHERN TRIBUNALS

Northern Tribunals make their decisions in a very large territory characterized by small communities and populations. Therefore, the likelihood of a northern Tribunal member having some relationship to parties appearing before him/her can be high. **Mere familiarity between the Tribunal members and the parties, lawyers or witnesses has not generally been sufficient to establish a reasonable apprehension of bias in a proceeding but the facts should be carefully considered in each case.**

Case law suggests that this familiarity must be considered in light of the context of the proceeding and the particular Tribunal. If the industry, group or profession being regulated is fairly small it may be impossible to establish a hearing process where those involved have no familiarity with each other.

4.7 CONCLUSION

Rules of fairness and the rule against bias are designed to protect the integrity of the decision-making system.

- The Board members must make Tribunal decisions and not rely on others (such as staff and legal counsel) to do so
- The sliding scale test means that the rules against bias are more strictly applied in relation to adjudicative functions and after a hearing is called.

Avoiding an apprehension of bias requires more care than avoiding a conflict of interest.

- A Tribunal member's behaviour and circumstances may lead to an apprehension of bias and any concern about either conflict of interest or bias should be discussed with legal counsel.

Conflicts of interest or bias must be disclosed as soon as it arises – a biased decision is void.

- Conduct of a hearing or the manner in which the Tribunal makes its decision after a hearing may also lead to an apprehension of bias.

Avoiding the problems of bias, apprehension of bias and conflict of interest requires vigilance and the establishment of an ethical framework for Tribunal governance.

- Tribunals must follow natural justice in carrying out or acting in the duties of being fair (Chapter 3 and 4).
- Tribunal members should refer to a Board's rules of procedures and policies for specific guidance.

Part 2:
Making Good Decisions

Chapter 5: Gathering and Working with the Evidence

Both the management of the evidence gathering process and decision-making on the basis of the evidence on the record are critical functions of a Tribunal. Tribunals require information or evidence to make decisions. It is an error of law to make a decision that is not supported by the evidence on the record.

By reading this Chapter, you will be able to:

- ✓ Understand the important rules of evidence applicable to Tribunal proceedings and what is meant by "the record"
- ✓ Know the rules which allow a Tribunal to identify and test important evidence that forms the basis for its decisions
- ✓ Identify specific issues which arise in relation to the management of the record in a Tribunal proceeding
- ✓ Know how to review and weigh the evidence received (or heard) by the Tribunal and explain why the evidence is relevant (or not)

Chapter Breakdown:

5.1 EVIDENCE AND THE RECORD

5.1.1 Importance of evidence for Tribunals

Administrative Tribunals are generally not bound by the "technical" rules of evidence but that does not mean that there are no rules of evidence applicable to a Tribunal's proceedings. **Both the management of the evidence gathering process and decision-making on the basis of the evidence on the record are critical functions of a Tribunal**.

Tribunals are established by statute as administrative decision-makers and they play an important role in a variety of decision-making contexts as presented in Chapter 2. **To make decisions, Tribunals require evidence on which to base a decision.**

When a Tribunal receives an application (or proposal) which requires a decision, a legal proceeding is initiated. The proceeding ends when the Tribunal has made a decision and any possible appeal period is over.

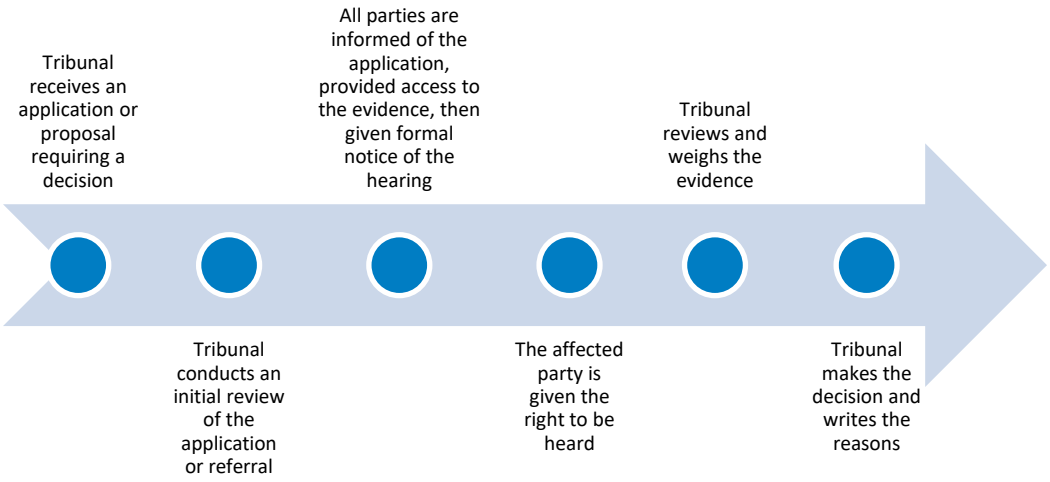


Figure 8: An example of a legal proceeding of an Administrative Tribunal

Different Boards have different 'triggers' to kick start this process:

- Land and Water Boards receive an application for a water license or land use permit
- Review Boards get a referral from the Land and Water Board to start an EA / EIA
- Land Use Planning Boards and Resource Review Boards generally do not often have formal proceedings (but can exercise quasi-judicial functions)

Tribunals are responsible for their own processes and that includes securing and managing the evidence which is required to make a decision. The Tribunal must ensure that all of the information needed for a decision is received before closing the record for a proceeding. Assisting a Tribunal with these matters and monitoring the evidence is an important function of staff and counsel.

5.1.2 What is evidence?

Evidence is information which the Tribunal can consider. To be considered, the evidence must be part of the record in a proceeding. One legal definition of evidence is: "that probative material, legally received, by which the Tribunal may be lawfully persuaded of the truth or falsity of a fact in issue…"

More broadly, evidence is something that helps decision-makers logically establish a fact. Evidence may be tangible or deduced as described in the key terms below.

KEY TERMS:

Tangible evidence: Where someone produces a physical object in order to establish its existence.

Deduced evidence: Where someone produces a series of observations, either personal or through others, which leads to a conclusion that something exists.

For the proceeding to be fair, the evidence must also be gathered, held and used in an open manner, which means that it must be accessible to all participants in a proceeding. (See 5.2.3 for more information on managing privileged or confidential evidence or information). It is the findings of fact, derived from the evidence, that are used to make decisions.

In the Court process, evidence is subject to technical rules about admissibility or exclusion before being accepted, whereas the general rule for Tribunals is that the "technical" rules of evidence (like the rules related to hearsay) do not apply. This means almost all of the information may be admitted without any testing of its relevance or importance, which has consequences later when a Tribunal must make its decision.

5.1.3 Purpose of evidence

There are 3 purposes for the rules of evidence before a Tribunal. They help to:

1. Establish sound factual basis for decisions
2. Ensure proper balance between the harm in accepting the evidence and the value in doing so, and
3. Maintain a fair and effective process

5.1.4 Rules of evidence

A Tribunal should make its decisions on the basis of the best available evidence. Courts are bound by rules of evidence which come from cases or statutes. **A Tribunal, however, does not have to follow the rules of evidence because accepting evidence is considered a matter of procedure and administrative decision-makers are masters of their own procedure.** Even with a relaxed approach to the rules of evidence, it is important for the Tribunal to address the reliability and truthfulness of information before deciding on the facts and making a decision.

Much of the "process" used in a proceeding is intended to allow the parties to challenge (test) each other's evidence. Before being persuaded of an important fact, the Tribunal must address the evidence critically.

Since Administrative Tribunals serve a different function than the Courts, rules of evidence are applied differently before a Tribunal. Some of the rules of evidence are based on statute. Every jurisdiction in Canada has an *Evidence Act*. Before the Courts in the trial context, s 24 of the *Charter* may also apply. Enabling statutes of some Tribunals also address matters related to evidence (e.g., MVRMA addresses it in ss. 22, 25, 114 and 115.1). Most of the "rules of evidence" are based in common or case law from the Courts and their trial processes.

5.1.5 Types of evidence

Information gathered from testimony, hearsay, physical evidence, site visits, and judicial notice may all be used as evidence.

Table 3: Types of evidence

Types of Evidence	Description
Testimony	A Tribunal may receive **oral or written** testimony during a proceeding, such as an affidavit or a statement. The testimony may be **sworn or unsworn**. It must be based on **personal knowledge of facts**. **Traditional knowledge may be included as testimony, but it could also be considered expert evidence.**
Hearsay	Hearsay evidence is an **oral or written** statement, made by a person who is not present at the hearing, which is put into evidence to prove the truth of a matter. **It is not admissible in a Court of law,** however this is subject to exceptions. Since Tribunals do not apply the strict rules of evidence, **they may admit hearsay evidence despite its unreliability**. However, because **it cannot be tested, a Tribunal should not give the same weight to hearsay evidence that it gives to direct evidence that has been tested.**
Physical Evidence	The main type of physical evidence that a Tribunal will receive will be in the form of documents, including **letters and reports**. A Tribunal may also receive: • Photos • Video or audio recordings • Objects • Demonstrative evidence (maps, charts, graphs, models or simulations) There may be authentication issues with such evidence. For example, demonstrative evidence can be easily doctored (e.g. "Let's Photoshop it!").
Site Visits	A Tribunal can **go out to the site of a proposed development and conduct "a site visit."** Courts sometimes do this too but they call it "taking a view." There can be fairness issues associated with site visits, as: 1. The Tribunal may not be able to bring representatives of every party and so evidence is being received in the absence of some parties 2. The applicant may assign a "tour guide" who takes the opportunity to try to persuade the Tribunal of the merits of their employer's position **It is important for the Tribunal to be in control and to set the ground rules when it is on a site visit.**

Judicial Notice	Not everything that is relevant in a proceeding must be supported by evidence. Tribunals may take **"judicial" or "official" notice of some facts** for which no evidence has been presented – **but such facts must be part of general or widely held views or knowledge.** Tribunals, like the Courts, may take judicial notice of certain matters that, put simply, are **well known enough that they can be assumed**. The Tribunal has the authority to take judicial notice because that power is implied in its decision-making power. However, personal knowledge of a Tribunal member is not considered to be "generally known and accepted" and may not be taken account of by the member as "judicial notice."

5.1.6 What is the record?

During a proceeding, a Tribunal solicits or receives evidence from various sources:

- Applicant
- Companies
- Communities and other affected parties
- Government
- A Tribunal's own files

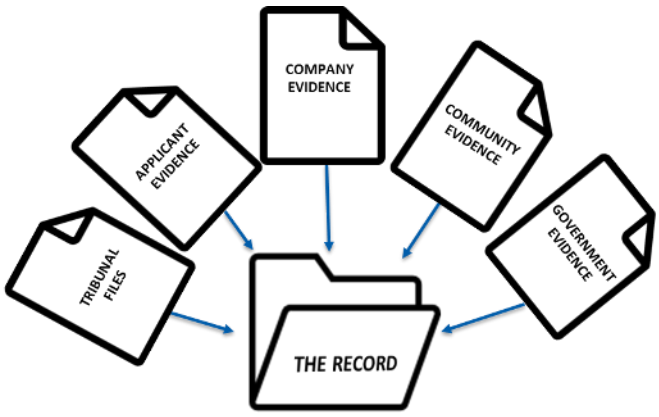


Figure 9: The various sources of evidence that may be received by the Tribunal

Some of the evidence may come from the Tribunal's own files if it has an ongoing regulatory or management function.

Collectively, all of the information compiled to address an application is called "the record." The record includes **all admissible information submitted to the Tribunal from the time the application is received until the record is closed**, after which the Tribunal makes its decision. Simply put the record is the evidence which a Tribunal uses to make a decision in a specific proceeding.

The record and public registries distinguished

Some Tribunals have statutory responsibility for maintaining a Registry of all information filed in relation to an approved activity. Such arrangements for regulatory Tribunals are common. For

example, Land and Water or Water Boards are responsible for a "public register" or a "water register" respectively. In the case of the NWT Public Utilities Board, a record must be kept of all proceedings and the record and all its decisions must be available in its offices.

Registries are common for Tribunals with ongoing regulatory authority and include historical information and correspondence and other day to day information about the compliance of regulated parties and Tribunal or government management of regulated activities. Although information may be moved off the registry onto the record for a specific proceeding, the **contents of the registry are not automatically considered evidence in a proceeding unless steps are taken to file the registry information on the record.**

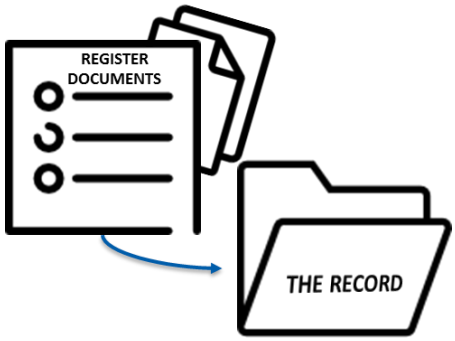


Figure 10: Register documents being filed on the record to be considered as evidence

5.2 GATHERING THE EVIDENCE NEEDED FOR YOUR PROCEEDING

This section will cover several aspects related to gathering the evidence for your proceeding, including:

- Ways to gather evidence
- Putting the evidence on the record
- Distributing the evidence to the parties, and
- Closing the record

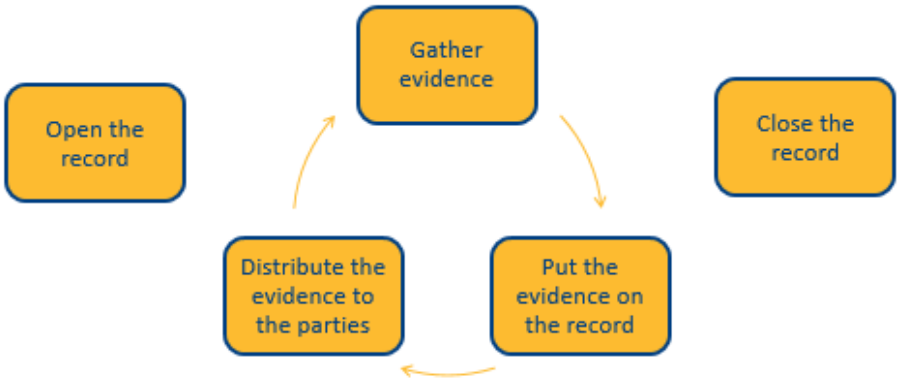


Figure 11: Gathering evidence needed for your proceeding

5.2.1 Gathering evidence

Issues with witnesses

Witnesses play a key role in delivering evidence to the Tribunal. The following issues are related to gathering evidence from witnesses.

Competence and Compellability

- The very young and those of unsound mind may not be competent to give evidence, particularly where the witness must be sworn. Competence involves both the issue of mental capacity and whether the witness understands the responsibility involved in giving testimony.
- Some witnesses may not be compellable (forced to provide evidence), usually for public policy reasons. For example, a wife may not be compelled to testify against her husband; or a solicitor may not be compelled to disclose privileged information.

Credibility and Impeachment

- Credibility and reliability are key to persuading a Judge or a Tribunal of a position. A witness must be credible for a trier of fact to conclude that his/her evidence is reliable. This is best judged where oral testimony is given. Normally, a witness' credibility cannot be attacked unless questions of character or truthfulness arise.
- For an expert witness, credibility is always in issue. An expert's credentials should be reviewed before he or she is allowed to give opinions on technical or scientific questions.

Cross-examination and questioning evidence

- Administrative Tribunals in the North tend to be very concerned about "cross-examination." Cross-examination occurs when a party is asked by other participants to clarify, to ensure that all assumptions are clearly stated or to challenge the evidence and/or attempt to discredit it.
- Every witness giving evidence has to be available for questioning for the proceeding to be fair and for the evidence to be properly tested.

- Having the participants test the evidence of other parties assists the Tribunal in determining what evidence is relevant and what weight it should be given. The Tribunal may also benefit from the expertise available in certain government departments when they (as parties) test the evidence of others.
- It is the Tribunal's job to ensure that cross-examination is polite, respectful and does not detract from Tribunal proceedings. The Chairperson can control the tone of questioning while ensuring that the evidence put forward is thoroughly tested.
- Questioning of a party in a hearing generally follows that party's presentation to the Board. Based on the parties' submissions prior to a hearing and presentations at the hearing, other parties, Tribunal staff, legal counsel, consultants, and Board members may question the parties. In other administrative proceedings (south of 60) Board legal counsel usually cross-examines witnesses to ensure that the evidence is tested.
- Order of questioning at a hearing generally is:

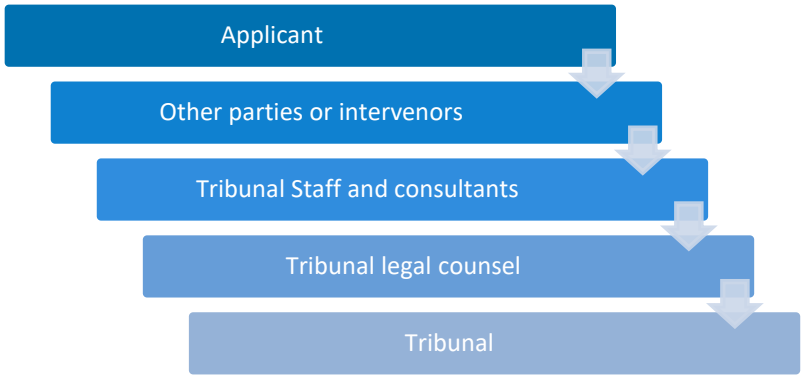


Figure 12: The order of questioning at a hearing

Undertakings (promises to provide additional information)

- Undertakings are promises made by parties to provide additional information on an issue in a hearing. A response to an undertaking can:
    - Be provided during the hearing or after the in-person public hearing but not after the proceeding's conclusion or the close of the record, and
    - Save time and allow the hearing to proceed to other matters.
- A party may give an undertaking to provide a document, answer a question or produce additional evidence. Undertakings given to the Tribunal should be precise and should fully describe the information to be provided. They are given a number (by the clerk or the Chair), are recorded on an undertaking list and are recorded in the transcript.
- If the information is to be provided after the hearing, the undertaking should include a deadline by which it will be provided since the hearing record remains open until all undertakings are received. Tribunal staff or counsel will follow up on undertakings if required.

Expert Witness

- In Court, only a properly qualified expert can offer opinion evidence on matters which are not commonplace or part of general knowledge.

- Rules related to the admission of expert opinion tend to be looser before Tribunals versus Courts. It is important to ensure that the expert evidence is required and that it will contribute to decision-making before admitting it.
- Tribunal members should determine the actual expertise of a witness before allowing opinion evidence (based on education, experience, writing, teaching etc.). An expert should not be allowed to offer opinion evidence outside of the expert's area of expertise.
- The Expert's duty is to the assist the Tribunal. The Expert's testimony should be the product of their independent judgment. An opposing party may raise concerns that an expert is unable to be impartial. The question is whether the expert would give the same evidence if she or he had been retained by the other party (*White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23)
- Ensure that expert expertise is required and tested.

Traditional Knowledge

- Traditional knowledge can also be expert evidence. Because it is given orally, in the past it was often downplayed or given little weight due to concerns about its reliability (hearsay).
- Courts have since held that it is a special case. For example, The Supreme Court of Canada in the *Delgamuukw* case overruled the trial judge's decision since traditional knowledge had not been given appropriate weight.
- In a series of cases, the Supreme Court of Canada has developed a sensitive and practical approach to the admission and use of traditional knowledge. Some of the same issues relevant to expert evidence need to be addressed in the context of traditional knowledge evidence (reliability, expertise etc.)
- The MVRMA requires consideration of traditional knowledge when available.
- When receiving traditional knowledge evidence, a Tribunal should consider whether:
    1. the evidence is relevant
    2. the evidence will benefit or assist the Tribunal
    3. admitting the evidence will result in any prejudice

5.2.2 How to get evidence on the record

It is vital for Tribunal staff and legal counsel to have a thorough grasp of the evidence on the record as the proceeding progresses. **"Managing the record" is therefore an active and important process in all proceedings.**

Certain kinds of questions are best addressed by written evidence or argument, whereas others require oral evidence. For example, elders should be heard in their own language in an appropriate setting. In a single large proceeding like an environmental assessment or a Type "A" water licence hearing, there may be steps in the process where either oral or written evidence is best suited to assisting the Tribunal. Different approaches can be used at different stages in the same proceeding. Some proceedings, like land use permitting, are most often conducted in written form.

Some mechanisms which a Tribunal can use to ensure that the evidence needed gets filed are:

- Information Requests

- Technical Sessions
- Issue subpoenas for documents or to ensure the attendance of important witnesses where a Tribunal has the authority to do so

There are also other ways for a Tribunal to get the information it needs for a decision, like site visits.

The Tribunal's staff must help the Tribunal to make sure it has all the information it needs to make its decision.

The Tribunal's staff and legal counsel must help the Tribunal to make sure it has all the information it needs to make its decision. In the initial (completeness) review of an application, staff and legal counsel should identify shortfalls in the material filed in relation to the statutory and regulatory requirements. For example, in an EA process, a Developer's Assessment Report (DAR) is reviewed for completeness by comparison to the Terms of Reference issued by the MVEIRB. Any deficiencies at this stage must be addressed.

As the proceeding goes on, the Tribunal must continue to determine if, in fact, statutory requirements have been met via a process which results in ongoing assessment of the evidence. If evidence is missing or the Tribunal wants more on a certain issue, it should take the steps necessary to get it.

5.2.3 Distribution of evidence to the parties

As indicated, Tribunals must be fair. This means that the evidence, in whatever form received by the Tribunal, must be managed by Tribunal staff to meet the requirements of fairness. As such, **a distribution system may be needed to notify the parties to the proceeding when new evidence is filed.** There are various ways to accomplish this:

Distribution of the evidence to the parties must be timely, as late arriving evidence poses fairness

- Parties can "serve" the evidence on other parties, or a
- Tribunal can distribute it or it can maintain an electronic registry where parties are notified and can access new information

Distribution must be timely, as late arriving evidence poses fairness problems and some Boards have specific policies or rules of procedure regarding late submissions.

Electronic registries and online response systems

Management of information received by a Tribunal is a critical part of the decision-making process. Many Tribunals now have Electronic Registries (band width permitting) which help to distribute the information to the parties in a timely way.

Managing privileged or confidential evidence or information

Given flexible evidence rules for Tribunals, the most common problems which come up relate to privileged or confidential information. Privileged information is information which includes legal advice, draft reports used to prepare for proceedings, witness preparation materials, and counsel's comments on Information Requests (IRs), transcripts and argument.

Solicitor-client privileged information must be kept confidential to protect the sanctity of the relationship between legal counsel and their clients. This is a type of protection which the Courts are careful to ensure. If an attempt is made to file evidence to which a claim of solicitor-client privilege is made, a Tribunal should seek the advice of its own legal counsel.

An important distinction regarding confidential information is that it can be subpoenaed, whereas privileged information cannot. Types of confidential information include information protected by privacy legislation, business and trade secrets, or cultural and traditional knowledge, among others. Confidential information can be important to a Tribunal's decision and may not bear on other parties' interests in the proceeding.

A Tribunal may have to file and hold the confidential evidence under confidential cover and keep it off the record to protect it. Some ways to manage confidential information in a proceeding include:

- Receiving it under confidential cover and only sharing it with affected parties after counsel for those parties give an undertaking not to disclose the details
- Only making the information available to parties that sign a confidentiality agreement, or
- Refusing to accept the evidence

Courts have dealt with these confidentiality issues and have set out the following test for what constitutes confidential information:

- Information must originate in a confidence that it will not be disclosed
- Confidentiality must be essential to the relationship between the parties to the confidence or in the public interest
- Damage done by release of the information must be significant

Concerns about confidential information commonly arise when:

- A party wants to file it but wants it protected from disclosure
- The Tribunal or a party tries to secure this information and access is denied because it is "confidential"

Several steps are important when working with confidential information

Figure 13: Steps to take when working with confidential information

MVEIRB dealt with such circumstances in the handling of both TK and archaeological information in relation to *Drybones Bay*. Only the Review Board, the developer and the Yellowknives Dene First Nation needed to see the information (all parties agreed). The information was received under confidential cover, was reviewed by the developer and was held separate from the portion of the record which could be accessed by the public.

Some of the information submitted to the Tribunal during its proceedings may include the personal information of individuals, such as the name, address or telephone number of an intervener in the proceedings. The Tribunal should take steps to prevent the disclosure of such personal information that is on the record, particularly if the Tribunal places the material onto an online registry which would make it even more easily accessible.

A Tribunal must be diligent in ensuring that it has all the information necessary to make a decision. The mere fact that privilege is claimed or that information is said to be confidential should not deter a Tribunal from satisfying itself of the status of the information, or making arrangements to see it while protecting legitimate interests in relation to the evidence.

5.2.4 Closing the record

At some point in a proceeding a Tribunal must say **"we've heard all we need,**" which usually happens after a hearing when undertakings and transcripts have been filed. At that point, the Tribunal must make its decision on the relevant evidence on the record and the record is closed. **It is a breach of the rules of fairness or, a legal error, to make a decision on irrelevant evidence or on evidence which does not form part of the record.**

5.3 WORKING WITH THE EVIDENCE

How a Tribunal evaluates the evidence (as the "trier of fact") and makes findings of fact requires using a clear process to organize and evaluate evidence and make a series of legal choices which must be made by the adjudicators acting alone and as a Board. Working with the evidence is mainly the Tribunal's responsibility supported by staff and counsel as required.

5.3.1 What is a fact?

A Tribunal, or "trier of fact," is often presented with different points of view by the parties to a proceeding. These views are all based on information or evidence filed during the proceeding. **A Tribunal's Rules of Procedure may address the process of determining what a "fact" is.**

A Tribunal must sift through the various assertions and make "findings of fact."

For example, in recent hearings, Boards in the Mackenzie Valley had to address concerns about caribou populations and the effects of development on those populations. The Boards were presented with different evidence from different parties about how serious the situation in relation to caribou really was.

In order to decide what mitigation was appropriate the Boards have had to decide on the facts in relation to the risk to caribou. This has meant reviewing the sometimes conflicting evidence on caribou and deciding for purposes of their decisions what the facts are about caribou. On that factual basis the Boards can then make recommendations about mitigation.

The party must convince the Tribunal of that fact. Rules often say that a party that intends to assert or prove a fact bears the evidentiary burden of doing so. A Tribunal must sift through the various assertions and make "findings of fact." This involves a review of the evidence and a reasoning process including consideration of:

- the reliability of the evidence,
- the credibility of the source etc.

In the end, the Tribunal decides what facts it will base its decision on. This kind of exercise is necessary for all important facts in issue in a proceeding. Making findings of fact is one of the Tribunal's most important functions and it must be approached systematically.

5.3.2 How information becomes a fact in a proceeding

How information becomes a fact in a proceeding:

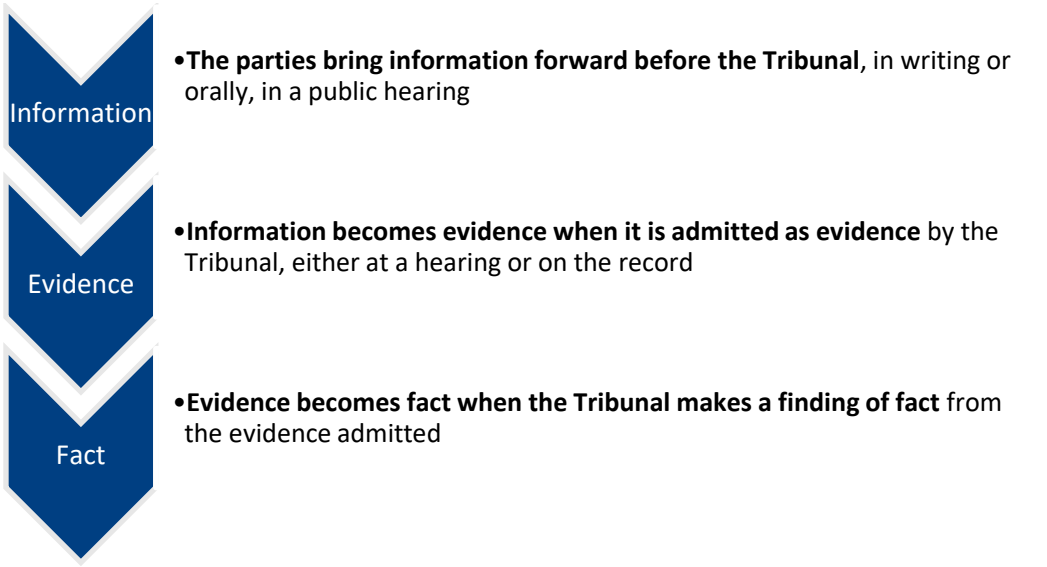


Figure 14: How information becomes fact in a proceeding

Tribunals often get more information than they want or need, so they need to determine what information is the most important. **Courts use the concepts of relevance and weight to guide them in such exercises.** Information is relevant if it helps you to answer a question which must be addressed in a decision. Evidence given weight by a decision-maker is simply more important evidence than the rest of the record.

The best way to address fact finding is to be systematic and clear in identifying the elements of a required decision. For example The Review Board must satisfy the requirements of s 117(2) of the MVRMA in an EA

(2) *Every environmental assessment and environmental impact review of a proposal for a development shall include a consideration of* ***(a)*** *the impact of the development on the environment…*

5.3.3 Using evidence to determine the facts

The Tribunal decides if evidence is admissible and relevant. If determined admissible and relevant, the Tribunal then gives weight to the evidence.
In other words, key things to consider when determining the facts include:

Confidence / Admissible	Relevance	Weight
•The Board must determine if it has confidence in the information or evidence that has been presented to the Board.	•If the information is determined to be true, the Board must then consider whether it is relevant – i.e. does it have a bearing upon or is it connected with the matter at hand?	•If the Board has determined the information to be true and relevant, it must then consider the weight (importance) of the information. 'Weight' refers to the importance, consequence or effective influence of the information on the matter at hand.

Determining admissibility

Questions to ask when deciding upon the admission of evidence

In an article titled "*Evidence Before Administrative Agencies"*, James L. H. Sprague sets out questions to ask when deciding whether or not to admit evidence:

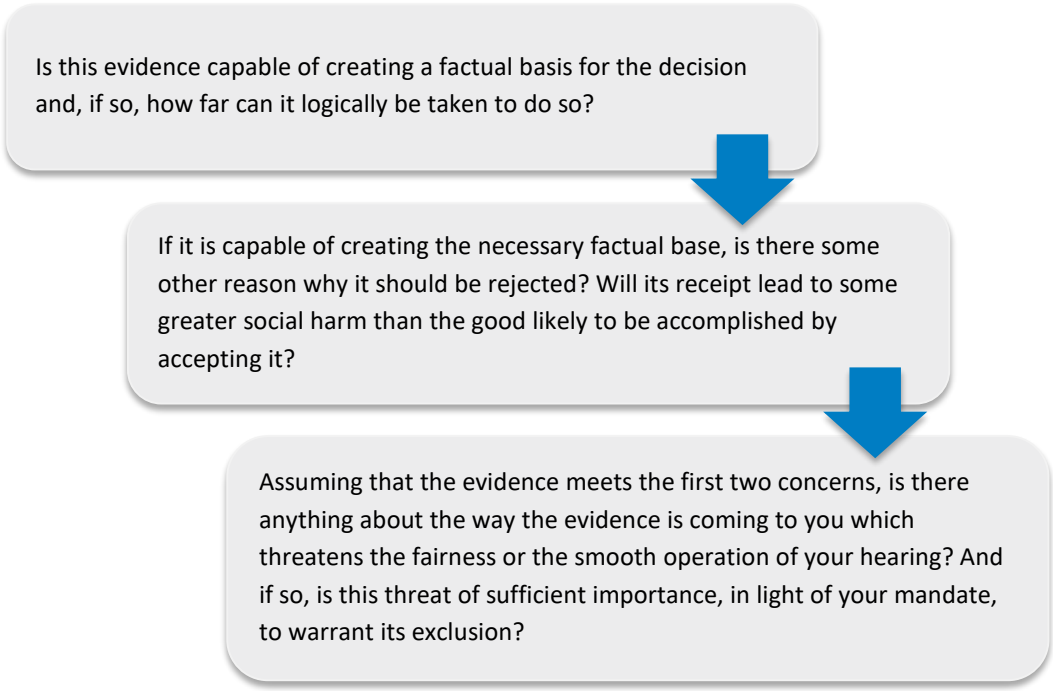


Figure 15: Questions to ask when deciding upon the admission of evidence

Determining relevance

Evidence is relevant if it will help the Tribunal make a determination of fact. In a Court, admissible evidence must be both relevant and material. It must make a difference to a fact in issue. **The concept of relevance is a key principle in helping the Tribunal decide what is important. There is no strict legal test for relevance; it is largely a matter of common sense.** It is important that the Tribunal knows what must be proved when assessing if it will accept or to reject any piece of evidence.

The Tribunal should ask:

- Does the information logically help to prove something that is an issue?
- If so, it is "probative" (or, "tending to prove [a point]") and relevant?

For example, if an engineer presenting evidence about water quality released from a proposed mine testifies that he has successfully operated a dozen underground coal mines in Nova Scotia, that may not be relevant if the applicant is applying for a water license for an open pit gold mine in the NWT. In addition, if the issue is the quality of effluent to be released from the gold mine, the evidence of the engineer's experience is not relevant by itself as it does not help the Tribunal to address water quality effects from the NWT gold mine.

Inadmissibility and the exclusion of evidence

When evidence is relevant and helpful the general rule is that it is admissible, unless there is a reason to exclude it. Reasons for exclusion may include:

- Privacy concerns or proprietary information
- Inflammatory/prejudicial information
- Evidence is not relevant
- Evidence is inherently unreliable (i.e., hearsay)
- It is not evidence (i.e., it is argument), or
- There are fairness concerns (e.g., surprise or late evidence)

The authority responsible for determining what the facts are (called the "trier of fact") makes the ruling on the admissibility of evidence. In a Tribunal proceeding, the trier of fact may be either the Tribunal (if a consensus decision is intended) or a Member if consensus cannot be reached; most information or evidence is admissible unless there is an objection and a ruling is required. **The most common evidentiary issue addressed by many Northern Tribunals is the handling of confidential information (e.g. Traditional Knowledge).**

Tribunal members' personal knowledge or expertise

Some Tribunals appoint their members specifically because of their personal knowledge or experience. **A Tribunal member with personal knowledge, training or expertise can use it to evaluate or better understand the evidence. However, this background or experience cannot be used as evidence or to replace evidence.**

The knowledge and experience of a Board member assists him/her to make their decision. It is not a substitute for the evidence in the proceeding. A Tribunal member must be careful in such circumstances not to have a closed mind and thus be biased.

Weighing the evidence

Something may be relevant but still not of much use in making a decision. For example, an undated, unsigned letter that is submitted in evidence may be right on point and may therefore be relevant, but because there is no way to know how truthful it is, it should be given comparatively little weight. Evidence that is more important to a decision should be given more weight.

The weight of an item of evidence describes the importance that is to be attached to it.

The weight of an item of evidence describes the importance that is to be attached to it. In weighing evidence, the trier of fact should consider credibility, reliability and the strength of the inference it gives rise to. Each member of a Tribunal should undertake such an analysis on his/her own.

Weighing the Evidence: A CSI (Crime Scene Investigation) Example

- Evidence of a fingerprint found at the scene of a crime is better circumstantial evidence that the accused was at the scene than proof that a common type of carpet fibre consistent with the carpets in the home of the accused was found at the scene.
- The inference from fingerprint to presence at the scene of the crime is stronger than the inference from common fibre to presence.
- Hence, a trier of fact will give more "weight" to the fingerprint evidence. It seems to have more probative value (e.g., helps to prove the case).

Five factors are traditionally used to weigh evidence:

1. Internal consistency – does the evidence or story contradict itself? Are there internal inconsistencies?
2. External consistency – do external facts contradict the evidence?
3. Inherent probability – is the evidence reasonable and or logical? Are any conclusions reached reasonable or logical?
4. Bias – did the source of the evidence indicate any bias or predisposition that would lead the Board to question their objectivity?
5. Demeanor (irrelevant without the "witness on the stand") – related to bias – does the way that the witness presents the evidence lead to concerns about truthfulness or credibility?

Irrelevant information or weightless evidence

Because of the wide latitude Tribunals have in accepting evidence, it is often difficult to limit testimony to that which is truly relevant. Parties often use a public hearing to discuss their own grievances which may have little or nothing to do with the matters before the Tribunal. Even though the Tribunal is sitting for a specific purpose, it may be reluctant to cut someone off. Yet, if the Tribunal allows anybody to say anything, it clutters up the record and can delay the process.

Cluttering up the record might cause problems when the Tribunal is writing its decision because it must discuss why certain evidence was not considered and what it relied upon to make that

decision. **This added volume of testimony increases the chances of missing something, which might lead to an otherwise unnecessary judicial review.** When the testimony is clearly no longer relevant, the Chair should cut it off and make a clear ruling, on the record, as to why more testimony on the point is denied. To make sure that you are not cutting off someone who is finally getting to the point, the wise Tribunal should gently interject and ask the witness to explain the relevance of what he/she is saying – keeping in mind cultural sensitivity and various approaches for sharing information (e.g., Traditional Knowledge shared through story-telling).

5.4 CONCLUSION

Managing the record to ensure that the evidence required by the Tribunal is available is of central importance to the success of a Tribunal's decision-making process. It is an active process which requires the attention of Tribunal members, staff and counsel.

Tribunals have a variety or mechanisms available to them to ensure that they get the information they need. Organizing and analyzing the evidence is best framed around the actual elements of the decision which must be made.

The key is to manage the record on the basis of an early understanding of the proposed development and knowledge of the requirements of the statute and Tribunal duties.

Chapter 6: Making a Decision

A Board's primary responsibility is to make recommendations and decisions on issues, within their mandate. It is important that the Board have enough information to make a decision, and when constrained by incomplete information, use means to find the information. A Board must be able to identify and evaluate the important information and make a decision that is seen to be reasoned, fair and defensible.

By reading this Chapter, you will be able to:

- ✓ Describe and use the process for effective Tribunal decision-making
- ✓ Use tools for simplifying the decision-making process
- ✓ Understand your role in the Tribunal decision-making process, both as an individual and as a member of the collective Board

Chapter Breakdown:

6.1 DECISION-MAKING PROCESS FOR CO-MANAGEMENT BOARDS

Quite simply, the primary role of a Co-management Board is to make decisions. These are either final decisions, or recommendations to a particular Minister or final decision-maker who makes the final decision. The issues that come before a Co-management Board may be quite complex and have significant implications for the parties involved (loss of time, money, perceived or real ecological impacts, etc.).

The most effective way to address complex issues is to address them in a stepwise (checklist) manner. **Setting up a framework on which to base the decision helps to ensure that all aspects of the issue have been considered and all relevant information has been put before the Board.** This approach does not need to be limited to large issues that are subject to a hearing. The approach is equally applicable to all issues requiring a Tribunal decision.

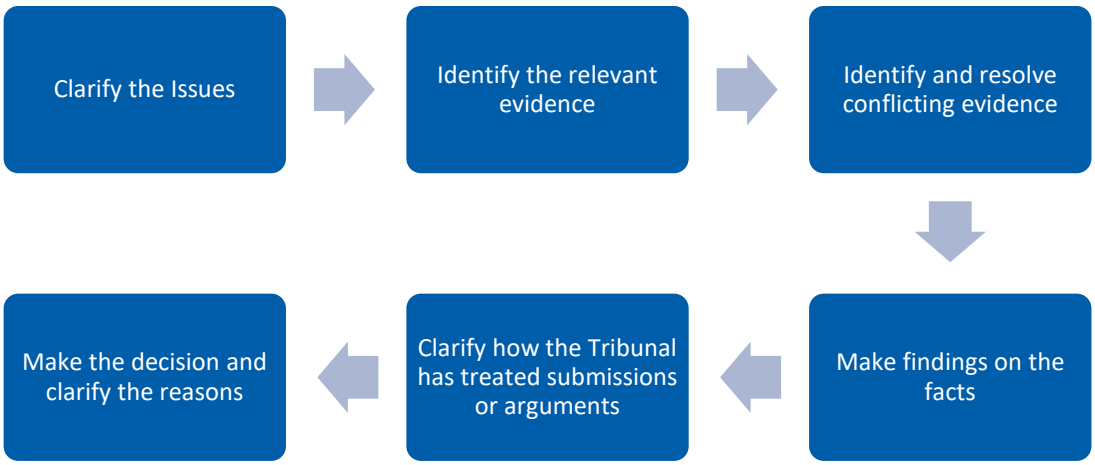


Figure 16: The decision-making process

6.1.1 Clarify the issues

This is an important first step which is critical to the rest of the process. It is important that the Board members clearly understand the decision that they are required to make. Some decisions may require a number of smaller issues to be resolved before the fundamental issue at hand can be addressed. For example the issuance of a water licence cannot take place before certain preliminary matters are addressed such as the Applicant's ability to fund closure and reclamation.

The Executive Director, with the help of staff and counsel, can play a key role in identifying and defining key issues for Board consideration.

Key things to consider when trying to clarify the issue:

- **Mandate:** Does the decision to be made fall exclusively within the Board's mandate (geographically or subject matter)?
- **Component issues**: Some decisions may require a number of smaller issues to be resolved before the fundamental issue at hand can be addressed. These smaller issues are often referred to as "component issues".

6.1.2 Identify the relevant evidence

As a condition of procedural fairness, parties are required to submit their evidence and arguments in advance of a decision. This allows the Board members, staff and counsel to review the material in advance and to prepare the questions they will ask during the hearing. Such preparation will help to test the value of the evidence presented. Most of a Board's time and effort will be devoted to establishing the validity of disputed evidence.

(See Chapter 5 – Gathering and Working with Evidence for more information).

6.1.3 Identify and resolve disputes

It is common for parties to have differing views and positions on an issue before a Board. Differing views, values and opinions are a fact of life that the Boards must address as a part of their mandate. When this occurs, it is the role of the Board to make a decision on the issue.

The challenge for Board members is to reach an agreement (preferably a consensus) on the relevance and weight of the evidence and facts presented and address any disputes in a systematic and objective manner.

- **Disputes between Parties:** It is important to focus on the facts and avoid judgment of the party's position or values. Questions from Board members should seek to establish the facts.
- **Differences of opinions amongst Board members:** A full range of views, positions, and values can also be expected within a Board membership that includes individuals from diverse backgrounds.

It is important to focus on the facts and avoid judgment of members' position or values.

6.1.4 Make findings on the facts

As described in Chapter 5, the Tribunal decides if evidence is admissible and relevant. If determined admissible and relevant, the Tribunal then gives weight to the evidence.

(See Chapter 5 – Gathering and Working with Evidence for more information).

Dealing with competing facts

Through logical reasoning the Tribunal must decide which version of the facts it accepts. When dealing with competing facts, a Tribunal must look at the evidence and evaluate:

- credibility/reliability
- expertise
- corroboration
- weight

Burden of proof and balance of probability

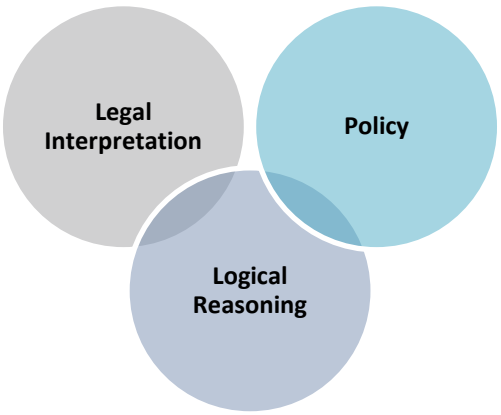
Any party attempting to prove a fact will bear the burden of proving that fact. The Tribunal should focus on the question of which party has the onus to prove the facts in the context of a proceeding. Tribunal members must assess the evidence and decide if there is enough proof to prove the fact on a balance of probabilities (more likely than not). The onus of proof may be set by statute or regulation or it may simply involve two parties contesting a fact.

For example, in an environmental assessment, if a developer and an intervener disagree about the significance of the impact of certain proposed actions, both parties must file sufficient evidence to try to convince the MVEIRB of their respective points of view. In such a circumstance, a Tribunal must weigh the evidence and make an informed decision. In this way, Tribunal decisions are "evidence driven."

6.1.5 Clarify how the Tribunal has treated submissions or arguments

A party's arguments for or against a particular decision should be clarified and reviewed against the facts. This can be done, for example, through careful questioning of the party and by analysis performed by the Board staff participating in the hearing process.

After the Board determines the facts based on the evidence, the Board must consider the facts in relation to the following three components, called fact testing framework:



1. Legal Interpretation

The Tribunal, having determined what the facts are, must now return to the question it asked at the outset: **What must be proven to meet the requirements of the Tribunal's mandate, legislation, and regulations?**

The Tribunal's mandate (jurisdiction) must be clear in the Tribunal's members' minds. If a Tribunal is set up to review wildlife management issues, it would not be appropriate for it to decide a case purely on the basis of socio-economic impacts. For example, if a Tribunal is only responsible for fish habitat, it would be outside of its jurisdiction to decide that a project that would wipe out the spawning grounds of a population of fish is acceptable because the project offers significant socio-economic benefits. The Tribunal's staff, in its first review of the matter, should identify shortfalls or discrepancies between the material filed and the statutory and regulatory requirements. It is then up to the Tribunal to determine if those requirements have been met by assessing the evidence submitted.

In its review of the relevant legislation and regulations, the Tribunal must identify the issues to be resolved and any statutory requirements that relate to an issue. Tribunal Counsel should assist the Tribunal with this review and explain how the rules of interpretation apply to the legislation or regulations.

2. Policy

Policy may be applied to the facts determined in a hearing process. However, unless the Tribunal's enabling statute specifically allows it to establish and apply its own policy, a Tribunal must not make decisions based upon policies that contradict the proven facts. "Policy" does not mean political consideration; a Tribunal should not to give way to political motives in reaching its decision. "Policy," in the context of Tribunal decision-making, is more about the way a Tribunal exercises its discretion.

3. Logical Reasoning

One way to make a decision is through a purposeful selection from among a set of alternatives in light of a given objective. It is difficult to describe in a few words how to apply logical reasoning to a set of facts in order to make a decision; using a system such as an issues matrix or a table of issues analysis may help. Logical thinking can apply the process of elimination or deductive thinking. Using an "if"- "then" approach can help to identify the "logical" alternative decisions.

Avoiding Traps in the Reasoning Process

Tribunal decision-makers are often selected because of their experience or special knowledge. A person with a certain background related to the subject under discussion will understandably bring that background to bear on a matter. If the decision-maker is not open to the evidence, this implies a built in bias in that person's reasoning. Similarly, someone who has participated in decisions on similar facts and reached the same conclusion each time, may have a predisposition to make the same decision again. Tribunals must recognize these potential pitfalls and work toward reasoning objectively as much as possible.

6.1.6 Make the decision and set out the reasons

The Board then comes to a decision on the issue using the criteria we just discussed. Each Tribunal member must:

- **Evidence:** Review the evidence and be able to explain why they think that the evidence is important.
- **Legislation**: Consider the relevant legislation and determine the scope and limits of their decision-making authority.
- **Policy**: Apply relevant policies in considering the evidence once legislative requirements are met.

Making the decision as a Board member

Each member has an obligation to make an independent assessment of the facts and the application of the law before making a decision. **Only the Board members who participated in the hearing may participate in making the decision.** Board decisions must be made by a quorum of the Board members (minimum number of members needed to make a decision).

Making the decision as a Board collectively

The development of a consensus Board decision should be undertaken only after each member has indicated her or his position. A consensus decision is desirable but not required. A decision can be made by a majority of the members. In the event of a tie the Board chair may vote to break the tie.

Quorum and Tribunal decisions

The issue of a Tribunal's compliance with quorum requirements is also related to the rule that "he who hears must decide." Quorum is the "…minimum number of a collective who must be present for the exercise of authority which has been given to the collective as a body." Quorum requirements must be strictly adhered to by a Tribunal in order to make a valid decision.

Quorum requirements may also apply to the conduct of general Tribunal business. With certain representative and Co-management Tribunals, quorum may also require that members nominated by certain groups must make up quorum for a decision to be made. A Tribunal's actions can only be done with certain members, or with a minimum of members, who are "appointed on the nomination" of a particular group or groups.

Case law in Canada has also held that following quorum requirements is essential for Tribunals to make valid decisions. The issue was discussed at length by the Federal Court of Appeal in *IBM Canada v Deputy Minister of National Revenue*. In the *IBM* case, the Court found that, although there was no direct authority on the quorum issue, "the Courts have consistently insisted on the necessity for a decision-making authority to strictly comply with quorum requirements at all times."

Working together to achieve consensus

Once Tribunal members are ready to begin the search for consensus, there are tools that can simplify decision-making.

DECISION-MAKING TOOLBOX

List the issues and the parties' positions on each issue •A summary spreadsheet can be used for this	Identify what needs to be proven and by which party	Organize and summarize the evidence received that relates to each issue
Determine which evidence is disputed versus agreed upon or undisputed	Discuss and develop an outline of the decision to assist the drafters	Look at the purpose of the evidence and ask what it is intended to prove
Make findings of fact based on the evidence •Undisputed or uncontested evidence assists the decision-maker	Apply the legislation to the facts, as necessary	Discuss reasons to include in the decision in relation to each issue

Tribunal can shorten the decision making and the written reasons in relation to some findings of fact by stating:

- The parties agreed…therefore…
- The evidence of…..was undisputed, therefore…
- The evidence on this issue all points to the same conclusion, therefore the Tribunal finds…

What happens when you cannot agree – Minority Reports

On the rare occasion, if members cannot agree, then the decision will be made by the majority of members that do agree. A dissenting member has the right to set out his/her views in the Board's final report. In such circumstances the Executive Director and Board counsel should assist in making appropriate arrangements to assist the dissenting members.

Importance of providing reasons

In many cases, Boards are required by law to provide reasons for their decisions – regardless, the Courts generally expect Tribunals to provide reasons for their decisions. Providing sound reasons demonstrates that the Board has seriously considered the issue and contributes to the transparency and fairness of the decision-making process.

The next step is to determine whether or not the evidence presented supports a fact and, if it does, how those facts relate to the issue at hand. When determining the facts, the Board must consider a number of factors.

6.2 CONCLUSION

One of a Tribunal's most important functions is to evaluate the evidence before it and make findings of fact. The Tribunal then uses these facts to make its decision. The rules of evidence are quite technical but the Tribunal does not have to comply with all of them. In the end, the Tribunal's decisions must be based on what it considers to be the best evidence. In that sense the Tribunal process must be "evidence driven."

Chapter 7: Writing a Good Decision

Once the evidence has been evaluated and a fair decision has been made, it is the responsibility of the Tribunal to develop a strong written decision with the support of its staff and legal counsel. It is expected more and more by the Courts that reasons be provided along with the decision. A strong written decision can therefore reduce the risk of judicial review.

By reading this Chapter, you will be able to:

- ✓ Identify the components of and general process for writing a good decision
- ✓ Understand the role of the Tribunal staff and legal counsel in supporting decision writing
- ✓ Recognize some of the best practices for decision writing
- ✓ Know the points of agreement between Tribunal members in drafting the decision
- ✓ Prepare decisions that reduce the risk of judicial review

Chapter Breakdown:

7.1 WRITING A GOOD DECISION

A written decision is the voice of the Tribunal in written format.

Even if not mandatory, it is expected more and more by the Courts that written reasons be provided. If the Tribunal has related the facts to the requirements of legislation in making its decision, then the reasons should explain this process. The Tribunal should explain any procedural rulings that were made during the hearing.

To write a good decision, the Tribunal should:

- follow an outline or template or use a framework to build the decision on
- use plain language and write clearly
- ensure the decision is logical and defensible
- provide helpful feedback to the drafter(s) on draft decisions, and
- write decisions that show that the process was open and fair and that the positions of the parties were considered

The Tribunal should be systematic in writing a decision. The establishment of a decision-making template may support the process. The summaries of evidence and issues may be used to help to structure the decision. They may have been developed and used during the evidence-gathering phase of the proceeding.

Tribunals should not be paranoid about the potential for judicial review but, in writing decisions, Tribunals would do well to remember what the Judge Strayer of the Federal Court of Appeal called "the cardinal rule for administrative agencies": "Explain yourself. Good Agency Decisions: A – Judge's Perspective" by Hon. B.L. Strayer. This article focuses on the importance of written reasons from the perspective of a reviewing Court. Judge Strayer points out that it is important that the Tribunal explain itself so that the Court may understand what it decided and why.

7.2 ASSISTANCE OF TRIBUNAL STAFF AND COUNSEL

Tribunal staff are there to assist the Tribunal in the decision-making process. Staff or counsel can assist in drafting reasons for decisions, however, **it is important that the reasons be those of the Tribunal, not of the staff and counsel.** Staff and counsel can communicate the reasons and decisions of the Tribunal to the parties, governments and their departments, the industry involved, the Courts, the media and to the general public.

A written decision is the voice of the Tribunal in written format. The decision should provide enough detail so that the affected parties can understand the reasons underpinning the decision and can properly assess their rights to judicial review or appeal.

7.3 WHEN TO WRITE THE DECISION

Tribunal should write its decision **as soon as possible after the hearing** because:

1. Both the parties and the public are entitled to know the hearing result as soon as possible. This is because the decision may affect rights, investments and public policy.
2. A decision is easier to write the sooner it is drafted after the evidence and argument have been heard. Memory fades and, although the transcript may be useful, the drafters will save time if they start writing sooner. The later they start, the more time they will need to review the evidence.

A long delay between the hearing and the reasons, without explanation, especially if it is not caused by the parties, may lead to judicial intervention. For example, a Court might find that the delay was an abuse of discretion and might quash the decision. Some legislation gives directions on the timing of release of reasons. Failure to comply does not, of itself, invalidate the reasons. However, delay is not seen favourably by the Courts.

7.4 AGREEMENT ON THE DRAFT WRITTEN DECISION

At the end of the drafting process, the Tribunal members must agree on the written decision and in reviewing drafts should:

- Know the reasons for the decision
- Not be overly critical of the drafter's writing style, grammar or punctuation
- Focus on the decision and the reasons for it
- Provide the drafter with objective feedback

7.5 CONCLUSION

The Tribunal and the individual Tribunal Members are the triers of fact. Consensus of members in making a decision may be sought with that in mind. A Tribunal's reasons should be based on a systematic and comprehensive review of the evidence on the record and a careful explanation of the Tribunal's decision.

Appendix A: Supreme Court of Canada Case Headnotes

The following headnotes summarize the rules of law that emerged from the Supreme Court of Canada cases previously discussed in this Reference Guide. Note that if you are to rely on any of these cases in informing your Tribunal decisions, you should refer to the full judgment through the SCC's website (https://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do).

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities, [1992] 1 SCR 623

Respondent Board, whose members are appointed by cabinet subject only to the qualification that they not be employed by or have an interest in a public utility, regulates appellant. One commissioner, a former consumers' advocate playing the self-appointed role of champion of consumers' rights on the Board, made several strong statements which were reported in the press against appellant's executive pay policies before a public hearing was held by the Board into appellant's costs. When the hearing commenced, appellant objected to this commissioner's participation on the panel because of an apprehension of bias. The Board found that it had no jurisdiction to rule on its own members and decided that the panel would continue as constituted. A number of public statements relating to the issue before the Board were made by this commissioner during the hearing and before the Board released its decision which (by a majority which included the commissioner at issue) disallowed some of appellant's costs.

Held: The appeal should be allowed.

The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.

There is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such

circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

A member of a board which performs a policy-formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias. Statements manifesting a mind so closed as to make submissions futile would, however, even at the investigatory stage, constitute a basis for raising an issue of apprehended bias. Once the matter reaches the hearing stage a greater degree of discretion is required of a member.

The statements at issue here, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. Once the order directing the holding of the hearing was given, the Utility was entitled to procedural fairness. At the investigative stage, the "closed mind" test was applicable but once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness at that stage required the commission members to conduct themselves so that there could be no reasonable apprehension of bias.

A denial of a right to a fair hearing cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, must be void. The order of the Board of Commissioners of Public Utilities was accordingly void.

Nicholson v. Haldimand-Norfolk Regional Police Commissioners, [1979] 1 SCR 311

Appellant was engaged as a constable, third class, by the Town of Caledonia under an oral contract providing for a twelve month probationary period. Eleven months later he was promoted to constable second class. The municipality was (after the expiry of the twelve month period) incorporated into the Regional Municipality of Haldimand-Norfolk. The respondent Board thereafter, but within eighteen months of his initial appointment purported to dispense with his services. Section 27 of Regulation 680 made under *The Police Act* provides *inter alia* that no police officer is subject to any penalty (under that Part of the Regulations) except after a hearing and final disposition of a charge on appeal or after the time for appeal has expired subject to certain exceptions, one of which is the authority of a board or council “to dispense with the services of any constable within *eighteen months* of his appointment to the force”. The Divisional Court granted an application to quash the decision of the Board but the Court of Appeal reversed on the basis that s. 21(*b*) of the Regulations had the effect of preserving the common law right of the Board to dispense with the services of any probationary constable at their pleasure (and consequently without a hearing) and took the view that the terms of s. 27 (*b*) did not admit of

contractual variation making the fact that appellant had been originally hired for a twelve month probationary period irrelevant.

Held: The appeal should be allowed.

Per Laskin C.J. and Ritchie, Spence, Dickson and Estey JJ.: *The Police Act* and regulations thereunder form a code for police constables with an array of powers some of which are discretionary. The respondent Board as a body created by statute, has only such powers as are given to it by the statute or regulations. In effect a constable is the holder of a public office exercising, so far as his police duties are concerned, an original authority confirmed by s. 55 of *The Police Act* and is a member of a civilian force. His assimilation to a soldier as in the *Perpetual Trustee Co.* case, [1955] A.C. 457, is for limited purposes only and cannot apply for other purposes such as liability or otherwise to peremptory discharge. In *Ridge v. Baldwin,* [1964] A.C. 40, Lord Reid set out a three-fold classification of dismissal situations: dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal. The present case is not one where the constable held office during pleasure, and accordingly fits more closely into Lord Reid's third class. The appellant should have been told why his services were no longer required and given an opportunity to respond. Thereafter it would have been for the Board to reach its decision and that decision, always premising good faith, would not have been reviewable elsewhere. While the appellant could not claim the procedural protections of a constable with more than eighteen month's service, he should have been treated 'fairly' not arbitrarily.

Baker v. Canada (Minister of Citizenship and Immigration, [1999] 2 SCR 817

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court -- Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him,

but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Appendix B: Administrative Law Issues Matrix Example

Topic	Issue	DESCTIPTION OF ISSUE AND NATURE OF PROBLEM RAISED IN EVIDENCE	PUBLIC REGISTRY DOCUMENT # AND SOURCE	DEVELOPER'S INPUT OR RESPONSE DOCUMENT #	RLEVANT DEVELOPER COMMITMENTS OR MITIGATION AND SOURCE	Resolved or Not?	Recommended Actions by Board
Wildlife	Increased Traffic problems	Daily commute from camp to worksite including ground and air traffic	Scoping Session #13471	#16228	Operation in accordance with the Standard Operating Procedures for Preserving Wildlife and Wildlife Habitat & Flying in Caribou Country	yes	
Wildlife	Noise disturbance	increase in air traffic with helicopters bringing in drill and workers	Scoping Session #13471	#16228	Operation in accordance with the Standard Operating Procedures for Preserving Wildlife and Wildlife Habitat & Flying in Caribou Country	yes	
Wildlife	Noise disturbance	increase in noise due to work on drills	Scoping Session #13471	#16228	Operation in accordance with the Standard Operating Procedures for Preserving Wildlife and Wildlife Habitat & Flying in Caribou Country	yes	
Wildlife	Garbage and sewage disposal	Control of garbage and sewage in the area, how will food and/or waste be stored at drill sites?	Scoping Session #13471,MVEIRB#16028	#16228	Not a problem as only two workers at a given time, carry bagged lunches and keep garbage in nap sacks later bringing everything back out at shift end.	yes	
Wildlife	Wildlife impact from site	Wildlife accessing the material in the sumps/ getting into holes	DFO#15914	#15914	Will cap all holes-no evidence of wildlife access in Yukon development	yes	
Wildlife	Caribou impacts	impact on caribou calving grounds, rutting areas, timing of work, he	Scoping Session #13471,	#16228	Caribou not known to calve in area and are usuall	yes	
Wildlife	Wildlife impacts	impacts on carnivores and other ungulates besides caribou	Scoping Session #13471	#16288	Will adhere to SOP for Preserving Wildlife and Wildlife Habitat during Project Activities.	yes	
Wildlife	Wildlife/human interactions	what type of wildlife safety training/precautions will be provided to employees?	MVEIRB#16028	#16228	All staff are briefed on Selwyn SOPs. This is required under employment agreements. Compliane is audited by senior staff.	yes	
Wildlife	Wildlife/human interactions	attraction of carnivores to worksites by waste or sumps	Scoping Session #13471	#15914	will cap all holes-no evidence of wildlife access in Yukon development	yes	
Wildlife	Access road and wildlife	Is the wildlife protection plan for the access road apply to the exploration program? If not will there be one for the exploration program?	GNWT #16028 -2nd IR	#16228	WPP not appropriate for exploration program. Will not develop a WPP or WWP for this program. Will use updated SOP on "Preserving Wildlife and Wildlife Habitat during Project Activities"	yes	
Wildlife	Cumulative Impacts	Will the WPP take into account potential cumulative effects of both the NWT and the Yukon development, particularly impacts on woodland caribou?	GNWT #16028 -2nd IR	#16228	SOP be be adhered to regardless of jurisdiction	yes	
Wildlife	Increased traffic disturbance	What is the estimated number of helicopter flights/drill rig/day for exploration drilling and definition drilling?	GNWT #16028 -2nd IR	#16228	2 at shift change every 12 hours,plus occasional fuel delivery (once every few days) none for definition drilling.	yes	
Wildlife	Wildlife & Aircraft Interactions	Can the proponent restrict flights to a frequently used, relatively narrow flight path that then branches out toward the individual drill sites?	GNWT #16028 -2nd IR	#16228	Flight paths will be selected on the basis of mitigation to wildlife, safety to crews and pilots and effeciency.Ensure operation in a responsible and safe manner that minimizes impacts to caribou.	yes	

Wildlife	Cumulative Impacts of caribou	What is the drilling program in the Yukon Territory and what are cumulative impacts (direct or indirect) on caribou	GNWT #16028 -2nd IR	#16228	This is outside the scope of assessment however from experience and the small size of the operation, the effects will be very low	yes
Wildlife	Monitoring problems of cari	Developers course of action for wandering caribou at sensitive time	GNWT #16028 -2nd IR	#16228	As SOP states, cease to work temporarily	Yes
Wildlife	Monitoring problems of caribou	How will caribou be monitored in the development area and surrounding area? What will developer do if large numbers of caribou wander into site? Are there plans to work with Parks Canada, GNWT or the Yukon government to use collar data as part of their program? How will monitoring be done in October and November as daylight gets less.	GNWT #16028 -2nd IR	#16228	2 tierd approach to monitoring (observation on site and past data from research).Work collaboratively with YT. Good baseline data.	yes
Wildlife	SARA	What are the potential impacts (direct and indirect) on other species at risk-grizzlies and wolverine	MVEIRB #16028 -2nd IR	#16228	potential impact include mortality due to threat to humans, avoidance or temporary spatial displacement due to noise or visual disturbances.	yes
Wildlife	SARA	How will species at risk that are identified be mitigated and monitored?	MVEIRB #16028 -2nd IR	#16228	See Standard Operating Procedure Guide	yes
Wildlife	Wildlife & Aircraft Interactions	Ability to avoid disturbing wildlife during fly-ins. What are "high concentrations" of wildlife according to the proponent?	MVEIRB #16028 -2nd IR	#16228	High concentrations are deemed to be greater than 10 in a square km area.	yes
Wildlife	Caribou ranges	Need clarification of the size ranges of the Nahanni Caribou and the Finlayson caribou herd range. The information in the DAR is contradictory.	MVEIRB #16028 -2nd IR	#16228	Nahanni Nerd Range is defined as 1,800,000 ha and the Finlayson herd as 2,300,000 ha.(Referenced from Gunn et al, 2002; Gullickson and Maneau, 2000; and Adamczewski et al, 2007.) There was a typographical error in the DAR causing contradiction.	yes
Water	Physical works	Identification of water crossings and water sources, particularly at lower altitude work sites	Scoping Session #13471	DAR	no development will occur within 30m of watercourses. There are no stream crossing anticipated.	yes
Water	Ground water contamination	concerns over groundwater contamination or heavy rainfall washing material into creek.	DFO#15914	#15914-not possible to separate	Very little water-no issues	yes
Water	River Contamination	negative impact to the waters of the South Nahanni watershed	Scoping Session #13471	DAR	no development will occur within 30m of watercourses. There are no stream crossing anticipated.	yes
Terrain	Cummulative Impacts	impacts from other exploration in the area especially Yukon development	Scoping Session #13471	DAR	Total disturbance from Selwyn Project is 48.4 ha of which 36.9 is in YT and 11.5 is in NT. The disturbance represents 1/5 of one percent of the 32,130 ha Selwyn Project area.	yes
Terrain	Physical Works	Uncertainty surrounding the location and number of drill sites in the area	Scoping Session #13471	DAR	By the nature of exploration drilling exact locations of each drill site cannot be known. There will be 25 exploration site(widely dispersed across the landscape) and 75 definition holes (are clustered at known deposits). Maps	yes
Terrain	Physical Works	Distance of setbacks from riparian zones	Scoping Session #13471	DAR	not within 30 m.	yes
Socio-economic	Community Engagement	community engagement is essential regarding decision making and general knnowledge of what is happening. Input into drill site and work locations	Scoping Session #13471	#13599	Fully intend to involve Sahtu workers if the permit is given for the exploration. In talk currently with TDLC.	yes
Socio-economic	Business and employment opportunity for the community	concerns related to lack of employment and other business opportunities	Scoping Session #13471	#13599	Fully intend to involve Sahtu workers if the permit is given for the exploration. In talk currently with TDLC.	yes

Socio-economic	Use of TK	local monitors needed as well as local knowledge	Scoping Session #13471	#13599	Fully intend to involve Sahtu workers if the permit is given for the exploration. In talk currently with TDLC.	yes
Public Safety	Wildlife Human Interactions	What type of wildlife safety training/precautions will be provided to employees?	MVEIRB #16028 -2nd IR	#16228	All staff have bear awareness training. All waste is taken out at the end of shift.	yes
Potential Park	Ecological Integrity	Adverse impacts to the ecological integrity before park creation could negate the value of creating a park	Scoping Session #13471	#13599	Primary reason for referral is not the interests of PC but the interests of TDLC. TDLC has taken this step out of concerns regarding consultation and because it requires more info about the proposed exploration activity. There is not a conflict over the land use at this time; rather there is potential conflict b/t possible future land use designations and the long standing mineral tenure that exists in the area.	yes
Management	Personnel and staff	Are there current environmental staff onsite- including drill sites? How often are they there? What authority do they have if issues arise?	IR from MVEIRB#15620	#15823	Environmental staff are continually present on the worksite as well as available specialist resource to the physical works and development team. The evnvironmental staff complete audits of operation, including active drilling sites, on a weekly basis for most aspects of operations.	yes
Management	Personnel and staff	how will developer ensure that personnel and subcontractors use "best practices" as determined by the company?	IR from MVEIRB#15620	#16228 - Tulita Hearing	All staff are required to adhere to "best practices". It is a part of the contractor and employment agreements.Weekly briefings.	yes
Managament	Reclamation	a number of reclamation issues need to be addressed-revegetation,	Scoping Session #13471,	DAR pages 27-2	Reclamation activities will be undertaken throughc	Yes
Management	Transboundary communications	Co-ordination of regulatory issues between Yukon and NWT	Scoping Session #13471	#16306	MVEIRB has a co-operation agreement with Yesab	Outside scope of Development
Management	Identification of mitigation strategy	Need a clearer identification of what developer means by "best practices" and "reasonable" regarding mitigation measures to be taken in the Environmental Management of the development. Is there an internal policy practice within company? Is it publically available? Are there more guidance documents	IR from MVEIRB#15620	#15823	Best Practices can be identified through relevant and accredited information such as regulatory guidance manual, product or equipment manuals, industry publications, etc. Best Practices are selected from these types of documents based on the nature of operations (exploration), and combined with locally developed mitigation judged by staff specialists and/ or government regulators. The environmental policy of the company is available in the DAR and is publically available.	yes
Culture	Heritage Resources	Impact to heritage resources	Scoping Session #13471	#16228	The Project is in a remote area and there is little information to suggest there has been any historic use of Howards Pass. AN AOA was recently conducted and no archaeological sites were identified.	yes
Culture	Traditional Harvest	Concerns of traditional harvest impacts; availability of animals and quality of meat	Scoping Session #13471	DAR	Because of the remote location of the project and the climate related constraints, it appears that there is a low likihood of conflict with traditional, subsistance or economic land use.	yes
Culture	Heritage Resources	Will proponent conduct a heritage resource impact assessment before activities begin?	GNWT #16028 -2nd IR	DAR, #16228	NO heritage survey will be conducted prior to drilling. It is in a remote location and little information suggests that there has been any historic use of Howards Pass.	yes
Aquatic Life	Need proper fish screens	need prevention of fish impingment or entrapment	DFO#15914	#15914- Alpine area, no fish	If needed will follow Fish Screen Guidelines	yes

Aquatic Life	Imapcts on fish /habitat	there is a concern about the potential of negative impact on fish populations and fish habitat	Scoping Session #13471	#15914	If needed will follow Fish Screen Guidelines	yes	
Air Quality	Burning of solid waste	Burning certain waste has the potential to have adverse environmer	MVEIRB #16028 -2nd IR	#16228	Burning of solid waste material is authorized by pe	Yes	Undertaking #1
	Land Withdrawl Issue	From Tulita Community Hearing	Finding out if both surface and sub-surface apply with respect to land withdrawls			Yes	Undertaking #2

DISCLAIMER

This guide has been produced for educational and training purposes only and is not intended as a source of legal advice. Its contents have been developed to address the unique interests and needs of Northern Tribunals. The guide is not a comprehensive review of Administrative Law or its principles. Readers with specific matters or issues of concern are advised to consult legal counsel.