



Union of British Columbia Municipalities

and



FIRST NATIONS SUMMIT

A Review of Dispute Resolution Processes

for First Nations &

Local Governments in British Columbia

August 6, 2003



SUDA MANAGEMENT *“Solutions for Local Government”*

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1.0 INTRODUCTION

1.1. Background

First Nations and local governments in British Columbia are continuing to develop a working relationship between their respective government units. As with any developing relationship, conflicting interests may arise from time-to-time which will require resolution between the parties.

The Union of BC Municipalities (UBCM) and the First Nations Summit (FNS) in British Columbia, with the financial support of the Department of Indian and Northern Affairs Canada, B.C. Region (INAC), wish to assist First Nations and local governments in the avoidance of conflict and, where it may arise, to have tools available to the parties to efficiently and effectively resolve the issues in a manner which serves the best interests of the government jurisdictions involved.

1.2. Purposes

The purposes of this report are to provide:

1. an examination of some past and present experience with disputes between First Nations and local governments in British Columbia, and the methods used to resolve them;
2. the consolidated and documented results of the research to be included in a practical user guide to help First Nations and local governments to avoid conflict and resolve issues;
3. recommendations to UBCM, FNS and INAC for overcoming barriers and options for encouraging and promoting effective dispute resolution methods between First Nations and local governments including staff training, sample protocols and a pool of accessible expert facilitators/arbitrators who may assist with the process of resolving disputes.
4. a practical user guide for First Nations and local governments, which shall include the following:
 - a general discussion of the common types and causes of local government / First Nations disputes in B.C. over time, with specific examples;
 - a discussion of common methods/steps First Nations and local governments have used to try to resolve their disputes (e.g. Courts, arbitration, political protocols, etc.), and the results, with examples;
 - a discussion of the possible barriers to effective resolution of disputes between them, with examples;
 - conclusions about the most effective methods and recommended steps for resolving disputes between local governments and First Nations; and
 - a list of resources available to assist First Nations and local governments in resolving issues.



The UBCM and the FNS have retained the services of Suda Management to undertake the necessary research, assemble the appropriate documentation and prepare a practical user guide to achieve the identified objectives of this report.

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1.3. Methodology

The methodology used in preparing this report was as follows:

- research of specific cases where disputes have occurred, including interviews with key officials from First Nations, local government and others involved with the issue;
- a brief review of some dispute resolution literature in order to provide a framework for barriers/conclusions/recommendations
- consultation with UBCM, the First Nation Summit, INAC and other First Nation and local government representatives;
- an analysis of the findings of the research phase and the interviews with local government and First Nation officials;
- preparation of a draft report and a preliminary User Guide for review with clients; and
- finalization of the report for presentation to the clients, including a user-friendly Guide for First Nations and local governments.

1.4. Format

The report is divided into five (5) sections as follows:

- **Part 1 – Introduction** - Outlines the background and objectives for the review;
- **Part 2 – Recent Experiences** – Provides an overview of the consultant’s research on relations between First Nations and local government and legislative changes impacting upon the relationship. This section also discusses specific issues over which disputes have arisen and the results of the various methods used by the parties to address and resolve the issues;
- **Part 3 – Current Issues and Processes** – Discusses a number of specific cases and the methods used by First Nations and local governments to address the issues and their intergovernmental relationships, and the levels of success achieved during these processes.
- **Part 4 – Current Alternate Dispute Resolution Practices** – Identifies and defines a variety of alternate dispute resolution methods currently in use in North America to resolve disputes between parties. This section compares the results of specific cases and the types of alternate dispute resolution processes which have been used by First Nations and local governments within the Province to address their concerns.
- **Part 5 – Recommended Practices** – Provides a series of recommendations, and includes a simple and user-friendly **guide**, to assist First Nations and local governments in British Columbia to help the parties identify and overcome barriers and promote effective dispute resolution methods. The **draft guide** provides a list of resources available to First Nations and local governments to assist in alternative dispute resolution processes.



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2.0 RECENT EXPERIENCES

This section provides an overview of the relations between First Nations and local governments and provides some of the background on legislative changes, which have contributed to the new relationship and the expanded potential for disputes between the governments jurisdictions.

2.1 First Nations Property Taxation

In 1988 changes in the *Indian Act R.S.C. 1985* permitted First Nations to levy property taxes on their reserves, including lands which had previously been considered off-reserve and “conditionally surrendered” land. While this change appeared to be a minor amendment, in fact it was an important part of the aboriginal self-government movement, which allowed First Nations to raise funds by taxation of land over which they have local control and gave the First Nations that entered the field some real fiscal and service responsibilities. While this was a major and positive change for First Nations in British Columbia, it was also a major factor in a number of conflicts, which arose with neighbouring local government jurisdictions.

Prior to this legislative change, the provincial property assessment and taxation system had always levied tax on occupiers of Crown and First Nation land. These provincial authorized taxes, on non-aboriginal occupiers of reserve lands, included local government taxes as well as direct provincial levies. Although most reserves are rural, and do not overlap with any municipality, almost all lie within a regional district which had been relying on taxes from the developments on First Nations’ lands. In a few cases, the reserves lie entirely or partly within municipal boundaries as established by Provincial letters patent, e.g. District of Delta, District of Central Saanich and the City of Duncan, and the revenue from such reserve developments formed a significant portion of the municipality’s revenue stream. The loss of revenue to the local governments involved, due to the implementation of First Nations property taxation, became a major and contentious issue in a few instances.

2.2 Service Agreements

A second issue arising from the implementation of First Nation Property Taxation on reserve lands related to the provision of services. Where local governments were previously supplying services to reserve lands and found that its revenue from taxation was being eliminated, it could, in theory withdraw its services unless it was adequately paid for the services in some other manner. The cost of services provided to reserve lands and the use and benefit derived by the occupiers of First Nations lands was, in some instances continues to be, a major issue that has led to serious conflict between the two governments.

2.3 Land Use, Planning and Development

As First Nations continue to move toward self-government and seek to generate their own source revenue, more emphasis is being placed on land development. The development of First Nation land, particularly properties lying within or immediately adjacent to a municipality, can result in conflicts around issues of competition and economic development. The competing uses of land in neighbouring communities has also proved to be a problem when First Nations, which may require enhanced levels of servicing for their lands, have approached local governments to negotiate new service provision agreements.



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3.0 EXAMPLES OF CURRENT ISSUES AND PRACTICES

During the course of the consultant's research and interviews with First Nations and local governments in British Columbia, it has been determined that the parties have utilized, or attempted to utilize, a variety of dispute resolution practices. Some examples of the issues and the dispute resolution processes the parties have used to address and resolve the disputes are described in this section.

3.1 Taxation Issues

With First Nations assuming responsibility for property taxation on Reserve and Treaty lands, many jurisdictions have sought facilitated discussions and mediation to bring the parties together to a mutually agreed position.

These discussions have been centered on costs, as local governments experience a direct loss of tax revenue and seek to recover their cost of servicing through agreements with the neighbouring First Nation. On the other side of the issue, First Nations have been seeking a new revenue source to provide improved services and facilities to their communities. They wish to retain as much of the new tax revenue as possible within their community.

While in some instances mediated settlements have been achieved; others have required more formal resolution processes including an arbitrated settlement in the case of Central Saanich and the Tsawout First Nation, and legal action in the case of the District of Salmon Arm and the Adams Lake First Nation.

This later case involved existing, fully serviced commercial developments on First Nation's lands. The developments were being taxed, similar to adjacent municipal properties, in order to recover the costs of municipal services. When the City lost its ability to tax the development, it attempted to cut off municipal services to the property and the case proceeded to Court.

The Court ruled that the municipality did not have a legal obligation to continue to service the properties, unless a service agreement was in place. The Court refused however to allow the local government to discontinue services until sufficient time had been given to allow the First Nation to provide its own infrastructure or make alternative arrangements to service the property. The Court also ruled that the First Nation was required to pay for the services received in the interim period.

Following the Court decision on the Adams Lake First Nation/District of Salmon Arm dispute, the two parties returned to the table, on their own, and successfully concluded a comprehensive service agreement. Subsequent to the negotiated agreement for the properties involved.

Subsequent to the negotiated agreement, the parties arranged for regular and ongoing communication on issues affecting the two jurisdictions. The success achieved with the Adams Lake First Nation led to a second negotiated service agreement between the Neskonlith First Nation and the District and the two parties now are cooperating in the development of water infrastructure to open additional First Nation's lands for economic development opportunities.



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3.2 Service Agreements

Agreements, to provide specific services to First Nations' lands, have been successfully negotiated between a number of neighbouring communities including, the Westbank First Nation and the Central Okanagan Regional District; Cowichan Tribes and the City of Duncan; and the Tsawout First Nation and the District of Central Saanich. The Westbank and Cowichan arrangements were concluded following facilitated discussions. The Tsawout/Central Saanich agreement required both facilitation and mediation, for an initial settlement, and finally an arbitrated agreement between the parties for the longer term.

While all agreements have required considerable effort to reach agreement, on-going communications continue to strengthen the relationships and in some cases are leading to increasing levels of cooperation on development and servicing initiatives. In other areas, such as the Adams Lake First Nation and the District of Salmon Arm, efforts to establish service agreements have involved the Courts.

In all cases, development of the relationship and continuous communications between the parties has been the key ingredient in the settlement of disputes on servicing and related issues.

3.3 Land Use Planning and Development Issues

In some settings, including the Cities of Nanaimo, Prince George and others, neighbouring First Nations have Reserve lands or potential Treaty Settlement lands located within the boundaries of the municipality. In these cases, the potential for conflicts over land uses is high.

In the case of the City of Prince George and the Lheidli T'enneh First Nation, land use has not been an issue, but rather has been the catalyst to bring the parties together and, through a proactive and cooperative working relationship, has led to the signing of a Protocol and Memorandum of Understanding (MOU) on Cooperation and Communications in 2002. These two documents formally recognize the importance of a strong and committed working relationship between the two government bodies.

The MoU and the Protocol are the results of reasonable people, from both communities, building respect and trust with each other. In the early 1990s, the Lheidli T'enneh First Nation identified sacred properties lying within Fort George Park, which lies within the City's boundaries. They indicated a desire to take back this part of their traditional territory and stop the trespass that had been occurring on the site. The City, recognizing the need to treat the lands in a dignified manner, because of the sacred use of the lands, worked with the First Nation to secure and protect the lands from further abuse and trespassing. The City now maintains the land as a sacred community site.

These early actions led to on-going discussions on a number of points of concern to the First Nation and, through a cooperative working relationship, the two parties have been able to address a number of areas of concern and to resolve any issues as they arise. The City has also taken steps to have Treaty Settlement lands identified within the City's Official Community Plan, one of the first in Canada to do so.

The Protocol and MoU entered into by the Lheidli T'enneh First Nation and the City of Prince George in July 2002 recognizes the mutual advantages of working together



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and the need to satisfy the interests and desires of both parties. Copies of the documents are attached as Appendices "C" and "D".

The Snuneymuxw First Nation is currently involved in the Treaty Negotiation process. The process is leading to a number of significant urban settlement issues that may impact upon the City of Nanaimo.

The concerns of the City relate to:

- local government's place in the process;
- identification of Treaty Settlement Lands within the City's boundaries;
- potential for planning and development conflict on the properties involved;
- potential loss of tax base;
- protection of parks and marine areas; and
- Various complex servicing questions.

To address these and other concerns, the City was invited to sit as an observer at the main Treaty Negotiation Table. The federal government also established a governance side-table, with participation from the First Nation, the City, Nanaimo Regional District and the Islands Trust, to address local governance issues. The province also agreed to accept the results of the side table discussions. In addition, the federal government and the province commissioned a report on the challenges facing the local government/ Snuneymuxw First Nation interface in the future. (The Adams Report) These measures, along with enhanced communications on park planning and economic development issues, may help to create the conditions for a more productive working relationship at the local level. In a related move, the City has recently joined the Lower Mainland Treaty Advisory Committee as an observer to provide improved dialogue amongst local governments dealing with Treaty issues.

3.4 Understanding of Potential Barriers

Based on the writer's research and from personal experiences within dispute resolution discussions, a major concern identified has been the lack of experience of the two government bodies in working together and dealing with issues of conflict between the parties. This presents a number of potential barriers to the two parties as they seek to address issues of conflict between their respective communities.

The potential barriers identified, which may hinder the resolution of issues at the early stages of a dispute, include the following:

- Lack of awareness and understanding of the history of the two government bodies;
- Limited understanding of the structure and manner of governance of each community, including the differences in the levels of responsibilities of each form of government;
- Lack of respect and trust between the parties;
- Limited experience with dispute resolution practices; and
- Linking of the current issue with past wrongs or perceptions of wrongful actions by one or both parties.

Section 5 of this report attempts to address these issues and provides suggested courses of action to overcome these potential barriers and resolve disputes.



4.0 ALTERNATE DISPUTE RESOLUTION PROCESSES – A REVIEW

This section defines and discusses a number of forms of dispute resolution, which are currently in use by governments, First Nations and the commercial sector.

4.1 What is Alternative Dispute Resolution?

Alternate Dispute Resolution (ADR) refers to a number of methods available to assist in the resolution of disputes between individuals or organizations, without a formal litigation process through the Court system. The processes are sometimes classified into the categories of facilitative and advisory, based on consensual processes by the parties, and determinative processes such as arbitration, legislation or court decisions.

These categories are generally defined as follows:

- **Consensus Driven** - referring to processes and outcomes that are decided by the disputing parties themselves;
- **Adjudicative** - meaning that a third-party makes a binding decision for the parties and includes the forms of arbitration and court adjudication; and
- **Legislative** – meaning approaches which focus on rules made by a group, organization or formal legislative body. In this case disputes over interpretation or application of rules may still be resolved through consensus or adjudicated means.

4.2 Dispute Resolution Options – Advantages & Disadvantages

Businesses, institutions and individuals choose arbitration and/or mediation to successfully resolve most disputes. Almost any type of dispute is capable of being resolved through an alternate dispute resolution process. Some examples of the most frequent types of disputes involve:

- Contracts;
- Partnerships;
- Construction; and
- Payment for goods or services.

ADR includes a number of alternatives, many of which are currently being utilized by First Nations, local governments and others. The form and a general definition of the various ADR processes and advantages and disadvantages of each are as follows:

4.2.1 Bargaining

“Bargaining” refers to a process whereby two or more entities reach an accommodation that is acceptable to all involved. The “bargain” will usually be based on undertakings by one or more of the parties involved to do, or not do certain things.

Bargaining may be implicit, in that a decision-making body may choose to modify its preferred alternative in order to achieve the support, or defuse the opposition of some other party. While there may be no direct exchange of offers and counter-offers, a public agency might modify a planned action in response to opposition



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voiced in a public meeting. The anticipated result, or other half of the bargain, would be the dropping of opposition to the proposed action.

This is a preferred process in which the parties reach an agreement through face-to-face discussions. As bargaining represents the first step of a resolution process, the parties may move to a more formal negotiation process if settlement cannot be achieved during the bargaining stage.

4.2.2 Negotiation

“Negotiation” is explicit bargaining. Negotiations occur when two or more entities enter into a direct exchange, typically involving face-to-face meetings, in an attempt to find some resolution to their differences. It is based on the understanding or assumption that an agreement will involve a commitment to act within the terms of the agreement.

Negotiation is a form of shared decision-making; that is, on a certain set of issues for defined period of time, in which those involved agree to seek an outcome acceptable to all involved.

Should negotiations fail to result in an agreement, the participants revert to pursuing their interests as appropriate, whether through unilateral decision-making or attempts to prevent those decisions from being realized through political or legal action or some other alternative dispute resolution means.

4.2.3 Consultation

“Consultation” processes are often part of a regular decision-making process, but the final decision making remains with the established decision-maker and the degree to which the decision is influenced by the consultation is at the discretion of the decision-maker.

Consultation is the basis of a variety of procedures referred to by such terms as “public consultation”, “public participation”, and “public involvement”. Methods of consultation range from formal public hearings and requests for written submissions to more interactive techniques such as workshops and advisory committees.

Consultation processes often lead to high expectations on the part of the parties being consulted, and may lead to feelings of rejection or abuse, in that the consulted parties feel that they have not been heard.

4.2.4 Facilitation

“Facilitation” refers to the task of managing discussions in a joint session. A facilitator may be used where parties of diverse interest or experience are in discussion, ranging from technical seminars and management meetings to public forums.

This type of process provides for an independent third party to assist the parties in their awareness of and understanding of the issues with which the parties are faced. A mediator will often serve as a facilitator as part of his or her broader role.



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Facilitation is not necessarily a decision making process, but it may still assist the parties in clearly identifying the issues and the relative impact of the options addressing the parties and the next best alternatives available to them.

4.2.5 Mediation

“Mediation” is negotiations with the assistance of an independent person, often referred to as a “third party”. Critical to mediation is the relationship between the mediator and the parties involved in the dispute. That relationship has four critical dimensions as follows:

- Independence from the parties and the immediate issue(s) in dispute;
- Mutual acceptance of the parties;
- Focus on the process and not the substance of the negotiations; and
- Assisting in finding a settlement mutually acceptable to the parties.

In this process, the mediator is likely to perform three major tasks: firstly, to act as a convener in assisting the parties to define the terms and conditions under which the negotiations will proceed; secondly, acting as a broker, representing the interests, concerns and ideas of one party to another, outside of joint sessions and in caucuses; and thirdly, in some cases, acting as a facilitator in joint sessions

The mediator only provides assistance to the parties as they address the issue, but does not have decision-making powers. In all cases, the content of the settlement remains the responsibility of the parties and must be mutually acceptable to them.

4.2.6 Arbitration

“Arbitration” is a formal adjudicated process with an “arbitrator”, or in some cases a panel of arbitrators, acting in the capacity of a judge. Disputing interests present their arguments and evidence and the arbitrator “rules”, making a decision on behalf of the parties.

This process results in an independent review of the facts of the dispute by an independent third party, who should be able to make an informed decision based on the facts, rather than the emotions that may be involved in an issue.

The parties will be bound by legislative mandate or contractual agreement to accept and adopt the decision of the arbitrator or panel. Bases for appeal to administrative or judicial bodies are very limited and usually pertain to points of law only.

4.2.7 Fact-finding

“Fact-finding” is similar to arbitration, except that the fact-finder’s findings are advisory. Underlying this process is the assumption that the judgement of an independent and respected, but non-involved person will bring pressures to bear on the parties and result in their accepting a compromise or accommodation which is based on that judgement.

The fact-finding process is usually less formal than an arbitration hearing and may lead to settlement of the issue with less outside intervention.



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This process is not binding on the parties and, if not accepted, may result in the introduction of additional concerns about the issue, not previously identified as a problem and may lead to hardening of the position of the parties.

4.2.8 Conciliation

“Conciliation” is a hybrid of fact-finding and mediation processes. Typically, a conciliator or conciliation board is appointed to assist in the settlement of a dispute with the authority to write a report. This process sometimes refers to attempts to settle disputes without bringing the disputing parties into a joint meeting, or the initial attempts to assist parties to agree to meet.

The conciliation process is generally much less formal than a fact-finding, but more structured than a mediation process. If the conciliator or board is successful in mediating an agreement between the parties, their report documents the settlement.

If their settlement efforts are not successful, the report will still be the conciliator’s recommendations of an equitable settlement, as in a fact-finding report.

4.2.9 Summary

This section has reviewed a variety of ADR processes and identifies a number of the advantages and disadvantages of each process. All of these processes are being utilized today by government jurisdictions and industry, but there is no correct process or order for use of the various processes to address a specific dispute. Rather, the circumstances of each dispute will dictate the appropriate timing and methodology to be used.

In addition to the Alternative Dispute Resolution processes identified, many disputes still find their way to the Courts for a formal and final legal decision on the issue at hand.



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5.0 RECOMMENDED PRACTICES

To assist First Nations and local governments in the avoidance of conflict and the resolution of issues that may arise between the two orders of government, the following practices are recommended.

5.1 Enhanced Communications

Continuous and timely communication on planning issues and potential development proposals, which may impact upon neighboring jurisdictions, and on issues relating to infrastructure servicing for the communities, can help to avoid disputes over issues that may affect the two government bodies.

Regular meetings between the two jurisdictions, both at the elected and staff level can be helpful to increase understanding of the issues facing each jurisdiction and any potential implications for the neighbouring body.

5.2 Dispute Avoidance

In any relationship, areas of disagreement may arise from time-to-time, but a proactive relationship, encouraging communication and cooperation between the parties, in an effort to achieve maximum benefit to the residents of the two communities, is in the best interest of all concerned. Avoidance of disputes is of course the preferred practice and many steps can be taken to assist in this regard.

Various levels of government have identified, or set out in legislation, dispute resolution practices to address issues as they may arise and before they become serious. The practices identified also include principles to assist the parties in avoiding dispute situations as well as setting out practices to deal with disputes. While not all of the examples of current practices relate specifically to First Nations and local government relations, they are set out here to give an indication of some of the approaches being used to avoid conflict and to address concerns between parties which can be used in a variety of circumstances.

5.2.1 FN Land Management Dispute Resolution Processes

A Framework Agreement was signed by fourteen participating First Nations and the Government of Canada in February 1996 to provide First Nations with the option of exercising control over their lands and resources. This Agreement, which has been further amended in 1998 and 2002, provides for dispute resolution in Part IX of the Agreement. A copy of this section is attached as Appendix "E" to this report.

5.2.2 Local Government Act - Regional District Dispute Resolution

Intergovernmental disputes, particularly between regional districts and their member municipalities, has resulted in the Province of BC setting out a formal ADR process in the *Local Government Act* to assist the parties in addressing issues arising between the jurisdictions. Copies of this process can be located under Parts 24 of the *Local Government Act*, Division 4.5 – Dispute Resolution in Relation to Services and also under Part 25. These sections can be accessed at the following web site.

- www.qp.gov.bc.ca/statreg/stat/L/96323_00.htm



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5.2.3 Nisga'a Dispute Resolution

As part of the Nisga'a Treaty, the parties have included a detailed process to address disputes as they may arise. This information is available through the Nisga'a web site under Chapter 19, which can be reached at the address identified below and is included in the list in Appendix "E".

- www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html

5.3 Education and Training

Continuous education and training, such as that which occurs at the Community-to-Community Forums, supported by the UBCM and the FNS, can help the parties to better understand the issues and increase the level of awareness of current projects and developments, and the potential impact of these projects and developments on neighbouring communities.

Some other examples of education and training that can be helpful to the parties include the following:

- Orientation on Governance Models;
- Roles and Responsibilities of elected and appointed officials; and
- Effective Partnering, and
- Servicing Agreements.

These forms of education and training are provided by a number of professional organizations, institutes of higher learning and private consulting firms. It is suggested that information on these sources is currently available, or should be available on the UBCM, FNS and INAC web sites and through information documents such as the "Net-work-book" prepared annually by the UBCM.

5.4 Training Sources

Specific opportunities currently available to local governments and First Nations to develop their respective skills in the area of dispute avoidance and resolution are currently available through the following institutions:

- Justice Institute of B.C. www.jibc.ca
- Simon Fraser University www.sfu.ca
- Royal Roads University www.royalroads.ca
- University of Northern British Columbia www.unbc.ca
- First Nation Summit www.unbc.ca
- Indian Taxation Advisory Board www.itab.ca
- Union of B.C. Municipalities www.civicnet.bc.ca

It is recommended that these links be provided on each of the UBCM, FNS and INAC web sites, for ease of access by your client groups.

5.4.1 ADR Information & Publications

There is a significant amount of information on Alternate Dispute Resolution processes available. The following web sites are considered good examples to provide information on the topic.



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- www.adrr.com
- www.peacemakers.ca
- www.ag.gov.bc.ca/dro/mediation.guide.htm

It is again recommended that these links be provided on the web sites of UBCM, FNS and INAC.

5.4.2 Sample Agreements

An important step in improving relations between First Nations and neighbouring local government bodies is the recognition and respect of the institutions, their responsibilities and the interests of each community. This respect can often be achieved by a simple protocol or memorandum of understanding that promotes cooperation on issues of mutual interest and concern, and that commit the parties to a meaningful communication and consultation process. A list of sample protocols and memorandums of understanding is attached as Appendix "D".

5.5 Other Sources of Information

Ease of access to these forms of information is an important factor and it is suggested that the UBCM, FNS and INAC consider establishing special web site pages and links to provide the sample copies of the Protocol Agreements and Memorandums of Understanding, and other information outlined above, for reference purposes.

5.6 Identified Support – A Resource List

To assist First Nations and local governments, as they seek to resolve disputes between their respective jurisdictions, a list of individuals, who are familiar with inter-governmental arrangements, may be able to provide support and advice to the parties as they enter into a dispute resolution situation. A list of individuals who have consented to be available to assist in such matters is attached as Appendix "F" hereto.

5.7 User Guide

A draft User Guide document to assist First Nations and local governments overcome potential barriers and to promote effective dispute resolution methods is attached as Appendix "G" to this report. This document is seen as a practical guide that is aimed at First Nation and local government elected and appointed officials.

The proposed guide does not reflect an exhaustive survey of the issue; rather it provides an overview of the subject and identifies a series of options to address issues arising between neighbouring communities. The document reflects the information obtained from research and during interviews with a number of local government and First Nation officials who have been involved in disputes and attempted to use a variety of the Alternative Dispute Resolution processes that have been identified. A list of individuals interviewed for this project is included in Appendix "A".

It is recommended that the guide be used as "living" document, one which grows overtime to reflect current ADR practices and can serve as an on-going reference tool which provides a single source access to information on this important topic.



References:

Dispute Settlement and the Public Manager – *the Mediation Institute, Mill Creek, Washington – 1990*

First Nations and Property Tax in B.C. – *Greenwood & Morris – 1994*

Approaches and Options for Treaties in Urban Areas- Chapter Seven – Dispute Resolution – *Peter Adams – 1999*

Dispute Resolution Models and Land Use – *Lower Mainland Treaty Advisory Committee, Discussion Paper Regan Schlecker – 2002*

ADR Resources – *Mediation Check List, Stephen R. Marsh, 2001*

What is "Alternative Dispute Resolution" – *Catherine Morris, 2001*

Getting to Yes "Negotiating Agreement Without Giving In" – *Fisher, Ury and Patton - 1991*

Interview Contacts:

Colin Braker, Communications Manager, FNS
Helen Davies, INAC
Wayne d'Easum, Administrator, CORD
Paul Douville, CAO, City of Duncan
Graham Dragashan, Aboriginal Issues Manager, MCAWS
Ian Fremantle, CAO, Iqualuit (former CAO Powell River)
Deanna Hamilton, President, FNFA
Harold Karas, Councillor, Squamish FN
Al Kenning, Deputy City Manager, City of Nanaimo
Maggie Knox, Administrator, City of Enderby
Rod Laurie, Manager of Taxation, Tsawout FN
Chief Maynard Harry, Sliammon FN
Manny Jules, Chair, ITAB
Chief Robert Louis, Westbank First Nation
Doug Lagore, CAO, District of Salmon Arm
Alison McNeil, Senior Policy Analyst, UBCM
Gary Nason, CAO, District of Central Saanich
Allan Neilson-Welch, Consultant
Barbara Nudd, Administrator, Spallumcheen FN
George Paul, City Manager, City of Prince George
Ken Scopick, Director of Operations, ITAB
Eric Pelkey, Administrator, Tsawout FN
Stan Westby, CAO, Powell River

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CHECK LIST FOR ACTION

Each circumstance of a disagreement between First Nations and local governments will have its own characteristics and will require its own special methods to resolve the issue. The following is a checklist that may help to identify a number of "trigger points", and that suggests courses of action to be taken to address on-going disputes between jurisdictions.

1. Clearly identify what the issue is. Take the time to review the circumstances surrounding the issue.
2. Document your position of the issue. Putting your position in writing and identifying your interests may help to clarify and qualify your concerns with the issue at hand.
3. Confirm and document the position and interests of the other party. Make sure you understand their position. Is it truly an issue or a simple misunderstanding of the other party's position and interests?
4. Review all of the options available to address the issue. Take the time to review Alternate Dispute Resolution options, as set out in Section 4.2 that may be open to you to address the issue. Remind yourself of the "next best alternative" if you are unable to achieve your objective on the matter.
5. Determine the appropriate ADR option to deal with the particular issue, recognizing that each of the methods identified may not be appropriate for the particular circumstance.
6. Consider facilitated discussions by a trusted third party who can assist the parties by acting as a neutral fact finder. Facilitation can be an informal start to a process and will help the parties to see the issue from a different perspective.
7. Again, consider the best alternative to a negotiated settlement (both sides). What if you fail to achieve a successful resolution? Will an imposed solution be satisfactory?
8. Attempt to negotiate a settlement of the dispute at this point.
9. If unsuccessful in negotiating a settlement in the early stages of the dispute, you may wish to consider a formal mediation process. This option starts to move the issue away from a settlement by the parties with the formal involvement of an outside "third party".
10. Review the current situation using a mediation check list (See Appendix "B"). The check-list provided is from a legal perspective, including the lawyer's role in mediation, but also applies to any independent mediator who may become involved at this stage.
11. If a mediation process is not successful, consider final arbitration to resolve the issue, again being aware of the implications of an enforced settlement by an outside party. Settlement in this manner can result in neither party being happy with the result.
12. At all times, the parties should be looking at the broader picture and should work towards a settlement that will meet the objectives of both sides and will not prejudice the future working relationship between the two government bodies.

Four principles identified through the Harvard Program on Negotiation and included in the publication "Getting to Yes" are worth remembering during the process.

- Separate the people from the problem
- Focus on interests, not positions
- Generate a variety of possibilities before deciding what to do, and
- Insist that the results be based on some objective standard.

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MEDIATION CHECKLIST

1. Select Mediator:
 - a. appropriate experience.
 - b. appropriate training.
 - c. appropriate methods.
 - d. fee schedule.
 - e. appropriate site.
 - f. conflict of interest
 - g. check agreement of parties on mediator.
2. Confidential Pre-Mediation Papers for Mediator:
 - a. concise statement of issues and positions.
 - b. identify strengths and weaknesses.
 - c. provide timeline for case and for negotiations.
 - d. detail who will be present and their relationship to the case.
 - e. supplement as to appropriate "live" pleadings and case law.
3. Pre-Mediation Client Caucus:
 - a. explain mediation process.
 - b. review Pre-Mediation Papers.
 - c. explain possible benefits of mediation.
 - d. explore initial unrealistic positions and sensitive issues.
 - e. discuss authority to settle.
 - f. warn of possible multiple impasses.
 - g. review the strengths and weaknesses of case.
4. Order Referring to Mediation:
 - a. double check for confidentiality provisions.
 - b. allocate costs.
 - c. identify time, place and persons attending.
 - d. make certain that all persons with authority will attend.
5. Lawyer's Role
 - a. to persuade and negotiate.
 - b. to communicate and persuade.
 - c. to protect client.
 - d. to appear reasonable and calm -- in command and confident.
6. Lawyer's Opening Statement
 - a. introduce yourself -- humanize yourself.
 - b. introduce your clients -- humanize your clients.
 - c. acknowledge a belief in the process and your client's good faith.
 - d. express sympathy.
 - e. outline your position, the basis for your position, and areas of good faith disagreement.
7. Initial Caucus
 - a. identify the strengths and weaknesses of case -- discuss.
 - b. evaluate the expected outcome of your case.
 - c. discuss "the first credible offer" and when to make it.
 - d. discuss unanticipated elements or overlooked issues.
 - e. discuss initial expectations.

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**SAMPLE MEMORANDUMS OF UNDERSTANDING
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1. **Memorandum of Understanding between the Province of British Columbia and the Union of British Columbia Municipalities**
2. **Protocol between the Province of British Columbia and the Union of British Columbia Municipalities ***
3. **Protocol between the First Nations Summit and the Union of British Columbia Municipalities ***
4. **Memorandum of Understanding On Cooperation and Communication between the Lheidli T'enneh First Nation and the City of Prince George**
5. **Protocol on Cooperation and Communication between the City of Prince George and the Lheidli T'enneh First Nation**
6. **Protocol between the Spallumcheen First Nation and the City of Enderby**
7. **Protocol between the Okanagan First Nation and the City of Vernon**
8. **Protocol between the Sliammon First Nation and the District of Powell River ***
9. **Statement of Political Relationship between Kamloops Indian Band and City of Kamloops ***
10. **The Alert Bay Accord ***
11. **Diditdaht/ Pacheedaht proposed Partnership Between the Diditdaht Nation and Ladysmith ***
12. **Tulalip Indian Tribes and City of Seattle ***

** Copies of documents not attached.*



SAMPLE DISPUTE RESOLUTION PROCESSES

1. **FN Land Management Dispute Resolution Processes**
2. **Nisga'a Dispute Resolution**
3. **Opaskwayak Cree Nation Land Code - Dispute Resolution**
4. **Westbank First Nation Land Code - Dispute Resolution**
5. **Local Government Act - Regional District Dispute Resolution**
6. **Other**

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RESOURCE LIST

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Harold Calla, Chairman Advisory Board
First Nations Financial Management Board
(604) 925-6665
<http://www.fnfmb.com>

Colin Braker, Manager of Communications
B.C. First Nations Summit
(604) 990-9939
<http://www.fns.bc.ca>

Graham Dragushan, Manager
Local Government First Nations Relations
Ministry of Community, Aboriginal &
Women's Services, Province of B.C.
(250) 387-4048
Graham.Cragushan@gems4.bc.ca

Deanna Hamilton, President
First Nation Finance Authority
(250) 769-2404
<http://www.fnfa.ca>

C.T. (Manny) Jules, Chairman
Indian Taxation Advisory Board
(250) 828-9857
<http://www.itab.ca>

Chief Robert Louis
Westbank First Nation
(250) 769-2400
<http://www.wfn.ca>

Alison McNeil, Senior Policy Analyst
Union of British Columbia Municipalities
(604) 270-8226
<http://www.civicnet.bc.ca>

Denise Walker, Senior Negotiator
Aboriginal Relations Branch
Ministry of Attorney General &
Ministry Responsible for Treaty
Negotiations, Province of B.C.
(250) 387-5210
denise.walker@gems8.gov.bc.ca

Others to be added.



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User Guide

