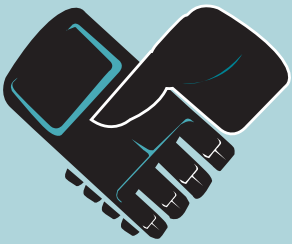
COMMUNITIES IN COOPERATION



A GUIDE TO ALTERNATIVE DISPUTE RESOLUTION FOR FIRST NATIONS & LOCAL GOVERNMENTS IN BRITISH COLUMBIA

PREPARED FOR

FIRST NATIONS SUMMIT

UNION OF BRITISH COLUMBIA MUNICIPALITIES

BY

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COMMERCIAL DISPUTE RESOLUTION & MEDIATION

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1.0 INTRODUCTION

A Guide to Alternate Dispute Resolution (ADR)

What is this guide all about?

Alternate Dispute Resolution (ADR) has proven effective in helping parties to foster constructive and trusting relationships and to resolve their differences in an atmosphere of mutual respect and understanding. This Guide is intended as a primer to introduce First Nations and local governments to the various methods, mechanics and advantages of ADR. This document is not a comprehensive training manual but rather a part of a growing body of resource material for First Nations and local governments to use in developing their relationships and in dealing with disputes[1].

IT IS INTENDED TO ASSIST PEOPLE IN RESOLVING DISAGREEMENTS WITHOUT GOING TO COURT

This guide is intended to assist elected officials, staff or any party working with municipalities, regional districts or First Nations governments in resolving differences without resorting to the courts.

Why is it needed?

We live in a complex society where disagreement and conflict are a natural byproduct of people trying to live together in harmony while still pursuing their own goals. Cultures may clash and disputes may arise. We need simpler methods for resolving differences and preventing these conflicts.

What's inside?

This guide will identify the alternate methods for dispute resolution, provide examples of how the methods can be used and give a step-by-step description of the more effective methods to be used in resolving disagreements and disputes.

Why us?

First Nations and local governments have particularly complex relationships. Their cultures and history differ widely, their approaches to decision making may differ and the issues that affect them are often complex. Both groups represent larger community interests that may overlap or conflict and negotiated agreements may be helpful in allowing the parties to live in harmony. Also, the relationships are ongoing - simple and effective methods are needed to help build lasting and trustful ways of dealing with one another.

[1] See the Union of BC Municipalities and the First Nations Summit websites to download other resources related to First Nation and local government relationship building and dispute resolution: www.civicnet.bc.ca and www.fns.bc.ca.

Is this guide just for disputes?

The word "dispute" may sound a negative tone that is not reflected in the relationship between the parties. Dispute Resolution may simply be a resolution of issues in which the parties differ and in which they seek agreement. Ideally, inevitable divergent goals of communities can be recognized so that local governments and First Nations can adapt to one another in a way that honors the principles and values of each of them. Hence, it is hoped that this guide will be read constructively and used in response to a wide variety of interactions between First Nations and local governments. For example, use of this guide is recommended for First Nations and local governments who may be:

* Planning a meeting to discuss issues of common concern or shared interest
* Concerned about a story in the media
* Organizing a Community to Community Forum or other joint event
* Developing a Protocol, Servicing or Shared Resources Agreement
* Anticipating a future problem.

2.0 BACKGROUND AND HISTORY

Where we have come from, where are we going?

WHILE LANGUAGE MAY BE COMMON, THE MEANING OF WORDS MAY VARY

The relationship of local governments and First Nations must be seen within a much larger context. Negotiations between First Nations and all levels of government have been proceeding for decades. The issues are complex and encompass governance, land ownership, judicial systems, and a variety of critical issues affecting cultural heritage, use of resources and quality of life. Treaty negotiations and other negotiations have yielded some significant successes in recent years but will, no doubt, proceed well into the future.

With this backdrop of ongoing dialogue, debate and negotiation at many different levels, issues may also arise at the community level throughout British Columbia where First Nations and local governments are confronted by the issues of living cooperatively together and solving day-to-day problems.

Alternate Dispute Resolution (ADR) is a dispute resolution process that is controlled by the participants and, therefore is well suited to diverse cultural groups whose decision processes may differ. The process helps diverse groups identify and address issues of common concern and common interest.

First Nations differ from local governments in the social, cultural and economic context in which they operate. For example, First Nations communities are generally smaller and there is a stronger sense of "place" for the individual within the community. Issues of present day concern may have strong historical roots; there is respect for the Elders of the community. While language may be common, the meaning of words may vary from community to community and care must be taken to ensure all parties understand each other's meaning.

COMMUNITY CHARTER EFFECTIVE JANUARY 1, WILL PROVIDE MORE AUTONOMY AND GREATER POWERS TO MUNICIPALITIES

There is federal and provincial government legislation in place for both groups namely The Indian Act and Local Government Act that govern certain types of decision and powers. At the community level however many day to day issues are handled in a discretionary and informal process that is unique to the local government and to the particular aboriginal community. In order to build a lasting and effective working relationships it is important to understand each other's processes including how decisions are made, who has authority, time requirements for decisions, and which decisions require approval at which level.

Interestingly, the legislative environment for both local governments and many First Nations is undergoing change. The Community Charter effective January 1, 2004 will provide more autonomy and greater powers to municipalities, with less provincial government oversight. This is also a trend for First Nations as they move toward greater self-government, through vehicles including the First Nations Land Management Act, self-government agreements and treaty settlements.

3.0 RECENT EXPERIENCES AND AGREEMENT EXAMPLES

Our successes and challenges

The 2003 SUDA Management review of dispute resolution processes provides an in-depth description of the types of agreements and recent successful negotiations between First Nations and local governments.[2] It is obvious that where the parties have been able to establish lines of communication and build a good working relationship the formulation of the various agreements becomes much easier.
The following is a brief summary of some of the issues in which First Nations and local governments may seek agreement at the community level.

- *Service Agreements* - These include the provision, sharing and extension of utilities (e.g. water, sewer and drainage) to First Nations land across boundaries. Given that First Nations can tax reserve lands, issues arise over compensation for services including capital cost of infrastructure, maintenance provisions, operating and replacement costs as well as area wide services such as libraries, roads and recreation facilities.
- *Land Use Planning and Development* - These issues include coordination of land development, addressing traffic and access, fire protection and public safety and compatibility with existing local development.
- *Preservation and Control of Sensitive Sites* - These issues include protection of sacred sites on lands outside of reserves, shared use and access agreements for contiguous park lands and shared maintenance and policing provisions
- *Special Events* - Agreements may be required for community events involving shared use of facilities and joint community participation.
- *Post-Treaty Relationships* -The issues described above and other that may arise will, in most cases, require solutions "made" by First Nations and local governments themselves.

In all of the above areas there have been recent successes accomplished through cooperative negotiations & establishment of trusting working relationships.

[2] "A Review of Dispute Resolution Processes for First Nations & Local Governments in British Columbia". Prepared for the UBCM and First Nations Summit by David Morris of SUDA Management, July 2003. Available at www.civicnet.bc.ca. and www.fns.bc.ca

4.0 ALTERNATE DISPUTE RESOLUTION (ADR)

Another way of getting there

ADR is a flexible approach to dispute resolution that seeks to achieve a faster more cost-effective resolution of disputes than the traditional approach of litigation. ADR covers a wide range of processes ranging from unstructured voluntary negotiations through to more structured methods of mediation and finally arbitration which result in binding decisions. ADR is consensual in nature and gives the parties involvement and control over the dispute resolution process.

4.1 ADVANTAGES OF ADR - *Why should we use it?*

The Alternate Dispute Resolution provides a forum whereby First Nations and local governments can resolve issues and disputes without compromising fundamental principles or values of either party.

This is achieved by:

- A high degree of participant involvement that leads to more control over the settlement agreement by the parties themselves;
- Creative solutions which more closely reflect the parties' interests & objectives;
- Greater procedural flexibility more in tune with the parties own timetable and approval processes;
- If required, the parties have the ability to choose their own neutral facilitator, mediator or arbitrator;
- The process occurs in a confidential setting removed from the public eye;
- Preserving existing positive relationships and creating the opportunity to build relationships for the future.

Conversely, in the litigation process:

- The participants have little or no control over the process and little control over the outcome;

- The process creates "winners" and "losers" and does not necessarily resolve the underlying issues;

- Litigation is adversarial in nature therefore counter-productive to building future positive relationships;

- The process may be lengthy and expensive with costs and solutions imposed by a third party (judge and/or jury) not affected by the outcome.

4.2 THE MAIN METHODS OF ADR

- The alternatives explained

1. The first alternative in resolving any dispute is Informal Communication. One party may pick up the phone or meet informally with his or her counterpart on the other side and deal with the issue simply and effectively. Issues are characterized by their lack of complexity and works well when the parties have open relationships based on trust and mutual respect. Informal communication is always the preferred method as it deals with matters simply and effectively, without cost or involvement of third parties and it strengthens the bond between the parties.

2. If informal communication is not successful the next step may be a Negotiating Meeting between the parties that is set up to discuss specific issues. The initiating parties agree on time and place as well as an agenda and the participants. The success of this direct meeting between the parties will be influenced by the historical relationship between the parties, their record of past resolution of differences and the complexity of the issues involved. The negotiation may achieve success if the parties are willing to listen to one another or it may result in positional bargaining where each side may harden their position and lead to deadlock. It may also lead to power struggles between the parties and within the parties themselves.

3. If the parties are unable to resolve the issues with a formal face-to-face meeting they may wish to engage the assistance of a neutral third party as a facilitator to engage in an Assisted Negotiation or Facilitation. The facilitator, who is acceptable to both sides, helps manage the process of negotiation by assisting the parties in identifying issues, communicating concerns and interests and helping the parties to formulate their own solutions. The facilitator is an individual that is respected by both sides but may not necessarily have specific training in conflict resolution or mediation.

4. The next level up the ADR ladder is Mediation. It bears many similarities to assisted negotiation but uses a more formal and structured process that has a proven record of success. Mediation is negotiation assisted by a skilled neutral third party, the professional mediator, who has no decision-making powers but assists the parties by focusing on issues and interests in order to achieve a settlement crafted by the parties themselves. Mediation is voluntary, confidential and "off-the-record" with respect to any future litigation proceedings. Settlements reached at mediation are non-binding in a legal sense but, since they are reached by the consensus of the parties, they are adhered to in the vast majority of cases. The parties may chose to enter into a binding agreement as a result of the mediation.

MEDIATION IS VOLUNTARY, CONFIDENTIAL AND "OFF-THE-RECORD"

Mediation has experienced growing widespread use in many fields recently owing largely to its cost-effectiveness, high success rate, and collaborative nature.

5. If the parties are unable to resolve their differences at mediation they may wish to proceed to Arbitration which is method of dispute resolution that involves an informal judicial or quasi-judicial procedure before an independent and impartial adjudicator(s) chosen by the parties. The adjudicator, or arbitrator, makes a decision that is imposed on the parties. It is consensual in origin, in that the parties mutually agree to proceed to arbitration, but mandatory once engaged. Although Arbitration may be preferable to litigation it still takes the decision-making out of the hands of the participants and, hence is not a collaborative process conducive to building cooperative relationships.

ARBITRATION IS CONSENSUAL IN ORIGIN, BUT MANDATORY ONCE ENGAGED

5.0 THE ADR PROCESS

Once the most appropriate method is selected, the next step is preparing for a negotiating meeting.

5.1 FIRST STEPS - *How to start?*

As a first step First Nations and local governments may wish to undertake their own assessment to identify issues in dispute that may be appropriate and timely for resolution. This can be done through staff groups or elected representatives at the community level. A facilitator may be helpful in this process to determine which issues may be suited to negotiated settlement. Once issues have been identified the parties should consider which dispute resolution method is most appropriate given the circumstances.

5.2 METHOD SELECTION

The method selected will depend on the nature and complexity of the dispute and the historical ability of the parties to communicate and jointly solve problems. Wherever possible the preferable choice in resolving differences is direct contact between the parties either through informal communication or a face-to-face negotiating meeting.

Generally speaking, more complex issues involving a large number of participants are better suited to assisted negotiation or mediation. Assisted negotiation or mediation can also help parties resolve differences where

communication between the parties is poor and parties have become intensely emotional or entrenched in their positions. In the context First Nations and local government disagreements or disputes the assisted negotiation or mediation methods are beneficial in that they create the opportunity for building a positive relationship between the parties and help establish a framework for resolving or avoiding other disputes in future.

Arbitration will achieve a settlement but the resolution is taken out of the hands of the parties and is more likely to lead to a "win-lose" situation rather than a "win-win" as is possible in negotiation and mediation.

5.3 PREPARATION FOR A NEGOTIATING MEETING

Recognizing the cultural differences, history and relationship issues between local governments and First Nations is an essential part of the preparation phase. It is during this phase that the parties strive for a level of understanding that sets that tone for discussions to follow. The preparation can be discussed informally between the parties or it may take the form of a "pre-negotiation" meeting assisted by a facilitator or mediator.

MEDIATION CAN HELP WHERE PARTIES HAVE BECOME INTENSELY EMOTIONAL OR ENTRENCHED

The Preparation phase deals with issues of Process rather than issues of Content - the latter is the subject of the negotiation itself. Some of the more important areas to be explored and determined in the preparation phase are as follows:

- an understanding of the other parties' decision making process based either in legislation or tradition. Both local governments and First Nations communities may have mechanisms for interacting with its community members

- related to the above is an understanding of the authority that each party brings to the table and the time required between meetings to report and obtain further guidance or instructions

- determination of who will participate directly in the negotiation/mediation meeting(s)
- determine if others are to be present i.e. lawyers, elders, government representatives, advisors etc. and what their role will be
- establishing a time frame for the meeting(s) which respect the needs of the parties including starting time, duration, any exclusion dates
- selection of the location that is perceived to be sufficiently neutral, free of distraction and addresses basic needs of food, equipment, amenities and special needs.
- determination of all prerequisite materials including expert reports, maps, plans, documents, display material, video etc.
- agreement on the main issues to be discussed and develop an appreciation for each others concerns and interests
- understand any procedures or formalities important to the other party
- determine the goals of the meeting & what can reasonably be expected
- agreement on cost sharing for the meeting,
- determine whether a third party facilitator/mediator is required and, if so, how they should be selected

5.4 MEDIATOR/FACILITATOR SELECTION

What to look for and how to select

If the parties decide that Assisted Negotiation of Mediation is the best method of resolving the issues in dispute then the selection of a mediator of facilitator is the next step. A mediator/facilitator can be described as someone who assists disputing parties in voluntarily reaching their own mutually acceptable settlement of issues but has no authoritative decision making power. He or she should have experience and skills in analyzing conflict and understanding the obstacles to settlement in order to assist the parties in the negotiating process. The mediator/facilitator should be a well-trained, reliable and thoughtful generalist

MEDIATOR SELECTION IS A MUTUAL DECISION OF THE PARTIES

with extensive experience in dispute resolution and not necessarily a substantive expert in that particular area. They are skilled process managers rather than experts on the content of the issues in dispute.

Mediator/facilitator selection is a mutual decision of the parties. Usually one or the other party will propose several alternate individuals. The parties make their selection based on credentials, personal knowledge and, if appropriate, interviewing the candidates.

The main sources of mediator names may come from the personal experience of one or both of the parties, recommendations from legal counsel, recommendations from the appropriate government ministry (currently the Ministry of Community, Aboriginal and Women's Services) or through the British Columbia Mediator Roster Society which sets qualification standards and maintains a list of qualified mediators.

6.0 FOCUS ON MEDIATION - *How it works*

Unassisted negotiations will take on a structure that is determined by the participants and the issues at hand. Arbitration follows a procedure similar to litigation. Assisted Negotiation will follow procedures determined by the facilitator in discussions with the parties. Mediation is a structured process that follows a certain proven format and highlighted in this guide for its effectiveness in dealing with complex issues in a timely and economical manner.

6.1 THE MEETING STRUCTURE

This section describes the details of how a mediation meeting is conducted.

If the parties decide that Mediation is the best was of resolving their differences the Mediator will likely follow a process that has been developed over many years and has a high success rate in most types of disputes. It should be noted, however, that each mediation may follow its own path as determined by the dynamics of the dispute and nature of the participants. The mediator is a process manager who will respond to the needs of the participants to "tailor-make" the meeting to be most effective.

Prior to the mediation meeting each party will meet in the days or weeks before to set goals for their desired outcome, determine who will be attending the mediation and to formulate their own particular strategy for the negotiations.

Stage One - Introducing the Process and The Mediation Agreement

In this first step the Mediator will arrange for the introduction of the parties, deal with matters of logistics including time limits, facilities, special needs and generally set a positive tone for the mediation meeting. The mediator will ask each party to sign a Mediation Agreement that sets out the basic rules and procedures for the meeting. This agreement should be circulated in the preparation phase prior to the meeting and any issues of concern dealt with at that time.

PRIOR TO THE MEDIATION MEETING EACH PARTY WILL MEET BEFORE TO SET GOALS FOR THEIR DESIRED OUTCOME

The Mediation Agreement usually includes the following provisions:

1. Identifies the parties and list the participants;
2. States that the parties will conduct themselves in a forthright manner and make a serious attempt to settle the dispute;
3. Confirms the level of authority of the parties in settling the dispute;
4. Recognizes the confidentiality of the proceedings;
5. Recognizes the privileged nature of the proceedings as being off-the-record and not admissible in any future litigation proceedings;
6. States the role of the Mediator as being a neutral third party and not an agent for any one party;
7. Recognizes the voluntary nature of the proceedings and states that any party may terminate the meeting;
8. Identifies the payment arrangements/cost sharing for the meeting;
9. Any other provisions that the parties feel are appropriate to the mediation.

Stage Two - Identifying and Framing the Issues

In this step each of the parties is invited to make an opening statement that summarizes the issues as they see them. Each party has an opportunity to speak and the mediator ensures that the parties understand each other's statement or position. The Mediator will attempt to clarify and identify the issues to be resolved and also the issues on which the parties appear to have agreement. This stage frames the issues for the next stage of exploring and resolving issues.

THE MEDIATOR WILL ENGAGE THE PARTIES IN CONSTRUCTIVE NEGOTIATING

Stage Three - Exploring and Resolving Issues

In this stage the mediator encourage frank and open discussion to explore the issues in detail. The Mediator will use his or her skills to engage the

parties in constructive negotiating by facilitating information exchange, identifying interests of the parties, encouraging movement and exploring alternatives to settlement. Throughout the mediation meeting the Mediator may suggest that the parties meet privately in caucus to assess their position and strategy and the Mediator may work with the parties privately in caucus to try and advance the mediation proceedings.

Stage Four - Finalizing the Settlement

In this final stage of the mediation meeting the Mediator attempts to clarify each area of agreement and ensure there is understanding between the parties. The Mediator may seek partial agreement on certain issues even if it is not possible to achieve final settlement on all points. The Mediator will prepare a settlement agreement and present it to the parties for acceptance and signature.

6.2 TIMING - *How long does mediation take?*

With straightforward disputes where the issues are relatively easy to determine, the above process can occur in one mediation meeting over the period of several hours. With more complex issues where the parties must seek consensus and authority from their own communities or councils the process can be extended over a number of mediation meetings. The process may be similar from mediation to mediation but it can be adjusted depending on the particular needs of the parties involved.

6.3 FINANCIAL CONSIDERATIONS

- How much does it cost?

The low cost of mediation is one of its advantages. Mediators charge by the hour at rates that reflect their experience and special areas of practice. Generally speaking mediator rates are less than lawyer's hourly fees. There will be additional costs for facility rental and any special requirements for equipment, food and refreshments. The average cost is in the $1,000 to $2,000 range per day. There will be additional costs for the lawyers or other consultants that the parties may wish to have at the meeting.

6.4 LAWYERS AT MEDIATION

Mediation can be conducted with or without legal counsel present.

MEDIATION CAN FORM MORE TRUSTING RELATIONSHIPS

Generally speaking, if the dispute arises as a result of a lawsuit and lawyers for all sides have been part of the negotiations then they may helpful at the mediation meeting. Lawyers play an important role in advising their clients on issues of law and how the courts

have interpreted the particular matters in dispute in past decisions. Legal counsel can be helpful partners in the negotiating process owing to their past experience in a negotiating forum. In the preparation phase, the parties should agree on whether or not to have legal counsel present.

It should be noted that the final settlement decisions are the responsibility of the parties themselves; lawyers and other experts may provide advice, input and opinions to assist in the decision making process.

6.5 POST-MEDIATION ACTIVITIES

First Nations and Local Governments may have ongoing issues that emerge over time. The mediation/negotiation environment can be a positive opportunity for the parties to form more trusting relationships and establish communication links to help deal with day-to-day conflict before they become disputes. The time period following a mediation/negotiation meeting is an opportunity for cementing the personal ties that are formed in the collaborative process. The parties should take the time whether at the negotiation session or after to "celebrate" and publicize, if appropriate, their achievements together.

7.0 DISPUTE RESOLUTION PROVISIONS IN AGREEMENTS

In the drafting of agreements, contract, leases etc. it is important to include a mechanism for resolving issues and disputes that may arise during the term of the agreement. An effective dispute resolution mechanism can ensure a collaborative approach to resolving issues rather than costly litigation. There are many examples for the inclusion of wording for dispute resolution but it is important to tailor-make a process that suits the nature and complexity of the agreement and is easily implemented by the parties. As an example, the dispute resolution process in the CCDC-2 Construction Contract is far too complex for dealing with a disagreement over fees in a servicing agreement. The DR chapter of the Nisga'a Agreement provides a useful model that can be drawn upon for agreements between First Nations and local governments (available at the Indian and Northern Affairs website at www.ainc-inac.gc.ca). This model follows a dispute resolution progression similar to the model described in Section 4.2 in this guide.

IT IS IMPORTANT TO TAILOR-MAKE A PROCESS THAT SUITS THE NATURE OF THE AGREEMENT

Historically many agreements have contained a provision that disputes would be resolved through arbitration in accordance with the Arbitration

Act of BC. This provision is rarely used as it is often cumbersome and costly to implement and may not be suited to the parties. A more appropriate provision would be to refer all disputes to an assisted negotiation and/or mediation with the parties mutually agreeing on a mediator.

Whatever the mechanism selected it should ensure a collaborative approach rather than a divisive one.

8.0 CONCLUSION

This guide attempts to describe the process, advantages and mechanics of Alternate Dispute Resolution for use by First Nations and local governments. ADR empowers communities to use less formal and less costly methods for addressing future issues and conflicts. Ideally the relationships and personal contacts developed during this process will help avoid conflict before it develops by establishing a forum for early dialogue and collaboration. The most important aspect of ADR is the opportunity it provides to build lasting relationships between the parties based on mutual respect and commitment to resolving conflict in a constructive manner.

9.0 ADDITIONAL EDUCATION, TRAINING AND MEDIATOR SELECTION

The are a number of sources where one can pursue training in the field of negotiation, conflict management and Alternate Dispute Resolution. Most of British Columbia's institutes of higher learning offer both part-time and full time study programs. The following is a partial list of the sources and contacts for mediator selection.

The Centre for Conflict Resolution at the Justice Institute of British Columbia, in New Westminster www.jibc.ca, offers one of the most widely recognized and comprehensive programs on all aspects of negotiation, conflict management and dispute resolution. Phone 604 528-5608

The Continuing Legal Education Society of British Columbia in Vancouver, www.cle.bc.ca, provides courses for Lawyers and Non-Lawyers covering a wide range of topics including single and multiple day courses on many aspects of Dispute Resolution.
Phone 604 893-2162. 1 800 663-0437

Royal Roads University in Victoria, www.royalroads.ca has become world known for its comprehensive degree and non-degree granting programs in Dispute Resolution, mediation, peacekeeping and diplomacy.

British Columbia Mediator Roster Society works in cooperation with the Dispute Resolution Office of the Ministry of Attorney General in Victoria and maintains an independent list of qualified mediators www.mediator-roster.bc.ca 1-888-713-0433. The Society also offers a "speakers bureau" on mediation topics.

BC Arbitration and Mediation Institute provides trained, knowledgeable arbitrators and mediators to the professional and business community and to the general public; offers training, workshops and accreditation for ADR practitioners. www.amibc.org 1-877-322-2264, 604-736-6614

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