DISPUTE RESOLUTION SYSTEMS:

LESSONS FROM OTHER JURISDICTIONS

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A report by

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EXECUTIVE SUMMARY

Purpose and Methodology

The Federation of Saskatchewan Indian Nations (FSIN), the Government of Canada represented by the Department of Indian Affairs and Northern Development (DIAND) and the Government of Saskatchewan have established a joint Fiscal Relations Table (FRT) to develop proposals for a new intergovernmental fiscal relationship under a self-government regime.

As part of their work, the three parties are undertaking a project on dispute resolution with two distinct lines of enquiry: the first relates to the development of a dispute resolution system that will be part of the new fiscal relationship among the three levels of government. The second revolves around the establishment of a community-based pilot project under the auspices of the Touchwood File Hills Qu'Appelle Valley Tribal Council (TFHQV).

This study is the research and development component of this project. In preparing it, the Institute has three objectives: 1) to provide the FRT members with an overview of the major themes found in the literature of direct relevance to their task; 2) to balance the lessons drawn from the literature with those derived from a number of case studies of dispute resolution systems; and 3) to make recommendations on how the information developed in this study can be put to best use by the parties in combination with other lines of inquiry they have initiated.

In executing this study, the Institute used library searches, interviews with knowledgeable experts and research on the internet to conduct both the literature review and the study of appropriate cases. The power of the research design in this study comes from the comparison of the themes from the literature – particularly in regard to principles and best practices – with the lessons to be drawn from the empirically-based case studies.

Principles and Best Practices

Conflict and disputes are not synonymous concepts: conflict is the process of expressing dissatisfaction, disagreement or unmet expectations. A dispute, on the other hand is a product of an unresolved conflict.

Aboriginal perspectives on conflict – and more broadly on the meaning of justice - differ markedly from 'western' views. The Aboriginal emphasis is on proactive measures - all of which are contained in traditional teachings about how life should be lived - for maintaining harmony and avoiding conflict. In contrast, western approaches place the emphasis on responding to actual disorder.

The literature distinguishes three broad approaches to resolving disputes – power-based, rights-based and interest-based. Benefits for reducing the reliance on power and rights-

based approaches include reduced costs; better quality decisions; greater satisfaction levels among disputants and the preservation of long-term relationships. There appears to be considerable convergence in the literature on Aboriginal justice to move in a similar direction, that is, to place greater reliance on interest-based approaches, often referred to as alternative dispute resolution (ADR).

There is a wide and growing spectrum of ADR techniques that can be grouped in six categories:

- Preventive ADR – e.g. joint problem solving;
- Negotiated ADR – e.g. principled negotiation techniques;
- Facilitated ADR – e.g. mediation
- Fact-finding ADR – e.g. neutral evaluation;
- Advisory ADR – non-binding arbitration; and
- Imposed ADR – binding arbitration.

Elders panels and circle techniques are approaches to resolving disputes that have arisen in Aboriginal communities and are being adopted more widely.

With the explosive growth in the use of ADR techniques has come a growing literature on the design of dispute resolution systems. Principles for designing such systems are summarized on the following page. Many of these principles resonate well with the findings of the Royal Commission on Aboriginal Peoples in its study of Aboriginal justice.

Implementation issues in establishing a new dispute resolution system include

- the desirability of using pilot projects to, among other things, test the system design and build support for a change in approach;
- developing appropriate guidelines and policies before a new system is introduced;
- anticipating the stress and burnout of personnel involved in the new program; and
- developing an approach to evaluating the new program that is timely, useful in sharpening program goals and one that emphasizes continuous improvement.

Case Studies – Intergovernmental Systems for Dispute Resolution

As a way of supplementing the principles and best practices gleaned from the literature, the Institute undertook four case studies of intergovernmental systems for resolving disputes. The first focuses on claims and self-government agreements with a special emphasis on the dispute resolution system in the Nisga'a Final Agreement. The principal conclusion of this assessment is that the Nisga'a system appears to meet most if not all of the design principles derived from the literature.

PRINCIPLES FOR DESIGNING DISPUTE RESOLUTION SYSTEMS

1. **Use interest-based approaches wherever possible;**
2. **Develop rights-based mechanisms that are low-cost, flexible and minimize the damage to relationships when interest-based approaches do not work or are not appropriate;**
3. **Provide a clear 'road map' for how the parties move from one stage of the system to the next;**
4. **Ensure that the parties have the necessary knowledge and skills to use interest-based techniques;**
5. **Build in an assessment component to the design process;**
6. **Empower future participants to assist in the design of the system so that it reflects their culture and priorities;**
7. **Recognize the importance of prevention;**
8. **Ensure that the design calls for ongoing maintenance, feedback and reevaluation of the dispute settlement system; and**
9. **Keep things simple.**

The second case concerns the Agreement on Internal Trade. The dispute resolution system in this Agreement appears to be significantly flawed – it is not well-publicized; the process is long and cumbersome; and there is no systemic identification of policy issues for follow-up. Nonetheless, it does take an interesting approach to dealing with the problem of having an arbitration panel impose upon the 'sovereignty' of the parties by having panel decisions binding not in a legal but in a political sense.

International examples of intergovernmental fiscal arrangements form the basis for the third case study. No country appears to have developed a formalized dispute resolution system akin to, say, the Nisga'a agreement. That said, a wide array of dispute resolution devices are in use. Canada in comparison to other countries fares well from the perspective of the World Bank officials. Nonetheless, in recent years Canada has not been immune to unilateral decisions by the federal government on reductions in transfers to the provinces and territories.

The final case – the Waitangi Tribunal – illustrates the effectiveness that a non-binding arbitration model can achieve, especially in a situation that existed in New Zealand where the court system refused to give any legal standing to the Treaty of Waitangi.

Conclusions – Models for the FRT in Saskatchewan

Based on the literature search and the case studies, the Institute suggests the following eight points for the FRT to begin discussions concerning an appropriate dispute resolution system for its purposes:

1. **The dispute resolution system in the Nisga'a Final Agreement correlates closely with the principles and best practices in the literature and should provide a good starting point for FRT discussions on an overall system design.**

2. **Another aspect of the Nisga'a Final Agreement worthy of close attention by the FRT is the way in which the dispute resolution system is connected to the fiscal relationship among the parties.** Rather than set out this connection in the final agreement – an agreement that might prove awkward to change in future years – the parties have chosen to a more flexible route, that of making the connection in the five year Fiscal Financing Agreements. This approach will force the parties to consider how the system is working at the renewal period. It may also allow the adoption of newer approaches to managing disputes in the fiscal area.

3. **Other aspects of the Nisga'a approach to fiscal arrangements that merit careful consideration on the part of the FRT from a dispute resolution perspective are the following:**

    - The inclusion in the Fiscal Financing Agreement of an approach for handling an "extraordinary event or circumstance" that "impairs the financial ability of the Nisga'a Nation to provide agreed-upon public programs and services…for which Canada or British Columbia provides funding…";
    - A clause that provides for a two year extension , or longer should the parties agree, of the current agreement in the event that no agreement is reached for renewing the agreement at its expiry.

4. **The FRT should consider placing significant emphasis on adopting a series of measures aimed at preventing disputes**. Some of these are as follows:

    - Ensure careful drafting of the original agreement so that ambiguous wording does not mask underlying disagreement;
    - Establish a formal mechanism – such as a tripartite committee system akin to what exists on the federal/provincial level - so that the fiscal relationship among the three parties is constantly monitored and managed;
    - Consider periodic ADR-type training sessions to improve basic skill levels among participants for resolving disputes;

- Avoid the use of complicated indexing schemes that only experts can comprehend;
- Establish appropriate means to ensure that other parts of the federal, provincial and First Nation governments implicated in the fiscal arrangement but not directly involved in its management are made aware of and understand the implications for them.

5. **Another important technique for avoiding disputes or assisting in their resolution is the use of joint teams to do research or technical assessments**. One area that requires considerable work and reflection is developing a series of measures for determining what comparable services might mean in a variety of program areas.

6. **The FRT might also consider adopting, where feasible, formula-based approaches for determining fiscal transfers with floors and ceilings - such as employed in the federal/territorial agreements - to provide greater certainty for all parties and to avoid annual re-negotiations;**

7. **It might consider as well the adoption of a number of procedural rules to ensure there are no "surprises' at the eleventh hour.** Examples include:

    - Notification before taking action in the case of a default on commitments in the financial agreement;
    - Early notification of new programs or services to be added to any re-negotiated agreement; and
    - An opportunity to comment on broader governmental initiatives that might affect the other parties in a significant manner.

8. **Finally, the FRT should develop an evaluation plan for the dispute resolution system before it is launched. Such a plan should ensure that performance data on the system is tracked to allow for ongoing adjustments to the system.**

Case Studies – Community-Based Systems for Dispute Resolution

In order to aid the design and implementation of the community-based pilot project to be undertaken under the auspices of the TFHQV Tribal Council, the Institute examined the following four case studies of relevance to this aspect of the project: a lands dispute resolution system at Cowichan First Nation; the Dispute Resolution Centre for Ottawa-Carleton; a school-based program in Prince Albert; and the Saskatoon Community Mediation Services.

Definitive recommendations on the design of the pilot will need to await the assessment phase now taking place with the Tribal Council. That said, the analysis of the case studies leads the Institute to the following six conclusions about this type of program:

1. **Compared to the sophisticated designs of the dispute resolution systems in the claims and self-government area, community-based approaches are much less complex. Yet, it is evident that they still require considerable 'infrastructure' in terms of policies and procedures; ethical guidelines; training programs; screening mechanisms for both volunteers and cases; and systems for tracking results.** In short, it would be a mistake to underestimate the organizational capacity required to develop and operate an effective, community-based program.

2. **In developing a community-based program, there are important choices to be made about how the program should be structured vis-à-vis existing organizations.** In the case of Queen Mary School, embedding the mediation program within an established community school has several advantages including stable funding and supportive relationships with various organizations, government departments and business. The DRCOC case illustrates the strength of creating an independent program, since it allows for interesting experimentation and greater legitimacy in the eyes of potential users, given its arms length relationship with the Crown. The Cowichan case demonstrates the merits of a middle approach – the Lands Committee relies on the staff and resources of the First Nation but nonetheless maintains a certain degree of autonomy so as to isolate the process from political interference.

3. **Despite their relatively simple design, community-based approaches tend to rely on a range of ADR techniques in recognition that no one technique can handle the wide variety of disputes. Having said this, mediation is common to all the case studies, confirming one of the 'lessons' from the literature.**

4. **Securing long-term, stable funding for community-based programs is invariably a challenge. Consequently, attempts to determine costs and benefits early on in the program operation can pay rich dividends**.

5. **Prevention can be a powerful supplement to any community-based programs but may not be practical in all cases.** Only the Queen Mary School case has a strong prevention orientation in its program. The merits of such an approach are numerous from reducing costs and conflicts to promoting a healthier, safer environment to learn. However, prevention is not possible in all cases. Often time programs and organizations are set up to react to incidences that have occurred and therefore are limited in their preventive ability.

6. **As part of an overall approach to self-government, the SFIN or individual tribal councils may wish to consider the desirability of establishing a capability similar to that now found in the Saskatoon Community Mediation Services for developing sustainable, dispute resolution capacity at the community level.** The functions that such an organization, in close collaboration with First Nation communities, might play could include the following:

   - Assessing the community's dispute resolution needs**;**
   - Recruiting and training volunteers;
   - Providing public education about dispute resolution;
   - Linking the community to other resources;
   - Providing ongoing support in the way of advice, program policies etc.;
   - Advising on the design of dispute resolution systems for self-government purposes.

Some concluding questions

In order to help the development process for the pilot project, the Institute believes that the following questions might usefully be addressed:

- **Assessment and Focus**: What is the evidence that the program is needed? What are we trying to accomplish? How will we measure success?
- **Participation:** Whom are we trying to serve? How will they become aware of the program? Why will they be motivated to use the program? What preparation will they have prior to using the services?
- **Organization:** does the program have the appropriate degree of autonomy to be legitimate to all parties?
- **Relationships**: is the program well situated within the community and is it tied to the work of other programs and organizations?
- **Funding**: is there a strategy for achieving long-term viability?
- **Training:** is there a strategy to train volunteers, mediators and other key actors?
- **Prevention**: can a preventive element be built into the program design? If so, how?
- **Policy and Procedures:** what in the way of guidelines and procedures are necessary to underpin the program and how will these be developed?
- **Evaluation**: what impacts are we trying to measure and how will we do this?

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I. INTRODUCTION

A. PURPOSE AND SCOPE

The Federation of Saskatchewan Indian Nations (FSIN), the Government of Canada represented by the Department of Indian Affairs and Northern Development (DIAND) and the Government of Saskatchewan have established a joint Fiscal Relations Table (FRT) to develop proposals for a new intergovernmental fiscal relationship under a self-government regime.

As part of their work, the three parties are undertaking a project on dispute resolution with two distinct lines of enquiry: the first relates to the development of a dispute resolution system that will be part of the new fiscal relationship among the three levels of government. The second revolves around the establishment of a community-based pilot project under the auspices of the Touchwood File Hills Qu'Appelle Tribal Council (TFHQ). This pilot project may focus on disputes between First Nations and DIAND relating to such matters as Band indebtedness and negotiations of land claims or on internal disputes within First Nations that often end up implicating the federal government.

This study is the research and development component of this project. In preparing it, the Institute is attempting to meet the following three objectives:

1. to provide the FRT members with an overview of the major themes found in the literature of direct relevance to their task of designing dispute resolution systems both for the intergovernmental fiscal arrangements and the community-based pilot project;

2. to balance the lessons drawn from the literature with those derived from a number of case studies of dispute resolution systems; and

3. to make recommendations on how the information developed in this study can be put to best use by the parties in combination with other lines of inquiry they have initiated.

With regards to the third objective, the project's management team will be meeting next month to consider the results of this study as well as those gleaned from the educational and awareness element, an element focussed on consultations and planning with First Nations in Saskatchewan. The conclusions and recommendations in this report are meant to be of direct relevance to that meeting.

Appendix 1 summarizes how the various elements of the study are related and the timing involved.

B. METHODOLOGY

In executing this study, the Institute used library searches, interviews with knowledgeable experts and research on the internet to conduct both the literature review and the study of appropriate cases. Appendix 2 contains a list of interviewees and Appendix 3, a selected bibliography.

The power of the research design in this study comes from the comparison of the themes from the literature – particularly in regard to principles and best practices – with the lessons to be drawn from the empirically-based case studies.

C. ORGANIZATION

The organization of this report is straight forward. The section that follows is devoted to the main themes that fall out of the Institute's review of the relevant literature. Following this review, the next two sections are devoted to case studies – one set that is oriented more to a government to government set of relations and a second set that focuses on community-based dispute systems. In the final section of the report, the Institute draws out the major conclusions and makes a number of recommendations for the project management team.

The Institute makes liberal use of Appendices so that interested readers can refer to additional information without lengthening the main sections of the report.

II. PRINCIPLES AND BEST PRACTICES

In preparing this section of the report, the Institute relied on documents from two broad subject matters: first, literature having to do with conflict management and alternative dispute resolution, literature which is primarily non-Aboriginal in focus; and second, research and reports relating to Aboriginal justice, primarily in Canada. While this latter set of readings tend to have a criminal justice starting point, many of the concepts and some of the experience have broad application to this study.

The review of relevant literature is organized under six sub-headings. The starting point is the nature of conflict and its relationship to disputes.

A. NATURE OF CONFLICT AND DISPUTES

Conflict, according to one set of authors[1], is the "…**process** of expressing dissatisfaction , disagreement, or unmet expressions…". Another defines the term as a form of competitive behaviour between people or groups[2]. Conflict is ongoing, amphorous and intangible.

A dispute is a **product** of unresolved conflict and, in contrast to conflict, is tangible and concrete. It has "…issues, positions, and expectations for relief"[3]. In addition to disputes, conflict can manifest itself in a variety of other ways – sabotage, lack of productivity, low morale, and withholding information are some examples.

Most authors view conflict as an inevitable part of the human condition. Further, from an ethical perspective it is neither good nor bad:

> "…conflict is like water: it is everywhere – within individuals, within groups, within communities, within nations, within the global village. As with water, conflict presents unlimited opportunities for growth and healing as well as for damage and destruction"[4].

Many authors find it useful to distinguish among types or causes of conflict. Some of these are the following[5]:

- **Relationship conflicts –** caused by misperceptions, stereotypes, strong negative emotions, poor communication etc.;

[1] Costantino and Merchant, "Designing Conflict Management Systems; A Guide to Creating Productive and Healthy Organizations", (San Francisco: Jossey-Bass, 1996, P. 5)
[2] CDR Associates, "Dispute Systems Design", material presented at a conflict management seminar, 1996.
[3] Costantino and Merchant, op. cit. P. 5
[4] ibid, P. 227
[5] CDR Associates, op. cit. P.6

- **Data conflicts –** the result of a lack of information, interpreting existing information differently, being misinformed etc.;
- **Interest conflicts –** perceived or actual incompatible needs occurring for substantive (money , resources), procedural (the way a conflict will be resolved) or psychological (trust, fairness) reasons;
- **Structural conflicts –** caused by oppressive patterns of human relationships (colonization, rigid hierarchies, for example); and
- **Value conflicts –** the result of incompatible belief systems.

The point of distinguishing among these types of conflict is that different conflict or dispute resolution approaches may be more useful in addressing one type of conflict than another. In this vein, some authors have developed a literature around what they term "deep-rooted" or "identity" conflict such as that experienced in the Balkans among various ethnic groups, in Ireland among Protestants and Catholics, and in the Middle East between Arabs and Jews. Deep-rooted conflict can also exist in small communities among families or clans.

Writing in the context of Canada's ongoing crisis of national unity, three Canadian academics exclaim the dynamics of deep-rooted or identity conflict in the following terms:

> "Identity conflicts engage deeply felt images of the self within a community and in the larger political world. They often embody issues of recognition and respect, along with the fear of denial and exclusion. The sense of threat from competing identities may be especially acute. Often, it may seem that there is little room for differences to co-exist within the same political space, and the parties may find it difficult to understand that acknowledging the identity of others need be no threat to one's own. For all these reasons, identity conflicts tend to be expressed in zero-sum language and in the emotive discourse of powerful symbols. Such debates are not nearly as amenable to trade-offs, compromises, and the kind of splitting the differences that are characteristic of the resolution of conflicts over the distribution of material goods."[6]

Aboriginal Perspectives of Conflict

While it is difficult to generalize about Aboriginal peoples in Canada, given the vast differences among them in terms of language and culture, it is clear that at least some Aboriginal groups approach conflict or more appropriately "justice" from an entirely different worldview. The emphasis from their perspective should be on proactive measures – all of which are contained in traditional teachings about how life should be lived – on maintaining harmony and thus avoiding conflict. The 1993 "Report of Grand Council Treaty Number 3" summed up this point of view in the following words:

[6] Stein, Cameron and Simeon, "Citizen Engagement in Conflict Resolution: Lessons for Canada in International Experience", Commentary (C.D. Howe Institute, June 1997).

> "Justice in the English legal lexicon…means the system of laws, courts, penal and appeal procedures of the Euro-Canadian system. There is no direct relationship with our systems. Justice to our people means allegiance to the integrity of our spiritual principles and values. Simple in meaning, but difficult to practice; to be pursued rather than attained…"[7].

Rupert Ross, a Crown Attorney who has spent many years experiencing and writing about Aboriginal approaches to justice, illuminates this Aboriginal perspective as follows:

> "It appears, then, that we have two different perceptions about where the primary spotlight should be aimed when it comes to a "justice system." To use a broad generalization, while the Aboriginal spotlight seems to shine primarily on the creation and maintenance of a peaceful society, the Western one highlights processes designed to respond to actual disorder instead. Not being aware of the fact the two spotlights illuminate different aspects of the same overall problem, we of the Western system are puzzled when Aboriginal responses to our justice questions fail to shed light on the kinds of things that we expected to see, but show us very different things instead.
>
> The best metaphor I can think of involves Western doctors asking Aboriginal people to "Please research traditional methods of dealing with heart disease". My imagination then sees the traditional medicine people putting 95 percent of their attention into describing the kinds of diets, work habits, teachings of moderation, strategies for healing and stress reduction and so forth that *prevented* heart disease from becoming a major health concern in traditional times. Only then might they mention, almost in passing, how traditional healers might have responded to an actual case of heart disease."[8]

It would appear that any durable approach to dispute resolution within an Aboriginal community would need to be sensitive to its overall perspective of "justice".

B. APPROACHES TO RESOLVING DISPUTES

Many writers[9] find it useful to distinguish among three broad approaches to resolving disputes:

- **Through the use of power –** strikes, lockouts, coup d'etats, wars, ignoring the weaker party etc.;
- **Through determining which side is right –** courts, binding arbitration etc.; and
- **Through reconciling interests –** negotiations, mediation etc.

[7] Quoted in Ross, "Returning to the Teachings", (Toronto: Penguin Books, 1996, P.257)
[8] ibid, P. 266
[9] See, for example, Ury, Brett and Goldberg, "Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict", (San Francisco: Jossey-Bass, 1988) P.18

Some go on to argue that western society, while successfully reducing the worst manifestations of the use of power as a dispute resolution device after two world wars, has now become a "rights-based" culture in a way "…unimaginable 100 years ago, and still unknown in parts of the world where there is little access to legal services for ordinary people."[10] Arguments for reducing our reliance on power and rights based approaches usually revolve around the following points, summarized in the table below.

REASONS FOR PREFERRING INTERST-BASED APPROACHES TO DISPUTE RESOLUTION

1. **Reduced costs –** litigation involves rising costs and lengthy delays; approaches involving the use of power, such as strikes or roadblocks, can be even more costly, potentially resulting in injuries or deaths;

2. **Better quality decisions -** resolutions through interest reconciliation tend to be more creative and more durable (research indicates a high percentage of compliance – in some cases 90% - with mediation-type approaches);

3. **Greater satisfaction among disputants –** they become active participants in shaping the solution as opposed to detached bystanders who have lost control of the process; and

4. **Long term relationships are preserved –** the win-lose nature of disputes settled through right-based or power-based approaches leaves the underlying conflict unresolved, suggesting the likelihood of future disputes and continued soured relations among the parties.

Several quantitative indicator of the growing dissatisfaction with court room litigation arose in a recent survey in Ontario[11] where 60% of the survey group said that they were either partly or very dissatisfied with the progress and outcome of their case through the civil litigation system. Of their lawyers, only a slim majority said that they thought that the client "usually' received value for money in litigation.

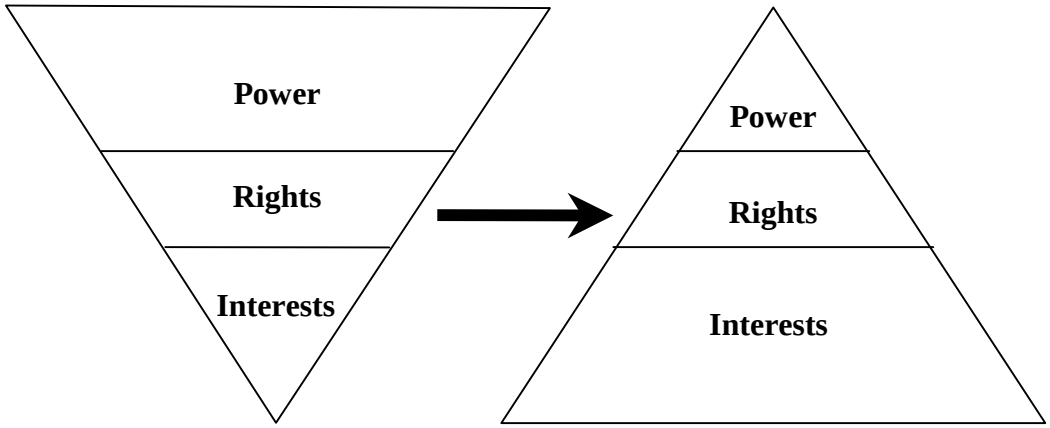
All of the literature reviewed by the Institute acknowledges that resolving all disputes through interest-based approaches is neither desirable nor perhaps feasible. Some argue, for example, that certain minority groups (e.g. blacks in the United States, Aboriginal peoples in Canada) would not have realized their sizeable gains in certain areas over the past decades had it not been for a number of seminal court decisions. Organizations may also use interest-based approaches to shield them from public scrutiny about systemic abuses. Further, it may be inappropriate or unethical to use such approaches when there

[10] Macfarlane, "Rethinking Disputes: The Mediation Alternative", Toronto: Emond Montgomery, 1997) P. 1
[11] Ibid, P. 4

is imbalance of power between the parties such as in some cases of domestic violence or when disempowered groups lack alternatives or have had no say in the design of the dispute resolution processes.

Nonetheless, there is a corollary argument made[12] that rights-based and even power-based approaches can be made less costly and more effective in their back-up roles. Tailored arbitration approaches, for example, can lead to more satisfactory results than the use of the regular court system; and cooling off periods can be built into strike procedures so as to reduce the likelihood of bitter, long term labour dispute. The following diagram [13]sums up the overall direction that appears to fall out of the literature:

Figure 1
Moving From a Distressed to An effective Dispute Resolution System



The goal is to develop a dispute resolution system that looks like the pyramid on the right where most disputes are resolved through reconciling interests, some through rights-based approaches and the fewest through the use of power. By contrast, a distressed system is the inverted pyramid on the left. The challenge is to turn this pyramid right side up.

Arguments in the literature on Aboriginal Peoples and the justice system are even more compelling in terms of the inappropriateness of rights-based approaches. Echoing ideas canvassed earlier in this paper, James MacPherson, the Dean of Osgoode Hall Law School had this to say in summing up the major themes that arose during the three day seminar on Justice issues convened by the Royal Commission On Aboriginal Peoples:

[12] See, for example, Ury, Brett and Goldberg, op. cit. P. 17
[13] Ibid, P. 19

> "The current Canadian justice system, especially the criminal justice system, has failed the Aboriginal people of Canada…The principal reason for this crushing failure is the fundamentally different worldview between European Canadians and Aboriginal peoples with respect to such elemental issues as the substantive content of justice and the process for achieving justice. With respect to the former, the European Canadian definition of justice is usually centred on the word 'fairness' whereas the Aboriginal definition usually highlights a different constellation of words like peace, balance and, especially harmony.
>
> With respect to process, it seems clear from the papers and the discussions at the Round Table that the linchpin of the current justice system (criminal and civil) namely the adversarial system, does not reflect the way Aboriginal people think about or resolve problems."[14]

Building on this last comment on thinking about and resolving problems are the observations of Elder Vi Hilbert in the Northwest Intertribal Court System's report on Salish justice:

> "I think it would have been disgraceful to have somebody else resolve your problems. Your own family needed to help clear your mind and clear your heart if you were having a problem".[15]

Appendix 4 contains another example, drawn from the work of the Royal Commission, of the inappropriateness of court-based procedures to Aboriginal ways of resolving conflict.

In summary, there appears to be considerable convergence in both sets of literature - albeit using somewhat different language and starting points - on the desirability of finding alternatives to dispute resolution based on rights and power-based approaches. Such alternatives revolve around the active participation of those affected parties in pursuing an interested based approach to dealing with conflict and are referred to under the general rubric of Alternative Dispute Resolution or ADR.

C. THE SPECTRUM OF ADR TECHNIQUES

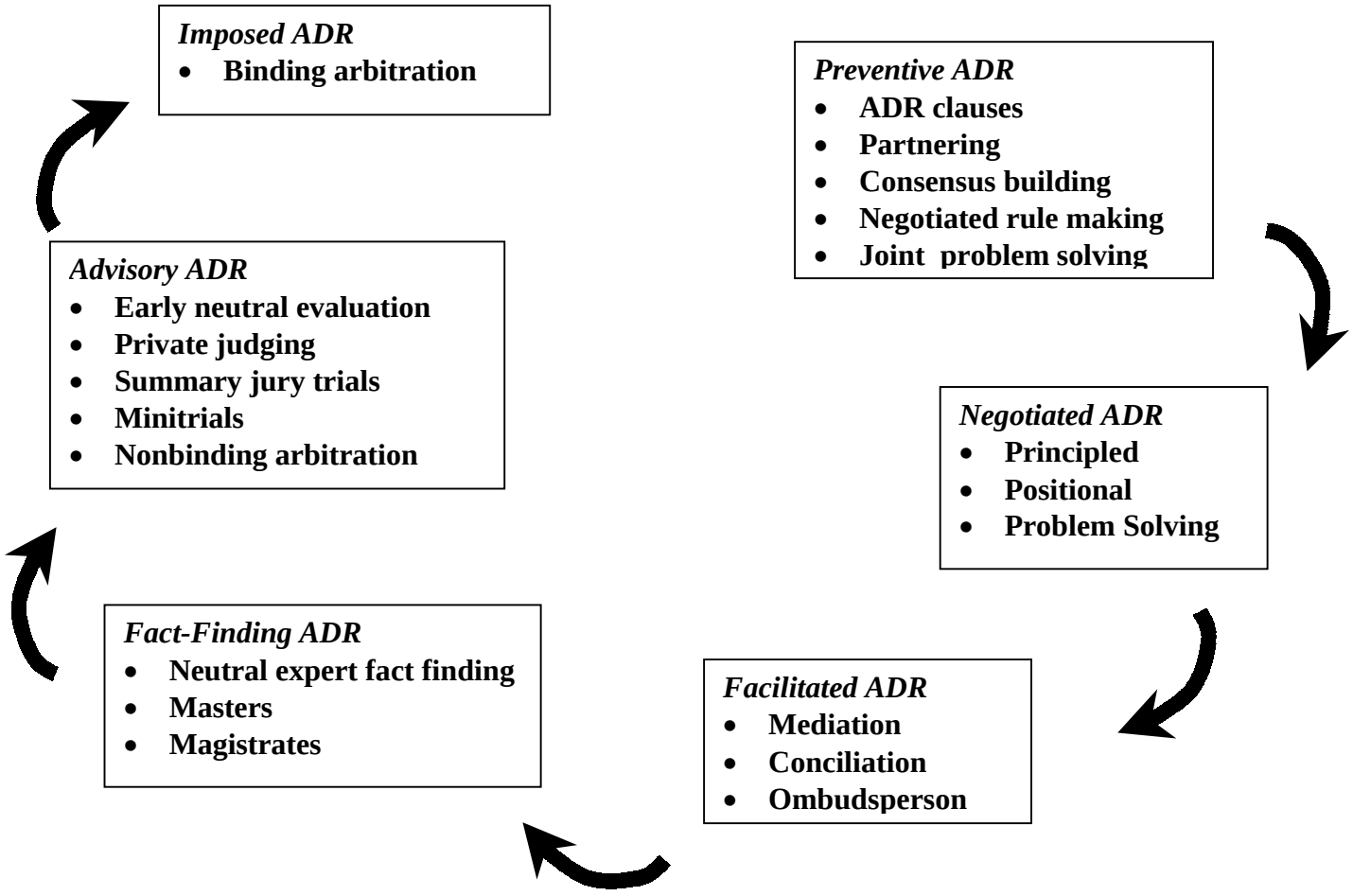
ADR is not new. As the Canadian Bar Association's subcommittee on ADR pointed out in its 1989 report, there has been a long tradition of settling disputes prior to their reaching disposition by the court system. The CBA estimates that over 90 % of all civil actions in Canada are settled without formal adjudication[16].

What is new is ADR as a distinct field of study with its own literature and growing accreditation processes, a development of the 1970s. The diagram below[17] provides the

[14] MacPherson, "Report From the Rapporteur" in "Aboriginal Peoples and the Justice System: Report of the National Round Table on Justice Issues", Royal Commission On Aboriginal Peoples, (Ottawa: Canada Communications Group) P. 4
[15] Quoted by Rupert Ross, op. cit. P. 263
[16] Canadian Bar Association, "Alternative Dispute Resolution: A Canadian Perspective" (Ottawa: Canadian Bar Foundation, 1989) P. 3
[17] The diagram is taken from Costantino and Merchant, op. cit. P. 38

range of ADR techniques under six categories ranging from *Preventive ADR* to *Imposed ADR.* (See Appendix 5 for a brief description of each of these techniques.)

Figure 2
The Spectrum of ADR Techniques



Other techniques might also be usefully added to the above spectrum. For example, in dealing with "deep-rooted" or "identity –based" conflict, the usual range of ADR techniques may not prove satisfactory in dealing with a single dispute because levels of trust are so low among the affected parties. Rather, a new approach may be called for, one based on open-ended community dialogues where at least the following[18] can be found:

- Discussion of identities, values and needs;
- Procedures that are inclusive, fair and respectful;

[18] Stein, Cameron and Simeon, op. cit. P.14

- An open agenda; and
- The dialogue is dynamic and occurs over time so that participants have an opportunity to reconsider their positions in light of what they have learned about others.

Appendix 6 contains a short description of one use of these open-ended dialogues in an international setting. Officials at the Canadian Institute for Conflict Resolution, interviewed in the course of this study, indicated that they had used a similar technique in Aboriginal communities based on the starting question "How do we develop a conflict-resolving community?"

Two additional techniques come from the literature on Aboriginal justice. The first is the use of **Elders panels**, usually in a mediating and advisory role. The second is the use of **circle techniques** for a variety of purposes but usually with a strong healing or restorative element. (Appendix 7 contains a description of the use, rationale and procedures of the sentencing circle approach developed at Hollow Water community in Manitoba.) Circle techniques are now enjoying increasingly wide use in non-Aboriginal settings – for example, in sentencing situations and for assisting offenders released on parole to integrate successfully into society.

A further point is worth noting. While the literature is not extensive, there has been some analysis of ADR techniques by Aboriginal writers that suggests that mainstream ADR techniques may not be in certain circumstances sensitive to Aboriginal approaches to dealing with conflict. Summarizing the Navajo Peacemaker Court system, the Royal Commission quotes two Navajo commentators, Philmer Bluenose and James Zion:

> "American mediation uses the model of a neutral third person who empowers disputants and guides them to a resolution of their problems. In Navajo mediation, the Naat'aanii [or headman] is not quite neutral, and his or her guidance is more value-laden than that of the mediator in the American model. As a clan and kinship relative of the parties or as an elder, the Naat'aannii has a point of view. The traditional Navajo mediator was related to the parties and had persuasive authority precisely due to that relationship. The Navajo Code of Judicial Conduct (1991) addresses ethical standards for peacemakers and states that they may be related to the parties by blood or clan, barring objection". [19]

Another Aboriginal commentator notes that "…if a mediation process were to be successful in helping people make and manage change, it would need to be grounded in Aboriginal spirituality. The spiritual focus would enable participants to heal through understanding and make decisions based on dignity and respect."[20]

Finally, the literature is clear that the choice of which ADR technique to use depends on the objectives of the disputants and the impediments to settlement. On the latter point,

[19] The Royal Commission On Aboriginal Peoples, "A Report On Aboriginal People and Criminal Justice in Canada", (Ottawa, Canada Communications Group, 1994) P. 190
[20] Marg Huber as quoted by Ross, op.cit. P. 265

for example, a high level of antagonism among the parties may rule out the use of unassisted techniques. Further, if the dispute is over an issue of fact or a question of law, then procedures such as neutral fact-finders or mini courts may be the most appropriate. More information on matching the appropriate mechanism to the nature of the dispute and to the goals of the disputants is contained in Appendix 8.

The issue of which ADR technique to utilize may be less complicated than might first appear. As two experts note:

> "…the difficulties of process selection are substantially eased by a recognition that mediation, where it satisfies the client's goals, is typically the preferred procedure for overcoming the impediments to settlement It is on this basis that we suggest a rule of presumptive mediation – that mediation, if it satisfies the client's goals, should, absent compelling indications to the contrary, be the first procedure used. If mediation is not successful, the mediator can then make an informed an informed recommendation for a different procedure."[21]

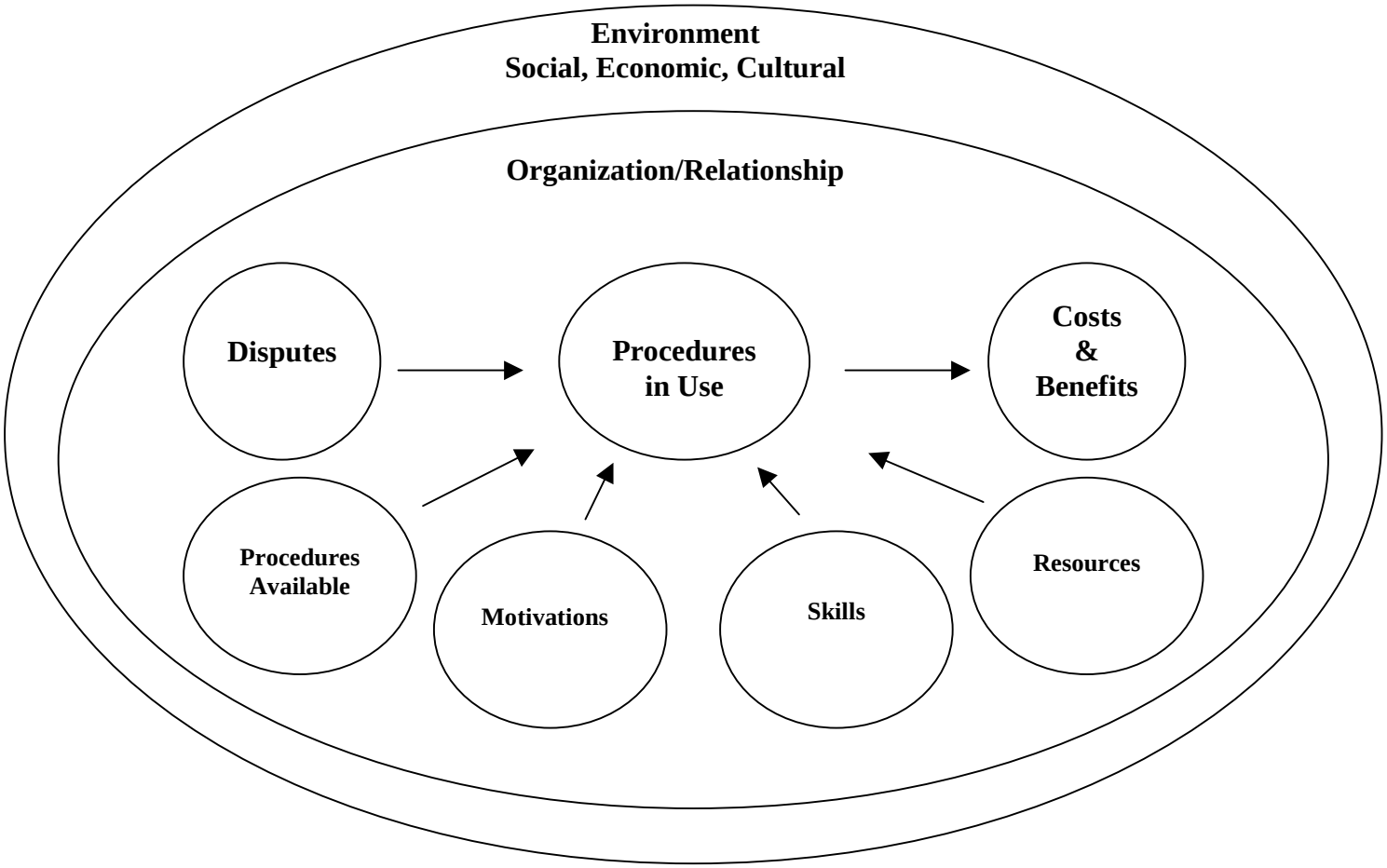
D. PRINCIPLES FOR THE DESIGN OF DISPUTE RESOLUTION SYSTEMS

With the explosive growth over the past few decades in the study and use of ADR techniques has come a related development – the realization that dispute resolution within an organization setting can usefully be looked at as a system of inter-related parts. These parts must work together in a logical fashion and be consistent with the surrounding "environment" if disputes are to be handled with efficacy. The diagram below[22] illustrates a model of a dispute resolution system.

[21] Sander and Goldberg, "Fitting the Forum to the Fuss: A user-Friendly Guide to Selecting an ADR Procedure", Negotiation Journal, Volume 10, Number 1, January 1994, P. 66

[22] Taken from Ury, Brett and Goldberg, op. cit. P. 24, with slight modifications

Figure 3
Model of a dispute Resolution System



Aboriginal writers, using less bureaucratic language, have come to similar conclusions about the usefulness of a systems perspective by arguing for "holistic" approaches to dispute resolution.

The art and science of designing dispute resolution systems is relatively new – the first book on this topic appears to have been written in the late 1980s. Nonetheless, a number of principles have begun to develop around which there appears to be a growing consensus. The table below summarizes nine such principles:

PRINCIPLES FOR DESIGNING DISPUTE RESOLUTION SYSTEMS

1. **Use interest-based approaches wherever possible –** it is critical to have the system reinforce and nurture "win/win" resolutions developed by the parties themselves or with some assistance of an outsider.

2. **Develop rights-based mechanisms that are low-cost, flexible and minimize the damage to relationships when interest-based approaches do not work or are not appropriate –** but parties should always have the option to return to more collaborative approaches if they so choose;

3. **Provide a clear 'road map' for how the parties move from one stage of the system to the next –** the point here is to minimize disputes about the process to be followed to resolve the substantive issue or issues**;**

4. **Ensure that the parties have the necessary knowledge and skills to use interest-based techniques –** disputants must understand their options and have the opportunity to develop appropriate skills;

5. **Build in an assessment component to the design process –** there is no one dispute mechanism that will handle all disputes; moreover, some disputes may result from deep- rooted conflict that may not be resolvable through the use of conventional ADR techniques;

6. **Empower future participants to assist in the design of the system so that it reflects their culture and priorities –** it is a contradiction to introduce in a hierarchical fashion a system that is premised on collaboration, accessibility and openness; moreover imposed systems seldom work;

7. **Recognize the importance of prevention –** the objective is not to suppress conflict; on the other hand, many conflicts can be avoided by anticipating their likelihood and dealing with the issues involved before them become contentious;

8. **Ensure that the design calls for ongoing maintenance, feedback and reevaluation of the system –** dispute systems must be continuously evaluated and refined, based on the experience of the participants.

9. **Keep things simple –** the system should be easy to understand, easy to access and easy to use with minimal delays.

The overall objective of applying these principles is summed up nicely by one set of authors in the following passage:

> "An old Ethiopian proverb holds: "When spider webs unite, they can hold back a lion". A good dispute resolution system consists of a series of successive safety nets – negotiation followed by mediation, advisory arbitration, arbitration, third party intervention, and so on – that can ensnare a dangerous conflict before it can do irreparable harm. An attempt is made to catch disputes early. If one procedure fails, another is waiting." [23]

Many of the above principles resonate with the findings of the Royal Commission in its report on Aboriginal justice. In particular, after reviewing the experience of a number of justice initiatives, the Commission was emphatic on the need for such initiatives to be "…firmly rooted in the community they are intended to serve". The Commission went on to note that "Communities themselves know best what justice issues they wish to address and how they wish to address them. There can be no one model of justice development."[24]

The Commission further noted the need for a project development phase in establishing any kind of justice program: "[b]ased on the experience to date and the recommendations of the various evaluation studies, a period of between one year and eighteen months of funded development work should be viewed as a necessary part of Aboriginal justice initiatives."[25]

E. IMPLEMENTATION ISSUES

Given the newness of designing systems for dispute resolution, it is not surprising that there is not much material on implementation. Nonetheless, the literature reviewed by the Institute suggests that there are at least the following issues to consider:

Use of a Pilot Program

At least one set of authors[26] makes a strong case for the use of a pilot project for launching a dispute resolution system, citing the following reasons:

- A pilot can help determine the willingness of disputants to change dispute resolution methods;
- Positive results can be persuasive in effecting wider application of the system;
- It is less risky for those with a stake in the old system to experiment with new behaviours and rewards;
- It can test the suitability of the design, particularly its fit with the organization and its members; and
- Such an approach can uncover unknown costs, attitudes, practices or constraints.

Criteria for selecting a pilot are summarized in the table below:

[23] Ury, Brett and Goldberg, op. Cit. P. 172
[24] Royal Commission On Aboriginal Peoples, op. cit. P. 168
[25] Ibid, P. 170
[26] Costantino and Merchant, op. cit. P.152

CRITERIA FOR SELECTING A PILOT
• Is the pilot linked to a significant priority of the organization or community? • Is there a commitment to change within the pilot area? • Are there sufficient number of disputes to test and are they resolvable? • Are there sufficient resources? • Are the results of the pilot measurable and easily evaluated? • Will a successful pilot provide compelling arguments for extending the approach to other areas of the community or organization?

Education and Training

Costantino and Merchant [27]identify five different types of education and training that should be considered in developing the implementation plans of a dispute resolution pilot project. These are summarized below:

ADR TRAINING AND EDUCATION

TYPE	TARGET AUDIENCE	PURPOSE	APPROACH
1. Marketing	Key decision makers (Board members) and managers	To address particular concerns and reservations	Use outsiders who have been successful in using ADR in similar settings
2. Awareness Education	Potential users of the system & those administering the system	To provide information on ADR, the options available, access etc.	Use peers & colleagues
3. Conflict Management & Communication Training	Potential users & those administering the system	To introduce skills that can be used in day to day life; to provide a basis for future ADR training	Generic skills not tied to any one ADR approach (one day session)
4. User Training	Potential users	To provide specific information about the ADR technique to be used	Use of video tapes and role plays over a 1-2 day period

[27] Ibid, P. 142-146

5. Training of Third Party Neutrals	Individuals who will serve as neutrals	To provide the basic skills to act as a neutral	Small group settings (8-12 people) over 3 days minimum

Some combination of the above training and education initiatives are likely crucial to the successful introduction of any new dispute system.

Organization and Personnel

Perhaps the most relevant observations for our purposes on personnel and organization issues come from Rupert Ross, based on his experience of examining many community-initiated justice projects[28]. The usual pattern, according to Ross, is to appoint a justice coordinator from each community, then giving that person the responsibility for pulling together a team. Such an approach has the following drawbacks

- The coordinators find it difficult to reach out across all factions to pull together a team that transcends them – so daunting is the task that few individuals are likely to want the job;
- The workload pressures lead to tensions, frustrations and eventual burnout; and
- There is a substantial expense involved in finding and training replacements.

To avoid these problems, Ross proposes that the justice coordinators "…should not be from any of the communities they serve, though they should certainly speak the same language and be personally familiar with other communities of similar size, geography and social history. In that way, they should find it easier to preserve their independence from the local power groups, enhance their acceptability to all factions and assure everyone of their impartiality as they move into creation of community justice teams."[29]

Program guidelines

Staff turnover, the use of volunteers, the need to explain how the system will operate to potential users, the existence of some difficult ethical issues such as confidentiality – these are some of the reasons for having a short set of rules that establish the parameters of the dispute resolution process. Appendix 9 contains a model set of rules[30] adopted in a labour relations context where a mediation process, if unsuccessful, could lead to binding arbitration.

A common failing according to some authors[31] is that the program is usually well launched before such guidelines are in place.

[28] Ross, op. cit. P. 249
[29] Ibid, P. 250
[30] Taken from Ury, Brett and Goldberg, op. cit. P. 175-176
[31] See, for example, Husk, "Making Community Mediation Work" in "Rethinking Disputes", op. cit. P.288

Conclusions

Conflict is one of the most sensitive aspects of human interaction and it requires courage for an organization or community to undertake significant change in how it deals with conflict. Consequently, it is not surprising that the "ideal" conditions in terms of organization readiness, leadership, resources or methodology seldom, if ever, exist. The advice from some is "just do it!" As two practitioners note:

> "…we all take the organization as we find it and if we wait until tomorrow – for more buy-in, for more resources, for more data – tomorrow never comes and the system never changes." [32]

Part of the rationale for just 'getting on with it' is a strong belief, among practitioners, in the power of interest-based processes, a power which borders on the 'magical' or indeed spiritual. In writing about his experience with healing circles at Hollow Water, Rupert Ross refers to "…the interconnecting of hearts that lived so long in separate, silent terror" and "…the music of their circle, of their unfolding kindness, humility, sharing, strength, honesty, caring and respect…" as the impetus for bringing "…some sense of the spiritual to the surface in me"[33].

In a similar vein, Costantino and Merchant note the "…the real beauty and gift of interest-based processes is in using them, not talking about them. The mediation process in particular can be amazingly empowering and energizing one for disputants enmeshed in conflict – a freeing of human need and desire in the midst of our more common expectations that we will win if only we can hide our pain, vulnerabilities, and weaknesses."[34]

F. EVALUATION

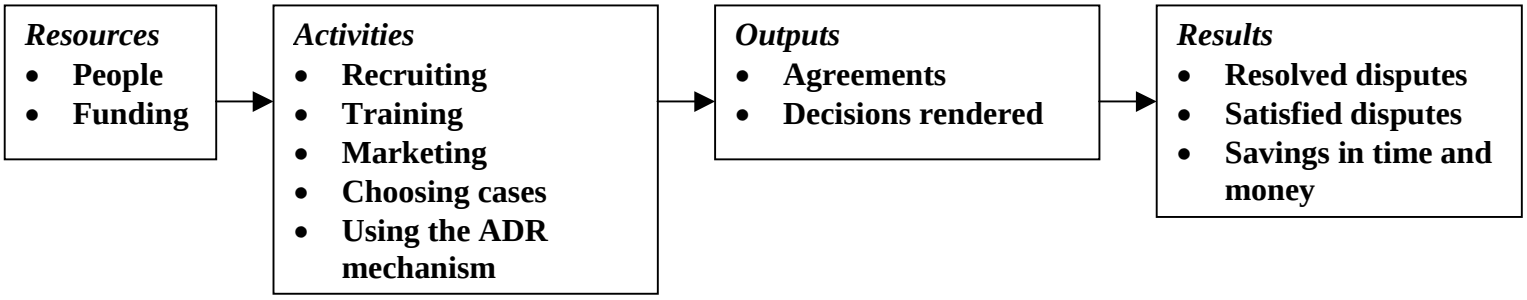
Any significant change in an organization or community, especially in an area as sensitive as resolving disputes, will be 'evaluated' by all those affected by the change and by other interested observers. Consequently it is important that those initiating the change think carefully about this topic, especially given that the rationale underlying a pilot is to 'test out' some new approach for potential wider application. Three lessons have emerged from the literature review.

The first has to do with timing. Evaluating a new dispute resolution system is often considered to be the last step in the implementation process and, not surprisingly, those administering the system do not usually turn their attention to this matter until well into the operational phase of the program. For some practitioners, such an approach is short-sighted. Benefits of developing an evaluation approach before implementation begins include the following:

[32] Costantino and Merchant, op. cit. P.220
[33] Ross, op. cit. P. 192
[34] Costantino and Merchant, op. cit. P. 220

- Reflecting on evaluation has the affect of sharpening thinking about the nature of the objectives of the pilot project. Organizers are forced to answer difficult questions like "what are we really trying to accomplish? How will we know whether we have been successful?"
- Thinking is also sharpened vis-à-vis the program logic, that is, the assumptions that underlie how the initiative will actually work. This involves developing and elaborating on the following conversion sequence:

Figure 4
Program Logic for an ADR system

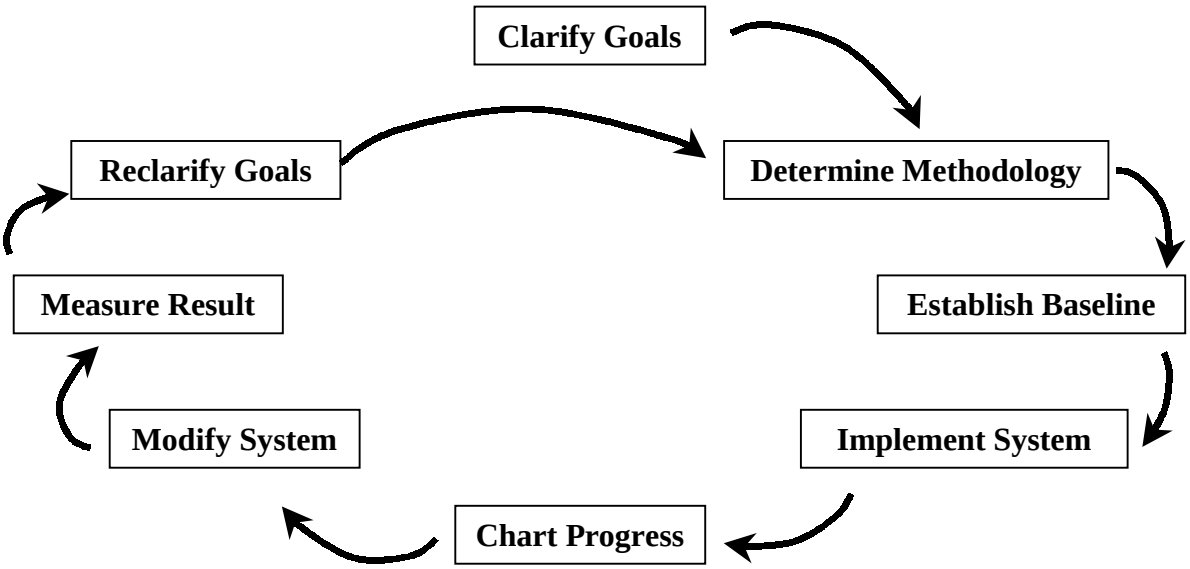


- Finally, early attention to evaluation forces an analysis of what will be the data requirements of a successful evaluation. Such an analysis often leads to decisions about what needs to be collected both before the initiative commences and while it is going on.

A second important lesson about evaluation is this: it is useful to think of evaluation as a continuous process provoking ongoing adjustments rather than a study to be conducted at some fixed time in the future by 'independent' experts – although such a study may be part of the evaluation design. This notion of a continuous process of learning is captured in the diagram below, taken form Costantino and Merchant[35]:

[35] Ibid, P. 170

Figure 5
The Evaluation Cycle



A final comment on evaluation relates to the range of issues to be tackled. Most successful evaluations concentrate on answering the following three basic questions:

- What results is the program achieving?
- How do these results relate to the program objectives?
- How can the program be improved vis-à-vis its management, delivery and design?

Answering these questions in the context of an evaluation of an ADR system involves a number of difficult measurement challenges. Some of these are set out in Appendix 10.

To meet these and other challenges, evaluators should use both quantitative and qualitative information gathered through a variety of methodologies ranging from surveys, focus groups, analysis of program data, cost analysis to case studies. The point of relying on a range of methodologies is to establish conclusions which can be supported by what evaluators term "converging lines of evidence", an acknowledgement of the difficulties of 'proving' causal relations in human activities.

III. INTERGOVERNMENTAL SYSTEMS FOR DISPUTE RESOLUTION

A. INTRODUCTION – RATIONALE FOR CASE SELECTION

The purposes of examining specific cases in the context of a literature review of principles and best practices are several. First, the cases can provide a second 'line of evidence' to confirm the lessons drawn from the literature. In this way they can enhance confidence in the recommendations coming out of the study. A second purpose is that they can increase understanding of the principles through concrete illustrations.

A final purpose for combining cases with literature searches is to discover divergences with best practices, divergences that, nevertheless, appear to work. An illustration of such a divergence occurred in an earlier Institute study on intergovernmental fiscal relations. Contrary to a consensus among the experts that sub-national governments should not have a taxing power on 'moveable assets' like personal income, local governments in both Sweden and Denmark had such a tax and it appeared to be effective. Divergences like this one may be important in thinking about the design of fiscal relations in Canada.

While case studies can be powerful in supplementing more broad-based lines of inquiry, they need to be chosen with care. In this study, the Institute had several criteria in mind.

- At least one of the cases should encompass Aboriginal and non-Aboriginal governments;
- Where possible, the mechanisms involved should deal with fiscal relationships;
- At least one of the cases should entail more than two levels of government to reflect the FRT context;
- The cases should reflect substantive experience in resolving disputes;
- There should exist some documentation or studies analyzing the case ; and
- At least one of the cases should draw on relevant international experience.

In applying these criteria, the Institute discovered that there are very few examples of formal dispute resolution systems existing between governments, let alone in the fiscal relations area. On the international scene, the most prevalent examples with substantive experience behind them are in the trade area. Closer to home, comprehensive claims and self-government agreements, with few exceptions, have dispute resolution systems embedded in them but the problem here is lack of any real track record. The only other domestic example of some relevance is the Agreement on Internal Trade among the provinces and the federal government.

With these limitations in mind, the Institute chose first to examine the range of self-government agreements rather than settling on a specific case. This said, special attention will be given to the Nisga'a Final Agreement because it is the most recent and by far the

most sophisticated of the agreements from a dispute resolution viewpoint. Next, the Institute will examine Canada's Agreement on Internal Trade for a variety of reasons: it is modeled on similar international agreements; it involves two of the three parties making up the FRT in Saskatchewan; and the dispute resolution system is designed for individuals as well as governments and consequently might have some lessons for the second, community-based track of this study.

Thirdly, the Institute will describe the results of its brief survey of the experience of other countries in the intergovernmental fiscal area rather than focus on one country, given the lack of any formal dispute resolution systems. Included in this international survey is a fourth case – the Waitangi Tribunal in New Zealand.

B. CASE #1 – CLAIMS AND SELF-GOVERNMENT AGREEMENTS

Overview of the Agreements vis-à-vis Dispute Resolution

A major observation from the Institute's review of dispute resolution in these agreements is the growing sophistication of the systems since the 1970s, a pattern that matches developments in the ADR field itself, albeit with a lag that is becoming shorter and shorter. Thus, the first modern claims and self-government agreements, negotiated with the Inuit, Cree and Naskapi in northern Quebec in the mid 1970s have no ADR mechanisms, let alone a dispute resolution system. (The *Cree-Naskapi (of Quebec) Act* did establish a Cree-Naskapi Commission, one duty of which was to act as a forum for resolving disputes arising from the implementation of the two agreements. For a variety of reasons, the Commission has never performed this duty with any success.) The Sechelt self-government agreement, negotiated in the mid 1980s, also contained no ADR clauses.

The Inuvialuit Final Agreement, signed in 1984 and subsequently amended in 1987 and 1988, was the first comprehensive claims agreement to establish a dispute resolution device in the form of an Arbitration Board with a broad mandate to "…arbitrate any difference between the Inuvialuit and Industry or Canada as to the meaning, interpretation, application or implementation of this Agreement"[36]. Later comprehensive claims in the north – the Gwich'in, Sahtu Dene and Metis and Nunavut agreements - followed the Inuvialuit pattern of establishing a permanent arbitration mechanism. The Gwich'in and Sahtu agreements (see Section 6.1.7) also allow the parties to refer a dispute to "…an alternate dispute resolution mechanism such as mediation or arbitration pursuant to the *Arbitration Act*…", promulgated by the Government of the Northwest Territories.

The initial four Yukon self-government agreements, signed in 1993, were the first to have a dispute resolution system in the sense of having a number of interrelated elements and a logical and well-defined sequence of moving from one element to the next. For example, with regards to intergovernmental transfers, the Yukon agreements first lay out a series on principles and conditions for the negotiation of self-government financial transfer

[36] "Inuvialuit Final Agreement", Section 18(32)

agreements among the First Nation, territorial and federal governments (see, for example, section 16 of "The Teslin Tlingit Council Self-Government agreement"). Any of the three parties may refer disagreements to a mediation process set out in the Final Agreement. If mediation does not produce an agreement, then both affected parties may refer the dispute to binding arbitration under a process established by the Final Agreement.

The most recent self-government agreements – the "Framework Agreement On First Nation Land Management" and the "Nisga'a Final Agreement" – go further than the Yukon agreements by establishing a wider array of ADR techniques in the fact finding and advisory categories. (Further elaboration on the Nisga'a regime will occur later in this section).

In addition to the growing sophistication in the agreements, there has been one other development of note and that is the federal policy of having implementation agreements negotiated as part of the claims and self-government process. This development has meant that the parties in some instances have been able to add a dispute resolution system where none existed before. For example, the implementation agreement signed with the Inuit of northern Quebec in 1990 has a three step dispute resolution system: consultations, mediation and arbitration (like the Yukon Agreement, the binding arbitration step must be agreed to by both parties).

Another important aspect of the implementation agreements is to establish an ongoing mechanism among the parties to the agreement to monitor implementation. Such a mechanism should provide an important preventive element to self-government dispute resolution regimes, provided that the parties meet regularly and are able to discuss any existing irritants.

With the development of implementation agreements, the Cree are the only claimant group without a dispute resolution system as part of their claims settlement.

Dispute Resolution Experience

Despite the considerable effort that has gone into designing dispute resolution systems into these agreements, especially over the past decade, there has been surprisingly little experience with them. For example, the only case that has gone to arbitration has been a dispute involving the awarding of a contract for the clean-up of some former DEW line bases in the two territories. The Inuvialuit were successful in arguing that the process for awarding the contract contravened the "Inuvialuit Final Agreement". During the arbitration process, it became clear that the official in the Department of Supply and Services respnsible for the tendering process was unaware of the Inuvialuit Final Agreement[37].

[37] The Arbitration Board, Inuvialuit Final Agreement, Award No. 001/94, P. .37

According to DIAND officals, there have been three or four other instances in which the Inuvialuit have served notice of their intent to use arbitration. The disputes in all of these instances were resolved before proceeding to the arbitration stage.

In another matter involving a claims agreement, the Nunavut Tungavik Corporation in 1997 decided to bypass the arbitration process set out in their agreement and went directly to the Federal Court with regards to a dispute with the Department of Fisheries and Oceans over the setting of turbot quotas. The Federal Court of Appeal upheld the claim of the Nunavut Tungavik and consequently, there is an important legal precedent that has been established, according to officials in the Claims and Self-government Implementation Branch of DIAND.

DIAND officials are unaware of any experience with mediation or other assisted ADR mechanisms. Furthermore, there appears to be no system in place for tracking the use of the dispute resolution systems.

The Nisga'a Final Agreement

The Nisga'a Final Agreement is the most recent claims and self-government agreement and, in the opinion of the Institute, has the most sophisticated dispute resolution system of all the agreements thus far. This reason and the fact that it involves three levels of government make it worthy of special attention in the context of this paper.

The dispute resolution chapter begins with a statement of four objectives, shared by the three parties:

> "a. to cooperate with each other to develop harmonious working relationships;
> b. to prevent, or, alternatively, to minimize disagreements;
> c. to identify disagreements quickly and resolve them in the most expeditious and cost-effective manner possible;
> d. to resolve disagreements in a non-adversarial, collaborative, and informal atmosphere."[38]

The parties further acknowledge their desires and expectations that most disagreements will be resolved by "…informal discussions between or among the Parties, without the necessity of invoking this Chapter"[39]. Those disagreements not resolved informally will progress through three stages as described in the chart on the next page.

Appendix 11 includes a detailed description of the processes for each of the mechanisms outlined in the chart.

[38] "Nisga'a Final Agreement", P. 233
[39] Ibid, P. 234

NISGA'A DISPUTE RESOLUTION SYSTEM	
Stage	**Key Conditions**
Stage One • collaborative negotiations	• can be initiated by any party following informal negotiations; • notice given to other parties; • a party not directly engaged may participate • parties agree to disclose sufficient information, appoint representatives with sufficient authority and negotiate in good faith
Stage Two • mediation • technical advisory panel • neutral evaluation • elders advisory council • any other non-binding process	• must go through collaborative stage first; • can be initiated by any of the parties; • a party not directly engaged in the disagreement may participate; • each process has carefully laid out procedures in its own annex (see Appendix 11)
Stage three • binding arbitration • judicial proceedings	• arbitration can be initiated by one party if specifically called for in the Agreement; otherwise all affected parties must agree; • must complete stages one or two unless otherwise specified

According to Bonita Thompson, a Vancouver-based lawyer who assisted the Nisga'a in negotiating the dispute resolution chapter, the stage two mechanisms were designed with specific disputes in mind:

> Mediation – to overcome general difficulties in negotiations
>
> Technical advisory panel – to deal with disagreements of a technical nature
>
> Neutral evaluation – where a legal opinion is required
>
> Elders advisory panel – where 'grey hairs' with wisdom can add a 'strategic' dimension to the dispute resolution process

Adjudication was designed to provide a non-judicial option, especially in disputes where a specific number is required, such as the Nisga'a wildlife allocation of a designated species.

In terms of the fiscal arrangements amongst the parties, the fiscal chapter provides for the negotiation of fiscal financing agreements every five years or at other intervals if the parties agree. The underlying principle is the same as that found in the Yukon agreements: provision of agreed upon public programs at levels "reasonably comparable"[40] to those found in the region. Like the Yukon agreements, the fiscal chapter also provides a long list of factors that the parties will consider in negotiating these financing agreements.

In terms of dispute resolution, the fiscal financing agreements will address this issue as well. In the first agreement, the parties laid out the following steps:

- disputes that can not be resolved by informal discussion will be referred to the Tripartite Finance Committee, a body established by the parties to oversee the implementation of the financing agreement – deliberations by this committee will constitute stage one, collaborative negotiations;
- If the Committee fails to resolve a dispute within 45 days, then the dispute will be dealt with under the dispute resolution chapter.

The implication of this last point is that any of the parties can initiate any of the non-binding, assisted ADR techniques in stage two. Binding Arbitration in stage three, however, would be available only if all affected parties agreed.

In summary, the Nisga'a dispute resolution system appears to meet most, if not all, of the design principles noted in the principles and best practices section:

- the emphasis as set out in the objectives is on interest-based approaches;
- a low cost, customized rights-based approach – binding arbitration - is provided for;
- there is a clear path from one stage to the next, minimizing the possibility of disputes about process;
- prevention is emphasized;
- an assessment has been made of the type of disputes that may occur and different ADR mechanisms have been matched to each type; and
- the process is not simple but is likely appropriate to the main users – public servants and politicians.

Other principles like the one calling for ongoing evaluation and adjustment to the system and the need for education of training of participants should be addressed in the implementation agreement.

What is less certain is the degree to which the dispute resolution system adequately addresses the following conundrum: the Nisga'a desire for funding certainty and the avoidance of 'unilateralism' on the part of the other levels of government balanced

[40] Ibid, P. 212

against the federal and provincial governments need to preserve the 'sovereignty' of their parliaments in determining the funding levels that they will provide to the Nisga'a.

C. CASE # 2 – AGREEMENT ON INTERNAL TRADE

Overview of the Agreement and the Dispute Resolution System

In July of 1994, the federal, territorial and provincial governments signed the Agreement on Internal Trade. The principal objective of this agreement was to "…establish no new barriers to internal trade and to facilitate the movement of persons, goods, services, and investments within Canada."[41]

The Agreement has four components: the first sets out the objectives and general trade rules; the second focuses on each of the economic sectors – e.g. agriculture, transportation, communication etc. – covered by the Agreement; the third deals with the operating structure and dispute resolution procedures; and the fourth contains provisions of general application.

The agreement does not have independent legal status but is purely a political accord. As one author notes:

> "…the legitimacy conferred on the agreement in political practice will be a major determinant of its ultimate impact in liberalizing interprovincial trade. This heightens the importance of dispute settlement; the higher the quality of dispute rulings and the more they are grounded in a coherent and consistent interpretation of the agreement, the more politically difficult it will be for governments to walk away from the commitment to free internal trade".[42]

In fashioning the dispute resolution system, the parties had four objectives in mind[43]:

- Disputes should be driven by governments rather than by private parties;
- The emphasis should be on ADR methods wherever possible;
- There should be no access to the courts; and
- Access by private parties should be restricted so as to discourage harassment of and financial costs on governments.

The dispute system as set out in the Agreement is modeled closely on those in the Tokyo Round of the General Agreement on Tariffs and Trade (GATT) and in the North American Free Trade Agreement (NAFTA). As the above objectives suggest, there are different procedures for governments and non-government parties. For governments, the Agreement lays out a five step process for most disputes. The first two steps –

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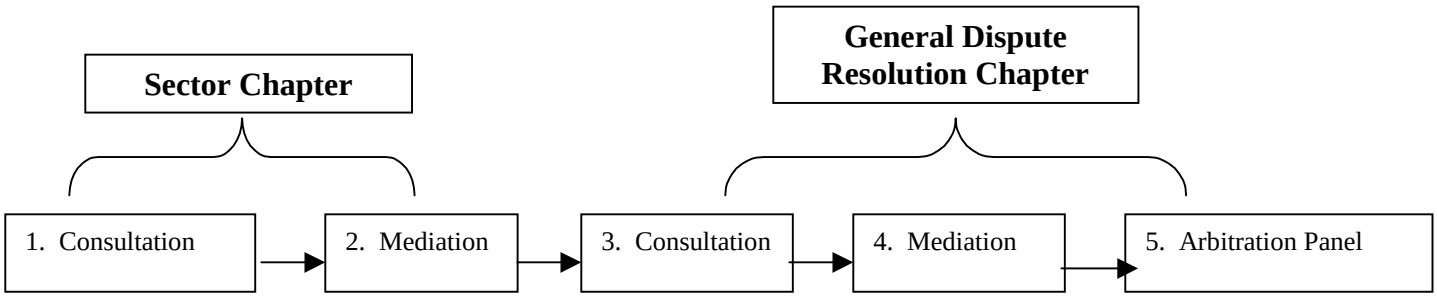
[41] Irving Miller, "Dispute Resolution: An Interprovincial Approach", in Getting There: An Assessment of the Agreement On Internal Trade, (Policy Study 26, C.D.Howe Institute; 1995)
[42] Robert House, "Between Anarchy and the Rule of Law: Dispute Settlement and Related Implementation Issues in the Agreement on Internal Trade", in Getting There, op. cit. P. 171
[43] Miller, op. cit. P. 152

consultation followed by mediation under the auspices of the sector working groups or appropriate sector organization of ministers – are established in most of the sector chapters. Once the government parties have gone through these steps, then can then access the general dispute resolution regime laid out in Chapter 17. This regime has three additional steps: consultation, mediation - this time under the auspices of the Committee on Internal Trade, composed of trade ministers – and finally arbitration by way of a panel. The diagram below illustrates this five step process:

Figure 6

Dispute Settlement Process
Agreement On Internal Trade



If both parties agree, then steps three and four can be by-passed to move immediately to the panel stage. Under step four, the Committee of Ministers may assist the disputing parties by resorting to a number of mechanisms – seeking the advice of technical experts; establishing working groups or fact-finding bodies; facilitating the use of conciliation, mediation and other dispute resolution mechanisms; and making recommendations.

Parties are not legally bound to accept the decisions of the panels under step 5. If a party refuses to comply, then the initial remedy is to make the matter public. If the matter is not resolved within one year, retaliatory action may be taken by the complaining party[44].

For private parties, that is, individuals or companies, they can apply to their respective governments to take up a dispute on their behalf. If the government agrees to do so, then the dispute follows the five step process illustrated above. If the government refuses,

[44] The NAFTA allows for a similar retaliatory action if the parties do not accept the panel's recommendations. In the Canada-U.S. Free Trade Agreement, which preceded NAFTA, the panel report went to the two-country Commission overseeing the Agreement and the Commission had to agree with the panel's recommendations. This procedure gave each country an effective veto over the pane reports.

then the private parties can apply to access the Chapter 17 mechanism (i.e. steps 3 to 5 above.) To do so, the individual or company must be screened with regards to three criteria:

- Whether the complaint is frivolous or vexatious;
- Whether the complaint is made solely for harassment ; or
- Whether there is a reasonable case of injury or denial of benefit.

Experience to date

The Internal Trade Secretariat assigns a file number to every complaint that arises under the Agreement. As of October, 1998, the Secretariat had received a total of 46 complaints since the Agreement was signed in 1995. The majority has been procurement cases involving the federal government. Only one of these 46 cases has been referred to an arbitration panel. In 1997, Alberta complained that the federal government's banning of certain manganese-based gas additives, supposedly for pollution abatement purposes, violated several articles in the Agreement. A panel heard the dispute and found for Alberta. The federal government announced that it would remove the ban on these additives.

In terms of time to deal with complaints, in the first year of operation the average time taken was seven months. In the second year this average had declined to three months[45].

Assessment

Observers give the dispute resolution mixed reviews. On the positive side, the regime is given kudos[46] for providing avenues for private parties to press complaints in contrast with international trade agreements and with the NAFTA, which provides only limited access. Another positive is the greater transparency than has been the case with international trade agreements.

Critics point to three weaknesses, all of which are deficiencies in terms of the principles outlined in the principles and best practices section of this paper:

- The agreement has not been well publicized, reducing ease of access for the dispute system;
- The time taken to resolve complaints is too long and the process, too cumbersome; and
- There does not appear to be any systemic identification of issues raised by complaints or follow-up on the policy implications they raise.

[45] Robert Knox, "Economic Integration in Canada through the Agreement on Internal Trade", in Canada: The State of the Federation 1997 – Non-Constitutional Renewal (The Institute of Intergovernmental Affairs, Queen's University, 1998)
[46] Robert Howse, op. cit. P. 170-171

At the root of these deficiencies is the origin of the dispute resolution system in the Agreement – that is, it was taken from international trade agreements and was never designed to deal with individual parties. As a result, according to at least one writer, there is a need for a major re-working of the system:

> "…the best dispute resolution process is likely to be a well publicized, single national system, accessible from anywhere in the country, with people dedicated to resolving issues using techniques similar to those used by ombudsmen and with panels available to deal with complex disputes or those that cannot be resolved through normal mediation processes. No complaint process should take longer than 90 days. This arrangement would also provide a data base of issues and problems that would help to adjust the Agreement and improve domestic market integration." [47]

From the perspective of the FRT, what is interesting about the Agreement on Internal Trade is the approach used to deal with the 'sovereignty' problem noted in the review of self-government agreements. The approach here has been to have panel decisions binding not in a legal but rather in a political sense. Whether this approach will be successful remains to be seen. Perhaps it is appropriate that the last word goes to a tentative optimist:

> "For the first time, governments in Canada have committed themselves to resolving trade disputes through a set of generally acceptable and enforceable rules. International experience with the GATT has shown that this commitment to a rule-based regime represents the fundamental breakthrough in promoting freer trade. Once a rules-based regime has been established – even if the substantive requirements of the rules are initially quite modest – a foundation has been laid for future construction. This is the promise and the potential of the Agreement on Internal Trade." [48]

D. CASE #3 – INTERNATIONAL EXAMPLES

Overview

In an earlier piece of research[49] that fed into the FRT process, the Institute surveyed the literature relating to intergovernmental fiscal relationships and then focused on four case studies before drawing lessons for Aboriginal self-government. As a consequence, Institute personnel were in contact with a significant number of Canadian and international experts. Neither these experts nor the literature revealed any information regarding formal dispute resolution systems tied to intergovernmental fiscal relationships.

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[47] Robert Knox, op. cit. P. 23

[48] Patrick Monahan, ""To the Extent Possible": a Comment on Dispute Settlement in the Agreement on Internal Trade", in Getting There, op. cit. P.217

[49] The study was entitled "Intergovernmental Fiscal Relationships: An International Perspective" and was completed in February 1998.

To confirm this finding, the Institute in the course of this study interviewed Anwar Shah, a World Bank economist, who has written extensively on fiscal relationships among national and sub-national governments throughout the world[50]. He confirmed the Institute's earlier finding that no such formal, dispute settlement systems exist. That said, a number of countries do have mechanisms specifically designed to prevent or manage conflict among sub-national governments or between sub-national and national governments.

A useful starting point is with Denmark, which has had since 1979 a forum for the national and sub-national governments to discuss and indeed negotiate tax rates, transfers for the following year and sub-national priorities. Part of this process involves joint technical assessments of local government finances and the establishment of procedural rules – for example, all new legislation regarding tax and expenditure issues must be vetted through a joint forum to determine the potential impact on sub-national governments.

Sweden has followed the Danish example by establishing a similar system of annual negotiations that focus on broad economic and tax policy as well as yearly transfers. Like the Danes, the Swedes have also developed some 'rules of the game'. One example is that the local governments have agreed not to raise their taxes in return for the central government's commitment no to impose new expenditure responsibilities. In contrast to Denmark, Sweden has relied on a series of ad hoc Parliamentary Commissions to provide advice as to the design of the transfer system. However, these Commissions do not advise on the yearly transfer amounts between the national and sub-national governments.

Australia even to a greater extent than Sweden relies on a third party – the Commonwealth Grants Commission, established in 1933 – to assist the Commonwealth and state governments in managing their fiscal relationship. However, the Commission's mandate is to make periodic recommendations on the distribution of grants among the states and leaves the determination of the total to be distributed to negotiations among the heads of the Commonwealth and state governments at an annual Premiers' Conference.

A variation of the negotiations model is found in Pakistan[51] where a National Finance Commission, chaired by the federal government with representation from all sub-national governments as well as some individuals with no governmental affiliation, advise on the amount of central government grants for a five year period. Consensus is critical. Otherwise with no agreement, the central government is free to continue with the current arrangements.

There are at least two federal countries where sub-national governments have significant influence on fiscal arrangements because of the make-up of the central government. In Germany, virtually every law affecting the interests of the states, including budgetary

[50] See, for example, "The Reform of Intergovernmental Fiscal Relations in Developing and Emerging Market Economies", (World Bank, Washington:1994)
[51] Information on Pakistan was derived from an interview with Anwar Shah of the World Bank.

measures, has to pass the lower house (Bundesrat), "…which – unlike the equivalent in other federations such as the United States, Canada, or Australia – is a true states' house in the sense that its members are appointed by state governments, recalled by them, and strictly bound to the directions of their respective authorities."[52]

The new South African constitution calls for a similar role to be played by the Council of the Provinces in the central government. These arrangements produce negotiations on the level of central government grants and other related issues, as in the other countries canvassed above, but with likely more 'clout' in the hands of the sub-national governments. (It appears to be too early to say whether this is indeed the case in South Africa as constitutional arrangements are still evolving).

Where does Canada fit into this spectrum of relationships between national and sub-national governments on determining the nature of its fiscal arrangements? From the perspective of the World Bank, the federal government in Canada has less control over the determination of annual federal grants than in any other federation. Mr. Shah, who knows the Canadian system well from having worked for a stint in Canada's Department of Finance, points to the formula-based approach adopted by Canada for determining its major intergovernmental transfers within rules for setting floors and ceilings to annual transfer amounts. He also points to the long-established series of intergovernmental committees in support of federal and provincial Ministers of Finance, committees that undertake joint technical work as a basis for continually fine-tuning the system.

Nonetheless, the Canadian system has not prevented a significant degree of unilateralism by the federal government over the past decade as it strove to deal with its deficit problems. In 1990, for example, the federal government froze EPF transfers at their 1989 per capita levels for two years and extended the this freeze for three additional years in the 1991 budget.[53] Similarly it capped the growth in CAP transfers to the 'have' provinces, an action which resulted in a Supreme Court challenge. Budget decisions in 1994 and 1995 continued this trend of unilateral federal action vis-à-vis the provinces and the territories.

Assessment

The Institute's survey of how various countries manage their fiscal relationships reveals no examples of the kind of sophisticated dispute resolution system that is found in the Nisga'a agreement. That said, these countries have employed a variety of mechanisms to help prevent disputes or, alternatively, to deal with them in a consensus–building fashion. These mechanisms, involving national and sub-national governments, include the following:

[52] Paul Spahn and Wolfgang Fottinger, "Germany" in Federal Fiscalism in Theory and Practice by Teresa Ter-Minassian, (International Monetary Fund, Washington:1997) P.227
[53] Russell Kerlove, Janet Stotsky and Charles Vehorn, "Canada" in Fiscal Federalism in Theory and Practice, op. cit. P. 218

- Permanent negotiating forums of ministers or other politicians, often supported by a series of committees of officials;
- The undertaking of joint research and assessments;
- The development of procedural rules such as the in Denmark where there is an opportunity for sub-national governments to review legislation that will affect them;
- The development of substantive rules e.g. no tax increases at the sub-national level in exchange for no new expenditure obligations from the national government;
- The development in Canada of formula with floor and ceiling rules for determining the total national government grant to the sub-national governments ;
- The use of multi-year funding agreements;
- The use of third party mechanisms (e.g. the Australia's Commonwealth Grants Commission) to recommend on the distribution of grants among sub-national governments and, in the case of Sweden, on modifications to the fiscal relationship; and
- In the case of Germany and the Republic of South Africa, structuring the federal government in a way that directly involves the sub-national governments.

It is important, however, to underline what is not present in these arrangements – that is, the use of a neutral third party to recommend (or to determine) the total amount of the national grants to sub-national governments. The sole exception is the court system but, at least in Canada, resorting to the courts does not appear to have been a successful strategy for provinces faced with unilateral federal action. In this regard it is interesting to note that the provinces, in their joint declaration for a newly designed social union, have included a dispute resolution device as one of the aspects of their reform package.

E. THE WAITANGI TRIBUNAL – NEW ZEALAND

The Treaty of Waitangi was signed in 1840 by a British naval captain and over 500 of the leading Maori chiefs of the time. It differs from most Canadian treaties in two obvious respects – first, it explicitly deals with "sovereignty", transferring some political rights from the Moari to the non-Moari New Zealanders; second, it is not seen by either party to be a land cession treaty. According to a study [54]done by the Canadian Bar Association, the Canadian equivalent of the Treaty of Waitangi is the Royal Proclamation of 1763, not the numbered treaties.

Reading the English and Moari versions of the Treaty together provides a comprehensive statement of Moari rights, which closely resemble Aboriginal and treaty rights claimed by Canada's Aboriginal peoples. These are rights to lands and resources, to cultural survival and to a degree of self-government. The New Zealand courts, however, gave the treaty no legal force and it was largely because of this negative response that pressure grew for the creation of an alternative mechanism for dealing with Moari claims for land, resources and a measure of autonomy.

[54] The Canadian Bar Association, "New Zealand's Waitangi Tribunal: An Alternative Dispute Resolute Device", 1994, P 5.

Following a long period of demonstrations, marches and sit-ins, paralleling similar events in Canada, the United States and Australia, the New Zealand government in 1975, with "the footfalls of land marchers ringing in their ears"[55], passed the Treaty of Waitangi Act, which established the Waitangi Tribunal. Its primary function was to act as a commission of inquiry on claims brought forward by Moari individuals or groups, where the definition of a claim was any act of the Crown or its agents that was in breach of the principles of the Treaty.

Initially, the Tribunal could consider claims only from Crown actions committed after the passage of the legislation in1975. The Act was was subsequently amended in 1986 to extend the Tribunal jurisdiction to cover claims arising since 1840, the date of the Waitangi Treaty signing. The mandate of the Tribunal was enlarged again in 1988: it was granted final and binding decision-making power (as opposed to its advisory role up to then) for Crown lands transferred by the government to any state-owned enterprise as part of a new 'privatization' policy for Crown assets. It was also granted the power to refer a claim to mediation.

The initial reaction of many Moari to the narrow mandate first granted to the Commission was negative and few claims were submitted. However, as the reputation of the Commission grew and as its mandate was enlarged, the number of claims mushroomed to the point where there is now, according to an official at the New Zealand High Commission, a backlog of well over 500 claims. As one writer noted, echoing similar experience in Canada,"[the government] did not anticipate the number and scale of the historical claims which would be brought, nor their complexity, nor the depth of the historical and other research which would be necessary to determine whether they were well-founded."[56]

As a response to the growing backlog of claims, the number of members of the Tribunal has been increased to 16 and its budget has grown to $5.1 million in 1998/99. The Tribunal[57] has a staff of approximately 50 individuals.

Assessment

The tribunal has what can be called a "soft" adjudicative role – adjudicative in the sense that it makes decisions, soft in that its decisions, at least prior to 1988, were not legally enforceable. As the Canadian Bar Association study concludes:

> "Thus the Tribunal occupied the middle ground between the Indian Commission of Ontario structure, which is facilitative, and the mainstream courts, which could be described as having a "hard" adjudicative role. Each of these three approaches to dispute resolution has its positive and negative aspects. One striking aspect of the Tribunal's experience has been its ability, in occupying the middle ground, to

[55] Alan Ward, "Historical Claims under the Treaty of Waitangi", in the *Journal of Pacific History*, 28:2 (1993), P. 183
[56] ibid, P. 186
[57] For more information on the Tribunal, consult its web site at www.knowledge-basket.co.nz/waitangi

> slide between all three. Many of its recommendations have not been decisions at all. They have been attempts to set up an agenda between the parties in order to facilitate a resolution. On the other hand, in different circumstances the approach has been one of getting out recommendations in a way that ensures *de facto* if not *de jure* enforceability. Supplementing this has been the Tribunal's newly enhanced investigative role, a role intended to underpin its function as advisor to government." [58]

Thus, having only an advisory role for almost all of the claims it has dealt with has been a mixed blessing for the Tribunal. On the one hand, it has allowed the Tribunal to adopt a variety of informal procedures for hearing evidence about and researching claims, procedures that would not have been possible if its conclusions were binding. Further, its advisory role has allowed it to interpret its mandate liberally, using individual, fact-specific claims to develop a broad analysis of the treaty relationship. The downside has been that the government has not always agreed with the Tribunal's recommendations and, in addition, to garner public support, the Tribunal may have had a tendency to 'water down' its analysis to appear 'pragmatic' and 'reasonable'.

A large measure of the Tribunal's success appears due to the legal vacuum in which it has been operating. It was the only forum in which concepts of pre-existing Aboriginal rights could have any relevance. Nonetheless, as the Canadian Bar study concludes:

> "That should not however, detract from the institution's quite remarkable achievements in the field of native rights in New Zealand. Under the chairmanship of Chief Judge Durie, the Tribunal has single handedly revitalised the concept of pre-existing justifiable rights. By drawing on American and Canadian jurisprudence the Tribunal has…opened the way for a return of treaty and aboriginal rights litigation to the mainstream Courts. Ironically, the politicians probably intended it to have the opposite effect in 1975".[59]

F. CONCLUSIONS – MODELS FOR THE FRT IN SASKATCHEWAN

The purpose of this final sub-section is draw together the lessons from the literature search and the case studies in terms of concrete suggestions for the FRT in the design of a dispute resolution system as one of the building blocks of a new fiscal relationship.

A central problem from the perspective of First Nation governments is how to avoid the unilateral resolution of disputes about funding through the use of power. The usual ADR response to this type of problem is to build a series of interest-based mechanisms, culminating in a rights-based approach, such as binding arbitration. But as noted above there are no national or international precedents for an approach based on binding arbitration, with the possible exception of the Waitangi Tribunal. National governments do not want to assign to a third party a fundamental aspect of their sovereignty in determining significant budgetary expenditures. The recent pay equity ruling rendered by

[58] The Canadian Bar Association, op. cit. P. 60
[59] Ibid, P. 57

a panel under the auspices of the Human Rights Commission against the federal government is a recent example that reinforces this reluctance. In a similar vein, the Premier of Saskatchewan announced recently that his government was not willing to submit a wage dispute with public sector employees to binding arbitration.

The recently signed "A Framework to Improve the Social Union for Canadians" also maintains the traditional position of Canadian governments with regards to maintaining their sovereignty. In setting out a number of principles and operating procedures for resolving disputes among governments and between citizens and their governments, the Framework appears to be a significant improvement over the Agreement On Internal Trade. Nonetheless, the role of third parties is to provide "expert assistance and advice while ensuring democratic accountability by elected officials"[60].

While this central problem appears to have no solution for the moment, the case study on the Agreement on Internal Trade indicates that there is experimentation going on, experimentation that is dealing with this same 'sovereignty' problem and that may lead eventually to new approaches.

With these developments in mind, the Institute suggests that the FRT might begin their discussions on a dispute resolution system by focusing on the following eight points:

1. **The dispute resolution system in the Nisga'a Final Agreement correlates closely with the principles and best practices in the literature and should provide a good starting point for FRT discussions on an overall system design.**

2. **Another aspect of the Nisga'a Final Agreement worthy of close attention by the FRT is the way in which the dispute resolution system is connected to the fiscal relationship among the parties.** Rather than set out this connection in the final agreement – an agreement that might prove awkward to change in future years – the parties have chosen to a more flexible route, that of making the connection in the five year Fiscal Financing Agreements. This approach will force the parties to consider how the system is working at the renewal period. It may also allow the adoption of newer approaches to managing disputes in the fiscal area.

3. **Other aspects of the Nisga'a approach to fiscal arrangements that merit careful consideration on the part of the FRT from a dispute resolution perspective are the following:**

    - The inclusion in the Fiscal Financing Agreement of an approach for handling an "extraordinary event or circumstance" that "impairs the financial ability of the Nisga'a Nation to provide agreed-upon public programs and services…for which Canada or British Columbia provides funding…";
    - A clause that provides for a two year extension , or longer should the parties agree, of the current agreement in the event that no agreement is reached for renewing the agreement at its expiry.

[60] "A Framework to Improve the Social Union for Canadians", February 4, 1999, P. 7

4. **The FRT should consider placing significant emphasis on adopting a series of measures aimed at preventing disputes**. Some of these are as follows:

   - Ensure careful drafting of the original agreement so that ambiguous wording does not mask underlying disagreement;
   - Establish a formal mechanism – such as a tripartite committee system akin to what exists on the federal/provincial level - so that the fiscal relationship among the three parties is constantly monitored and managed;
   - Consider periodic ADR-type training sessions to improve basic skill levels among participants for resolving disputes;
   - Avoid the use of complicated indexing schemes that only experts can comprehend;
   - Establish appropriate means to ensure that other parts of the federal, provincial and First Nation governments implicated in the fiscal arrangement but not directly involved in its management are made aware of and understand the implications for them. The intent here is to avoid unintentional 'blunders' from uninformed officials, such as noted in the section of this report dealing with the Inuvialuit Agreement.

5. **Another important technique for avoiding disputes or assisting in their resolution is the use of joint teams to do research or technical assessments**. One area that requires considerable work and reflection is developing a series of measures for determining what comparable services might mean in a variety of program areas. And there are no doubt other joint projects that could be usefully launched. (It is useful to note that this joint approach to research is now being used in an attempt to resolve specific land claims.)

6. **The FRT might also consider adopting, where feasible, formula-based approaches for determining fiscal transfers with floors and ceilings - such as employed in the federal/territorial agreements - to provide greater certainty for all parties and to avoid annual re-negotiations;**

7. **It might consider as well the adoption of a number of procedural rules to ensure there are no "surprises' at the eleventh hour.** Examples include:

   - Notification before taking action in the case of a default on commitments in the financial agreement;
   - Early notification of new programs or services to be added to any re-negotiated agreement; and
   - An opportunity to comment on broader governmental initiatives that might affect the other parties in a significant manner.

8. **Finally, the FRT should develop an evaluation plan for the dispute resolution system before it is launched. Such a plan should ensure that performance data on the system is tracked to allow for ongoing adjustments to the system.**

IV. COMMUNITY-BASED SYSTEMS FOR DISPUTE RESOLUTION

A. RATIONALE FOR CASE SELECTION

In contrast to Aboriginal communities, community-based programs for resolving disputes are a relatively recent phenomenon in non-Aboriginal communities. In the United States, the first court-based diversion program began in 1969 and by the mid-seventies there were a dozen or so similar programs. By 1985, there were over 180 US community mediation programs.

Canada's community mediation programs also evolved from court-based programs, but, according to one observer, were from the outset "…more ideologically linked to alternatives to the retributive justice system and often started by religious groups like the Mennonites."[61] In 1978, the first community (not court) based mediation program began in Kitchener Ontario.

Like the last section the purpose of this one is to examine a number of cases affecting both Aboriginal and non-Aboriginal communities to ascertain how their experience stacks up vis-à-vis the lessons from the literature. Case selection criteria included the following:

- The Institute looked for a variety of cases, some in Aboriginal communities, others in non-Aboriginal communities and with at least one affecting both communities;
- The Cases should illustrate a variety of ADR techniques from mediation to elders' councils to community circles or conferences;
- Cases should demonstrate at least several years of experience; and
- Finally, the Institute tried to find one case outside of Canada.

To meet the last criteria, the Institute spent considerable effort gathering information on the Northwest Intertribal Court System, a consortium of ten small Indian tribes situated in the State of Washington. Among other things, this organization had been referenced in the Manitoba Aboriginal Justice Inquiry and, indeed, the Inquiry had recommended that the "…Aboriginal people of Manitoba consider using a regional model patterned on the Northwest Intertribal Court System in the state of Washington."[62]

On examination of the material on the Intertribal court System web site and after interviewing the court administrator, the Institute concluded that interest-based approaches to resolving conflict were not central to this court system. Rather their use is dependent upon the presiding judge and the individual laws of the tribes. For these

[61] Gordon Husk, "Making Community Mediation Work", in Rethinking Disputes, op. cit. P. 282
[62] "Report of the Aboriginal Justice Inquiry of Manitoba", Province of Manitoba, 1991, P. 317

reasons, the Institute chose not to build a case study around this example. (See Appendix 12 for more information on this court system.)

With the above criteria in mind, the Institute chose four cases: a lands dispute resolution system at the Cowichan First Nation; the Dispute Resolution Centre for Ottawa-Carleton; a school-based resolution program in Prince Albert and the Saskatoon Community Mediation Services. The Cowichan case is the starting point.

B. CASE #1 – COWICHAN LANDS INVESTIGATION COMMITTEE

Overview

The Cowichan Tribes have approximately 3250 members of whom just over 2100 live on six different reserves, located on Vancouver Island. Prior to World War II, the First Nation approved a number of allotments of land to some of its members, subject to Section 20 in the *Indian Act*. These allotments were not approved by DIAND. The department considered the particular lands in question, which were forested, to be a collective resource. Nonetheless, the First Nation went through with the allotments and several consequences followed – the lands in question were not surveyed nor was any record made of the allotments in the Indian Land Registry. The result was a series of disputes, in some instances between family members and in others between different families - disputes varying from the location of a particular property boundary to the identity of the individual or family entitled to a particular land allotment.

To deal with these disputes and other related to land matters, the elders of the Tribes have constituted a Lands Investigation Committee consisting of thirteen elders from all six reserves. The lands administrator for the First Nation provides the staff expertise to investigate the circumstances behind a particular dispute and do any needed research – for example, in tracing the parcel of land through wills.

To make a claim, a Tribal member must submit a letter to the lands administrator with supporting documentation. In addition, a visit to the site by the chairman of the committee and the lands administrator is a usual step in the process. Neighbors disputing the claim are given an opportunity to state their side of the case.

The Committee meets monthly with five members constituting a quorum. Members meet with the disputants, sometimes separately at other times together, to hear their sides of the disputes. The elders' aim is to reach an agreement among the parties, especially if they are from the same family, as to how to resolve the dispute. If no joint resolution can be reached, the Committee will make a recommendation to the First Nation Council. (The Committee takes a vote in camera.) With only one exception, the First Nation Council has accepted Committee recommendations. All new allotments approved by council, subject to a few exceptions, must be posted for a thirty day period. Complaints are referred to the Committee for consideration.

Committee members have a responsibility to declare a conflict of interest if the claim involves an immediate family member or is a beneficiary of an estate related to the claim.

The elders are paid a small honorarium by Council. That said, the elders' Committee consider themselves independent of Council. The elders believe that this dispute resolution system should be above 'politics' so as to ensure its legitimacy in the eyes of the community.

The Lands Investigation Committee has dealt with a total of a dozen or so cases this year and some seven the year before.

Assessment

The evolutionary nature of this dispute resolution mechanism has meant that the process up to now has not been written down. Further, there appears to be a need to clarify the relationship of the Committee to the Tribal Council. The Committee is in the process of developing a policy statement to deal with both of these issues.

C. CASE #2 – THE DISPUTE RESOLUTION CENTRE FOR OTTAWA-CARLETON

Established in 1987, the Dispute Resolution Centre for Ottawa-Carleton (DRCOC) is a not for profit organization with a mission of broadening "…the application of conflict resolution techniques within the Ottawa-Carleton in order to create a more peaceful and understanding community."[63] It is governed by a volunteer board of directors chosen by its members and has a staff of five, only one of whom is full-time. The Centre relies on about 30 volunteer mediators and some 100 other volunteers for fundraising, preparing participants prior to mediation, policy implementation, research and other support.

With a budget of approximately $150,000, DRCOC has historically relied for financial support on a variety of sources – donations from community members and the legal profession, the federal and provincial governments; fundraising events; the provision of training; and membership fees among others. DRCOC is also in the process of preparing a strategic plan to work with corporate entities to secure additional monies.

Criminal cases, involving either youth or adults, are the prime focus of its programming with interventions at four stages: pre-charge; post charge; post-plea; or post-conviction. Statistics derived from some 600 cases in 1997 show that 27% took advantage of the voluntary mediation option. Seventy-six percent of the mediated cases involved four categories of charges - uttering threats; common assault; assault causing bodily harm and mischief. The vast majority (53%) related to charges of common assault.

The Centre's Executive Director has the final authority for determining whether cases are suitable for mediation. Those involving an "abusive" spousal relationship are excluded

[63] Mission and Goal Statement, Dispute Resolution Centre for Ottawa-Carleton, June 1998

automatically. For other cases the key criterion is the likelihood that an accused will honour an agreement arising from the mediation. Specific factors in arriving at this determination may include, but are not limited to, the following:

- Degree of alcohol involvement;
- Nature of the criminal charge;
- Prior criminal record;
- Degree of fear of the victim in relation to the accused;

Regular annual analysis of the Centre's cases show that on average some 70% of the cases reviewed are deemed to be suitable for the mediation option. Of these, about 30% participate in the program. In excess of 90% of mediations are concluded with a written agreement based on common understanding among the parties. Evaluations of the program (involving interviews with parties to the process) show that some 90% of these agreements are honoured.

The mediation program is voluntary. Should both accused and complainant agree to participate, the mediation process occurs in three stages. In the first stage, the mediator explains the process, confirms the agreement of the parties to participate and clarifies the ground rules. In the second stage, with the assistance of the mediator, the participants give their perspectives of the incident(s); clarify their interests and brainstorm for possible solutions. The final stage focuses on formalizing the agreement among the parties. Legal counsel do not attend the mediation sessions.

Copies of the agreement are given to the participants, defence counsel and the Crown Attorney, who makes a final determination on the matter.

The Centre has developed an extensive list of the knowledge, skills, abilities and attributes it looks for in a mediator. (This list as well as other relevant material from the centre, including description of generic cases, is included in Appendix 13.) Training for mediators occurs in a number of phases:

1) 20 hours of generic mediation training;
2) 15 hours of training specific to the court-based aspects of the program; and
3) an apprenticeship consisting of observing at least two mediations.

The Board is considering the possibility of developing a CD ROM for internal training purposes and as a potential funding source.

In addition to mediation, the Centre has also begun to offer dispute resolution conferencing as an additional ADR technique for cases where the number of persons affected by the incident goes well beyond the accused and complainant. In one recent conference over 40 participants were involved. Preparation of each participant for such conferences is extensive and involves an explanation of the process itself and how participants might participate.

Following this preparatory stage, participants meet at the conference with a facilitator and at least one other 'neutral' who has responsibility for helping the facilitator construct a

final agreement. The following is a brief description of the conference dynamics, dynamics that appear to have a high degree of similarity to Aboriginal healing circles:

> "A Dispute Resolution Conference brings together a group of people who have been affected by harmful behaviour. This collective may include those directly impacted as well as other community members who have been impacted by similar harmful behaviours. The opportunity to repair the damage done and minimize further harm is often the factor which motivates people to attend these Conferences. Emotions can, and frequently do, become intense. The role of the facilitors is to manage the process in such a way that emotional safety of the participants is ensured while allowing for the expression of angry feelings, the clarification of the needs and interests of all parties, the acknowledgement of individual responsibility and the development of a path to common understanding to ensure that the harmful behaviour does not occur again."[64]

As with the mediation program offered by the Centre, it is not necessary for the accused to admit guilt before participating in the dispute resolution conference.

Assessment

In a recent article[65], a former co-ordinator of a community-based mediation service listed the following as typical problems faced by such programs:

- **stagnation in the referral base** – often because of poor publicity about the program;
- **lack of focus** – it is difficult for a struggling new program to refuse anything remotely related to its mission;
- **program sloppiness** – continuously changing staff and volunteers require systemic procedures;
- **lack of ethical guidelines** – for such matters as confidentiality, terminating a mediation, data acquisition etc.;
- **managing volunteers** – volunteer intake procedures are often inadequate; training can be poor and terminating a volunteer with poor performance can be difficult;
- **staff turnover** – caused by lack of security, stress, little room for advancement etc;
- **being part of a larger agency** – resulting in loss of autonomy, conflicting cultures etc.;
- **funding instability** – accounting to many funders can be time-consuming; in addition, fund raising can divert energies away from the key concerns of the program;
- **turf** – other social agencies may perceive the program as a threat or develop their own mediation services;
- **determining program value** – the cost of mediation per case appears to run in the $1 k to $2 k range. Quantifying court-based savings is not easy, let alone broader benefits to society.

[64] This description was provided by the Centre's Executive Director, Carole Eldridge
[65] Gordon Husk, op. cit. P. 287

In terms of the design principles noted in section II of this paper, these common problems have more to do with program operation than design. Nonetheless, many do relate to design principles, such as ensuring that the parties have the skills and knowledge to use the dispute resolution system and that there is ongoing maintenance and reevaluation of the system.

With a mediation success rate in the low to mid nineties, the Centre appears to be handling many of the potential problem areas with obvious effectiveness. The Executive Director attributes this success to a number of factors. The center is dealing with the appropriate type of cases; it is attracting skilled volunteers to perform the mediation; it is spending considerable effort in preparing participants prior to the intervention; is providing the necessary support to the mediators in the way of training, procedures and policies; and finally, is placing significant emphasis on crafting well-written, comprehensive agreements.

From the perspective of the Executive Director of DRCOC, the major problem areas for her organization are funding instability and the related issue of determining program value.

D. CASE # 3 – MEDIATION IN THE SCHOOL: QUEEN MARY COMMUNITY SCHOOL, PRINCE ALBERT

Overview: Community School Concept

The original Community Schools Program in Saskatchewan began in 1980 to address urban Aboriginal poverty. The goal is to provide Indian and Metis students with a learning environment and program that is culturally affirming and that respects and reflects their histories, experiences and educational needs. Community Schools are founded upon a tradition of community education and development recognizing that " . . . difficulties children experience in school are often the result of circumstances that originate in the home or the community."[66]

Community Schools serve as a flagship for educational innovation for at risk and Indian and Metis students by:

- Providing the framework and elements for a broadened definition of the role of schools that integrates a comprehensive range of supports;
- Emphasizing partnerships among schools, parents, community members and Indian and Metis groups in educational planning;
- Emphasizing community development and empowerment;
- Providing a support role to neighboring schools and leadership in the province; and
- Providing a mechanism for ongoing planning and evaluation.

[66] Saskatchewan Education. "Building Communities of Hope" Community Schools Policy and Conceptual Framework, p. 4.

In sum, to achieve this vision Community Schools require the " . . . commitment, support and shared resources of boards of education, educators, parents, community members, human services agencies, and the provincial government."[67] The comprehensiveness of the Community Schools approach is seen by the creators and administrators of this model as the most effective means of addressing the complex needs of at risk, Aboriginal students. They believe that a piecemeal approach will have limited chance at success.

The vision, goals, principles and best practices of the Community School Program can be read as a holistic means of preventing conflict and promoting safe, learned and vibrant communities. Reflecting the Aboriginal perspective outlined in Section II (Principles and Best Practices), the Program outlines proactive measures to ensure student learning, shared responsibility, community empowerment, equity and cultural harmony.

See Appendix 14 for an outline of the Community School's vision, goals and strategies; and partnerships.

Mediation in the School

As part of its philosophy to help Aboriginal students deal with their problems in a proactive and holistic manner, Queen Mary Community School adopted a mediation program in September, 1997. Queen Mary is a K-9 school with a student population of approximately 750, of whom 80% are either Metis or Indian. Poverty issues are a major concern in the community and transiency has an important impact on student achievement.

The need to implement such a program derived from the growing sense among teachers, the school coordinator and principal that a "badge of honour" had developed for those students who were mandated to appear in Court. In an effort to reverse this mindset and resolve conflicts within the community, Queen Mary School formed a partnership with the Department of Justice and The Aboriginal Women's Council of Saskatchewan.

The program is designed to deal with all forms of violence from vandalism and verbal abuse to gang violence. Led by the Aboriginal Women's Council who provides mediation services one half day per week, cases are dealt with using a variety of techniques. Community School Coordinator, Fay Stupnikoff, states that depending on the severity of the conflict, the mediator will use one on one discussion, group conferencing and on occasion healing circles. Mediator Wanda Gamble explains that it works well to begin by speaking with the students individually followed by a mediated session together where they are asked to agree to a formal, written contract indicating their willingness to resolve the issue.

In cases where there has been a lack of willingness to resolve the conflict, or if it involves more serious charges like assault, the mediator will tend to involve parents, families and teachers in a group conference. Part of the effectiveness of this approach is

[67] Ibid., 5.

that the participation of the various parties has already been cultivated by the Community School philosophy. In cases where the dispute cannot be resolved by the mediator, the school reverts to its zero tolerance policy and, if still unresolved, to the police.

Since the inception of the program in 1997, over 37 cases were settled through mediation (20 of which would have resulted in charges being laid) and many more through informal channels. Those involved with the program feel it has been cost effective, saving thousands of dollars in court costs and police work. Victims and their families have also demonstrated a greater sense of satisfaction by having input in resolving their difficulties, and it has generally brought the community together in a more positive way.[68] The success of the Program can also be seen in the funding that has been provided by the Department of Justice for one additional full time mediator to service the needs of the five other community schools in Saskatchewan.

See Appendix 14 for an example of a case referred to mediation.

Assessment

The strength of the Queen Mary mediation program lies in its preventive community approach. Various players[69] both within the school and those affiliated with it are working together to ensure that the students work through their problems in a just and responsible manner. By coordinating the mediation program within a larger community learning framework, the supports and resources necessary to change behaviors have the opportunity to succeed. The model is also geared towards helping resolve disputes when they do occur, through an interest-based approach. Only if necessary does the school send cases to more traditional rights and power-based resolutions.

The Community School model also utilizes multiple tools in a culturally affirming manner to achieve its objectives. For example, the school curriculum includes learning prevention skills through the Family Life program (anti-racism and discrimination, anger management), as well as a youth justice committee, peer support group and a youth conflict management team. Queen Mary also coordinates with programs offered by social services (bereavement courses for students dealing with violent deaths), Justice and The Salvation Army (anti-shoplifting workshop). In so doing, the Mediation program becomes another tool for the community to deal with its problems both collectively and individually, rather than dealing with issues in a piecemeal manner.

One of the challenges for replicating this type of program elsewhere is funding. The cost to maintain one and a half mediators on a full time basis in 6 community schools is approximately $55,000. However, this does not include all the infrastructure costs related to the Community School projects, nor does it reflect the amount of money given

[68] Interview with Wanda Gamble, The Women's Aboriginal Council, December 14, 1998.
[69] Those involved include: the Queen Mary principal, teachers, coordinator, police, Department of Justice, social services, The Aboriginal Women's Council, Indian and Metis Friendship Centre and the Salvation Army.

by the various partners. Similarly, funding is needed to train the volunteer component of such a program as well as to support projects like youth justice committees, peer support groups, conflict management teams and training seminars for students and parent councils.

In summary, with its emphasis on prevention, training and education, and the use of multiple ADR techniques that are culturally appropriate, the program appears to conform well to many of the criteria outlined in Section II.

E. CASE # 4 - SASKATOON COMMUNITY MEDIATION SERVICES

Overview

Established in 1983 by the Mennonite Central Committee, Saskatoon Community Mediation Services (SCMS) is a non-profit organization with a mandate to promote "…a restorative approach to dealing with conflict in the Saskatoon community."[70] With an annual budget of approximately $300 k and a staff complement of nine augmented by some sixteen volunteers, the SCMS is unique in Saskatchewan in offering a wide range of services:

- **Adult diversion program –** this service is funded by the Provincial Department of Justice and receives some 850 referrals per year from crown prosecutors, defense counsel and others associated with the legal system.
- **Training** - The SCMS has run a peer mediation program in inner city schools over a three year period and is now involved with a variety of other training initiatives including
  - conflict resolution training for parents and teens through the school system;
  - mediation training offered to the general public twice per year;
  - mediation apprenticeship training for a rent geared to income housing project; and
  - fee for service training for interested organizations and agencies.
- **Education and public awareness** – The SCMS has a resource centre, publishes a newsletter, responds to requests for information on conflict resolution, provides speakers, runs special events involving guest trainers etc. and has used summer theatre programs to both entertain and inform about conflict resolution.
- **Community Mediation** - this is a consulting and mediation service to individuals or groups; in addition, the SCMS has a contract with the Department of Social Services to do 70 cases of parent/teen mediations per year.

In terms of Aboriginal groups, the SCMS has an ongoing relationship with the Saskatoon Tribal Council, which is involved in a complimentary diversion project. In addition, the SCMS is discussing the possibility of providing assistance to one of the First Nation members of the Tribal Council to set up a conflict resolution program.

[70] Taken from material supplied to the Institute by SCMS.

Assessment

For the purposes of this paper, the most relevant of the SCMS services described above is the mediation apprenticeship training program, given that the aim of this program – to establish self-sustaining conflict resolution programs - parallels that of the TFHQV project. With a budget of approximately $33 k, the SCMS has worked with a rent geared to income housing project consisting of over 100 families for an eighteen month period. Over that time, a SCMS mediator and trainer, working with the tenant association, accomplished, among other things, the following tasks:

- Conducted an organization assessment of existing disputes and dispute resolution patterns;
- Developed and fine-tuned the mediation program;
- Recruited, trained and apprenticed the volunteer mediators;
- Provided skills training for the Tenants Association and other parties;
- Had a mid project evaluation conducted;
- Initiated work on a procedures manual including the development of two referral processes;
- Publicized the availability of the service through the orientation package for new tenants;
- Conducted a final evaluation;
- Organized a transition period so that there was some overlap with a new co-ordinator (the position requires about one quarter of a person's time); and
- Linked the housing project program with volunteers from the wider community.

The housing project has a plan in place to ensure long term sustainability of its program and has raised enough funds to train another volunteer mediator. The SCMS remains involved in an arms-length, consulting capacity.

Asked about lessons learned in this eighteen month process, the Executive Director of the SCMS, Helen Smith McIntyre, made a number of observations. First, she noted how essential it was to have a core group within the Tenants Association who were highly committed to the project. Without such commitment, similar projects have little likelihood of success.

Second, she cautioned that organizers of similar projects should be prepared for disputes to surface very quickly after the project is announced – in essence so quickly that the project in its start-up phase was unable to immediately respond. This suggests the importance of managing community expectations.

Finally, she pointed to the length of time – eighteen months - over which the program developed. Long term viability can not be created overnight. A lot of work has to be accomplished, as the above list of tasks indicates, to establish a successful dispute resolution program. Further, ongoing external support is still required.

F. CONCLUSIONS – THE TFHQV PILOT PROJECT

A definitive set of conclusions regarding the design of the TFHQV pilot project must be fashioned in conjunction with the assessment phase of the project now underway. That said, the community-based cases described in the last section combined with the results of the principles and best practices section lead to the following six conclusions that might be useful in the design phase.

1. **Compared to the sophisticated designs of the dispute resolution systems in the claims and self-government area, community-based approaches are much less complex. Yet, it is evident that they still require considerable 'infrastructure' in terms of policies and procedures; ethical guidelines; training programs; screening mechanisms for both volunteers and cases; and systems for tracking results.** In short, it would be a mistake to underestimate the organizational capacity required to develop and operate an effective, community-based program. Futhermore, it takes time, as the SCMS case above illustrates, to develop this capacity from a standing start.

2. **In developing a community-based program, there are important choices to be made about how the program should be structured vis-à-vis existing organizations.** In the case of Queen Mary School, embedding the mediation program within an established community school has several advantages including stable funding and supportive relationships with various organizations, government departments and business. The DRCOC case illustrates the strength of creating an independent program, since it allows for interesting experimentation and greater legitimacy in the eyes of potential users, given its arms length relationship with the Crown. The Cowichan case demonstrates the merits of a middle approach – the Lands Committee relies on the staff and resources of the First Nation but nonetheless maintains a certain degree of autonomy so as to isolate the process from political interference.

3. **Despite their relatively simple design, community-based approaches tend to rely on a range of ADR techniques in recognition that no one technique can handle the wide variety of disputes. Having said this, mediation is common to all the case studies, confirming one of the 'lessons' from the literature.** In addition to mediation, the four case studies illustrate the following: group and community conferencing; a variation of a circle technique; and a variation on binding arbitration.

4. **Securing long-term, stable funding for community-based programs is invariably a challenge and consequently putting in place a system for determining costs and benefits, early on in the program operation, can pay rich dividends**. The tendency is not to think of the evaluation up front, resulting in potential problems later on when trying to secure funding for ongoing projects.

5. **Prevention can be a powerful supplement to any community-based programs but may not be practical in all cases.** Only the Queen Mary School case has a

strong prevention orientation in its program. The merits of such an approach are numerous from reducing costs and conflicts to promoting a healthier, safer environment to learn. However, prevention is not possible in all cases. Often time programs and organizations are set up to react to incidences that have occurred and therefore are limited in their preventive ability

6. **As part of an overall approach to self-government, the SFIN or individual tribal councils may wish to consider the desirability of establishing a capability similar to that now found in the Saskatoon Community Mediation Services for developing sustainable, dispute resolution capacity at the community level**. The functions that such an organization, in close collaboration with First Nation communities, might play could include the following:

   - Assessing the community's dispute resolution needs**;**
   - Recruiting and training volunteers;
   - Providing public education about dispute resolution;
   - Linking the community to other resources;
   - Providing ongoing support in the way of advice, program policies etc.;
   - Advising on the design of dispute resolution systems for self-government purposes.

Some concluding questions

In order to help develop the pilot project, the Institute believes that the following questions might usefully be addressed:

- **Assessment and Focus**: What is the evidence that the program is needed? What are we trying to accomplish? And how will we measure success?
- **Participation:** who are we trying to serve? How will they become aware of the program?
- **Organization:** does the program have the appropriate degree of autonomy to be legitimate in terms of all parties?
- **Relationships**: is the program well situated within the community and is it tied to the work of other programs and organizations?
- **Funding**: is there a strategy for achieving long-term viability?
- **Training:** is there a strategy to train volunteers, mediators, students?
- **Prevention**: can a preventive element be built into the program design? If so, how?
- **Policy and Procedures:** what in the way of guidelines and procedures are necessary to underpin the program and how will these be developed?
- **Evaluation**: what impacts are we trying to measure and how will we do this?