

What happens at the pre-hearing conference meeting?
Pilot Project

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General Information

Human Rights Commissioners can refer a complaint to Commission-Directed Mediation and/or to an Adjudicator for a hearing. This guideline deals with the human rights hearing process.

At a hearing, the Complainant gets a chance to prove their complaint and the Respondent gets a chance to defend themselves. A Human Rights Adjudicator listens to all sides of the story, reviews and considers evidence and decides if discrimination or harassment happened. Adjudicators are independent of the Human Rights Commission. They have experience, knowledge and training in human rights law. A hearing must happen without undue delay.

Learn more about our Human Rights Adjudicators on our website at: <https://thinkhumanrights.ca/about-us/>

The goal of the hearing process is to resolve disputes between parties in a way that:

- is accessible, timely, inexpensive, informal and flexible
- is procedurally fair
- applies human rights law and principles
- is proportional to the circumstances of each complaint
- is supportive of the parties involved in the hearing process
- realizes that there are other ways to resolve disputes

These considerations should guide the actions and decisions of all people involved in the hearing process.

Step 1 – An Independent Adjudicator is assigned

The Chief Adjudicator notifies the Commission's lawyer about the assignment.

Step 2 – Filing the Commission Record

The Commission's lawyer contacts the parties, lets them know who the Adjudicator is and sends them a copy of this guideline.

The Commission's lawyer also identifies the documents to go in the Commission Record. The parties should already have these documents, but can contact the Commission if they are missing something and/or need another copy.

The purpose of the Commission Record is to give the Adjudicator enough background information so that they can understand the issues and be prepared for the pre-hearing conference meeting.

The parties should review the proposed list of documents and let the Commission know if they object to any of the documents listed or if they think something is missing. If no objections are raised, the Commission's lawyer sends a copy of the Commission Record to the Adjudicator for their use at the pre-hearing conference meeting. Where possible, the Commission Record is sent to the Adjudicator by email.

What goes in the Commission Record?

The Commission Record CAN include the:

- Complaint Form
- Reply Form
- Rebuttal Form
- any other submissions/documents already provided by the parties during the investigation
- any additional relevant evidence obtained during the course of the investigation

The Commission Record WILL NOT include the:

- any information about mediation or settlement discussions

- any communications between Commission staff and the parties that is not relevant to the investigation
- any submissions made in the consideration of a section 31 deferral or section 32 dismissal
- any other information that is not relevant to the investigation

Step 3 – Scheduling a Pre-Hearing Conference Meeting

A pre-hearing conference is a meeting of all the parties (usually by telephone). It takes place before the actual hearing. The goal of the pre-hearing conference is to make a plan for the hearing. Pre-hearing conference meetings usually only take one hour.

The Adjudicator gives the parties a range of acceptable dates for the pre-hearing conference meeting. Reasonable attempts will be made to schedule a mutually convenient date. The Adjudicator may set a date for the pre-hearing conference meeting if a party fails to respond or cannot commit to attend on a timely basis.

The Commission's lawyer lets the parties know when the pre-hearing conference meeting will take place.

Step 4 – Pre-Hearing Conference Meeting

The Adjudicator, the Complainant, the Respondent and the Commission's Legal Counsel take part in the pre-hearing conference meeting. The parties can have a lawyer represent them at the pre-hearing conference if they wish, but it is not necessary. The Adjudicator leads the discussion at the meeting.

Pre-hearing conference meetings are not recorded. There can be more than one pre-hearing conference.

Some of the issues to be discussed at the pre-hearing conference meeting include:

- the date and location of the hearing
- the length of the hearing
- any procedural or preliminary matters that need to be resolved before the hearing

- what are the main issues to be decided at the hearing?
- can the issues be clarified or simplified?
- can the parties agree that the Commission Record contains all of the evidence?
- are there any other documents the parties intend to rely on at the hearing that is not already contained in the Commission Record?
- is there a need for witnesses to testify at the hearing? If so, who are the witnesses? Can their testimony be given by affidavit evidence? Is there a need to cross-examine these witnesses?
- can the parties agree on certain facts?
- what documents will be needed to prove damages (if appropriate)?
- what are the deadlines for filing documents/submissions?
- will there need to be another pre-hearing conference meeting?
- non-participation of a party
- any accommodation requirements needed for the hearing (eg. ASL translator)?
- will the hearing be recorded?
- any privacy concerns?

Important Issues to Consider

The most important issues to be decided at the pre-hearing conference meeting are the format of the hearing and the level of participation of the Commission at the hearing. The parties need to be prepared to discuss these issues at the meeting.

Hearing Format

Hearings can either be informal or formal. Separate guidelines explain each of these options in more detail.

The biggest difference between an informal and formal hearing is the role of the Adjudicator and the use of cross-examination. In an informal hearing the Adjudicator takes the lead and asks the questions. In a formal hearing the parties are responsible for presenting their own case and witnesses can be cross-examined by the opposing party.

Both informal and formal hearings can be done in person, by phone or by video conferencing.

Informal hearings are faster, simpler, less costly, less adversarial and less intimidating. They are best used where:

- the complaint is simple and uncomplicated
- the hearing is not expected to take too long
- the parties are not represented by lawyers, or a lawyer or support person attends, but does not play an active role
- the facts are generally not in dispute
- there are few to no witnesses and credibility is not at issue
- the only issue is a legal or policy question
- the parties still work together or have some sort of ongoing relationship and want to reduce conflict

An informal hearing happens many different ways. If the only issue is a legal or policy question, the facts are not in dispute, there are no witnesses and/or we have all evidence, the hearing can be done in writing. Hearings **done in writing** only need the parties to make a final written submission or to say they have nothing more to add. The Adjudicator can also ask the parties to comment in writing on certain issues raised at the pre-hearing conference meeting. In most cases, parties can email their submissions to the Adjudicator.

In other cases, the parties might hold an **oral hearing** in person, over the phone or by video conference. The process is very informal – the hearing is more like a conversation where the parties get to tell their side of the story. The Adjudicator takes a more active role in leading the hearing, can ask questions of the parties and can ask to hear from and question witnesses, if necessary. The hearing may consider all issues or only focus on certain issues.

Formal hearings resemble traditional hearings. They generally take longer and are best used where:

- there are complicated legal or factual questions
- there are many witnesses with credibility at issue
- there is more evidence to be presented and considered

However, the formal hearing process should remain flexible and proportional to the circumstances of the complaint. Not all aspects of the formal hearing has to be in person. Formal hearings can also use other ways to get the evidence. For example, the parties can file written briefs on specific legal or preliminary questions and/or use affidavit evidence instead of calling witnesses.

The **Adjudicator will review each of the options with the parties and make a recommendation** about what type of hearing they feel would be best in the circumstances. The parties are able to make comments about the proposed hearing format. The Adjudicator will try to get the parties to agree on the best format for the hearing.

Often, the best option is an informal hearing because it is faster, simpler, less costly, less adversarial and less intimidating.

A formal hearing remains the default if the parties cannot agree on an appropriate format.

Parties that agree to an informal hearing can always change to a formal hearing if the issues become too complicated.

Role of the Commission at the Hearing

The Commission is an independent party to the hearing. It does not represent the Complainant or the Respondent at the hearing. The Commission's job is to have carriage of the complaint and represent the public interest in preventing discrimination or harassment.

The Commission administers and enforces the Human Rights Act by scheduling and covering the costs of the hearing, other than the costs of a party's own lawyer or expert witness (if they choose to get one). The Commission always takes part in the pre-hearing conference meeting and files a legal brief reviewing the state of the law of discrimination and/or harassment. The Commission may also provide cases that are like the one discussed at the hearing. The main goal of the legal brief is to give the Adjudicator and the parties a clear understanding of the relevant human rights legal issues and the Commission's view of its public interest role.

If the Commission appears at the hearing it will take part like any other party. The Commission also tries to make sure that the process runs smoothly, that it is timely and that a written decision happens within a reasonable timeframe.

Having carriage of the complaint does not mean that the Commission will appear and present evidence at every hearing. The Commission, like any other party to the hearing, can choose its level of participation at the hearing. Regardless of the level of the Commission's participation, the hearing will go ahead with the Commission's support.

The Commission will appear and present evidence at the hearing only if it advances its public interest mandate. The Commission considers the following factors when deciding its level of participation:

- are the parties represented by lawyers?
- is the complaint simple or uncomplicated?
- are the facts generally not in dispute?
- are there few to no witnesses where credibility is not at issue?
- is all relevant evidence before the Adjudicator?
- does the complaint raise broad-based policy or systemic issues?
- does the complaint address a pressing public policy concern as identified by the Commission?
- does the complaint raise a new point of law, settle one that remains in doubt or change legislation, policies or programs?
- does the complaint significantly advance the purposes of the Human Rights Act?
- was a reasonable settlement offer made and is that settlement in the public interest?
- are there important systemic remedies that need to be requested?
- would either of the parties be prejudiced by the Commission's decision to not participate at the hearing?

The parties are told of the Commission's level of participation at the pre-hearing conference meeting. The Adjudicator, the Complainant and/or the Respondent's position on the Commission's level of participation may be considered in our decision to appear and present evidence.

Failure to Attend the Pre-Hearing Conference Meeting

The parties must attend and be prepared for the pre-hearing conference meeting. It is the parties' obligation to keep their contact information current and advise the Commission if they move or change phone numbers or email addresses.

A party can request a postponement, but will need to give a good reason for re-scheduling the pre-hearing conference meeting. The request should be made to the Commission's lawyer who will send it to the Adjudicator. The parties are notified about the Adjudicator's decision.

A Complainant may withdraw part or all of their complaint at any time by completing a Withdrawal of Complaint Form.

If a party does not attend the pre-hearing conference meeting and/or a postponement is not granted, the meeting will go ahead without their participation.

A party may request an expedited hearing date (usually by telephone) if the other party fails to attend the pre-hearing conference meeting. The parties will be notified by registered mail of the date of the expedited hearing. At an expedited hearing, a Complainant can request an order of discrimination and/or harassment based on their evidence in the Commission Record. A Respondent can request a dismissal of the complaint due to lack of evidence of discrimination and/or harassment. See section 39 of the Human Rights Act.

Step 5 – After the Pre-Hearing Conference Meeting

The Commission's Lawyer confirms any decisions made at the pre-hearing conference meeting and/or next steps. Any filing deadlines and the hearing date are also confirmed for the parties.

Step 6 – Prepare for the Hearing

The next step is to prepare for the hearing – whether informal or formal. The parties will receive a separate guideline explaining the agreed upon format in more detail. The Commission's Lawyer can help navigate the parties through the hearing process, but cannot give legal advice, regardless of the format of the hearing or our level of participation.

Step 7 – Attend the Hearing

The parties must attend and be prepared for the hearing.

Step 8 – After the Hearing

A complaint is either dismissed or a finding of discrimination or harassment is made. The Adjudicator must give written reasons for their decision. This process is often time-consuming, as the Adjudicator needs to review each piece of evidence to determine its relevance and what weight or “probative value” it should be given. Remedies can be ordered.

Depending upon the hearing format and how complicated the case is, the parties should be prepared to wait several months to receive a written decision. The following table sets out an estimate of how long it will take an Adjudicator to make their decision:

Length of Hearing	Estimated Timeline
Written hearing	2-3 months
2 days or less	4-6 months
More than 2 days	6 months or longer

Step 9 – Appealing a Decision

If either of the parties disagrees with the decision of the Adjudicator, they may appeal the decision to the Supreme Court of Newfoundland and Labrador (General Division). Section 42 of the Human Rights Act states that an appeal must be filed within 30 days of receiving the Board of Inquiry’s written decision. Contact the Supreme Court (General Division) [Court’s website](#) for more information on how to file an appeal.