



January 21, 2008

**ADR Institute of Canada Response to
Gazette Notice DGRB-010-07 – Consultation on Proposed Conditions of Licence to
Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive
Site Arrangements**

Introduction to ADR Institute of Canada

The ADR Institute of Canada (ADR Canada) provides national leadership in the development and promotion of dispute resolution services in Canada. In concert with our six regional affiliates, we represent and support professionals who provide dispute resolution services and the individuals and organizations that use those services. Our standards and programs reflect our commitment to excellence in the field.

We offer National Standards and a Code of Ethics, national accreditation for mediators and arbitrators and a broad range of tools and services for users of ADR services. ADR Canada regularly assists organizations of all kinds to develop and administer ADR programs designed to resolve disputes between various parties. Having ADR available demonstrates a willingness on the part of an organization to assist the parties in resolving disputes and avoiding the high costs of litigation and protracted conflict. By outsourcing ADR to us, organizations can receive all the benefits of an ADR regime, without having to acquire the expertise necessary for a successful program.

**Industry Canada Has Requested A Response From The ADR Institute Of Canada
Response To The Following Proposed Conditions Of License As Set Out In
Gazette Notice DGRB-011-07:**

1. Are the timelines for responding to requests to share and roam and for submitting agreements that have not been finalized to an arbitrator appropriate? Are there other timelines that should be considered?
2. Specific provisions regarding arbitration may vary from province to province. Would it be useful to adopt a national code such as the ADR Institute of Canada's National Arbitration Rules in default of any specific arbitration agreement? Are there any special provisions which should be made applicable to the arbitrators concerning sharing and roaming?
3. Are there any other licence conditions required to facilitate sharing and roaming?

General Comments:

The purpose of the licence conditions is to impose an arbitration process for the resolution of disputes for two issues in order to ensure that the parties to the dispute do not use lengthy and costly court processes to circumvent or defeat the intent of the policy decision made to allow shared facilities for wireless communication. An arbitration process, poorly designed, can result in protracted proceedings including court challenges. Therefore the conditions to the licences must provide clear direction to

minimize the risk of such proceedings and must recognize where the incentive to delay will arise in the process.

For instance, the owner of the infrastructure will want to delay the actual sharing until such time as the amount to be paid is determined. The new operator will want to get the shared facility operating as soon as possible if it intends to operate or at least tie up infrastructure opportunity while incurring the lowest possible cost. The conditions by which the parties are required to submit their dispute to arbitration and the structure of the arbitration process must include all the elements of the best arbitration clause that parties to private agreements would include, as well as address the specific power issues in these cases.

These elements are:

- Clear statement of the arbitrator's jurisdiction
- Precise statement of events and the timelines between events that trigger steps in the process, including disclosure obligations as to evidence and witness statements including expert witnesses
- Precise statement of the issue to be determined by the arbitrator including any limitations on evidence that might be taken into account
- A process of appointment of the arbitrator(s) to ensure minimum risk of allegations of bias, to ensure prompt appointment of the arbitrator(s) and to minimize the potential for court proceedings that prevent the arbitration from going ahead through attacks on the appointment of the arbitrator
- Clear set of rules of proceedings to be followed by the parties so that the process moves to resolution and decision as expeditiously as possible.
- Provisions that prevent the party opposed to the new competition from delaying the actual installation of the physical plant needed to implement the CRTC decision through delay of the arbitration to determine the compensation to be paid.
- Statement of the law to be applied (i.e. law of the location of the infrastructure, law of the province of the head office of the infrastructure owner?)

In addition, parties in negotiating such agreements frequently provide their own rules concerning rights of appeal, but the law in Canada varies from jurisdiction to jurisdiction as to whether or not a clause barring an appeal from an arbitrator's decision is effective in law.

The parties may also specify that the arbitrator must deliver a decision within a specific period of time, the method of hearing (oral evidence, written evidence only, electronic teleconference, or some combination), costs allocations, and limitations on pre-hearing motions and disclosure.

Since the arbitration condition is intended to ensure that there is sharing of infrastructure, Industry Canada should give serious consideration to separating the issue of how much compensation should be paid from the issue of the actual construction and implementation of the sharing. If the new entrant is delayed in getting its service up and running because of disputes as to the arbitration, then the intent to add competitors to the market place will be defeated. So long as the existing operators who are being

forced to share infrastructure are assured of being properly and fairly compensated, there should be minimal objection to such a separation. Therefore we recommend that a condition of the licence should require the sharing of the infrastructure whether or not the compensation is agreed, so long as either party has the right to commence the arbitration process.

If this recommendation is adopted then the new operator now will have the infrastructure it needs but the amount of compensation will be unresolved. The power issue now will be that the new operator will delay the arbitration decision so as to avoid paying for the infrastructure as long as possible. Therefore Industry Canada should specify that once the infrastructure is operable, the new operator must pay to the owner of the infrastructure a figure that is the average of the figure that the new operator wants to pay and the figure that the infrastructure owner says is owing, calculated and payable on a monthly basis, until the arbitrators' decision is final. When that decision is final, then the adjustments between what has been paid and what is owed can be resolved by simple accounting.

Response to specific questions:

1. Are the timelines for responding to requests to share and roam and for submitting agreements that have not been finalized to an arbitrator appropriate? Are there other timelines that should be considered?

On the basis that the parties will negotiate themselves, the timelines are reasonable. Other arbitration processes (as in resolution for prices for processed vegetables for instance where time lines are critical so that producers will bring their product to the processor within the season and be paid) include negotiation time lines telling the parties exactly when they have to put their figure as to payment and the terms to the other party.

2. Specific provisions regarding arbitration may vary from province to province. Would it be useful to adopt a national code such as the ADR Institute of Canada's National Arbitration Rules in default of any specific arbitration agreement? Are there any special provisions which should be made applicable to the arbitrators concerning sharing and roaming?

It is very useful to adopt the National Code of the ADR Institute of Canada. The Arbitration Rules of the Institute are receiving broad acceptance and a standard clause, set out below, is frequently used in commercial agreements and in consumer agreements:

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall be arbitrated and finally resolved, pursuant to the National Arbitration Rules of the ADR Institute of Canada, Inc. [the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.]. The place of arbitration shall be [specify City and Province of Canada]. The language of the arbitration shall be English or French [specify language].

3. Are there any other licence conditions required to facilitate sharing and roaming?

Some other conditions are noted in the general discussion above.

Another tool to facilitate the arbitration is a fixed roster of pre-qualified arbitrators that must be used by the parties. Such a roster prevents the delay that occurs while parties search for and debate whether or not the arbitrator proposed by one party or another is adequately trained or knowledgeable. Such a roster would give credibility to the process and permit specialized training of otherwise capable arbitrators who are not familiar with the details of sharing and roaming or the industry generally. To avoid issues of conflict of interest, the roster needs to include generalist arbitrators as well as the specialists. The roster can be administered by a third party, such as the ADR Institute.

Another tool to facilitate the arbitration is the use of the ADR Institute as the institution for the arbitration, giving the Institute power to appoint arbitrators if the parties are unable to agree (from the pre-approved roster), providing a central location for housing the documents pertaining to the arbitration, etc.

Further Information

Should further information or elaboration be required please contact Mary Anne Harnick, Executive Director, ADR Institute of Canada at 1-877-475-4353 or 416-487-4733 or admin@adrcanada.ca

Yours truly,

Don Short, President
ADR Institute of Canada