DISPUTE RESOLUTION BOARD
Discussion Paper

I. THE CHALLENGE

One generation beyond the successful negotiation of Yukon's Umbrella Final Agreement (UFA), Chapter 26 Dispute Resolution has rarely been used as intended.

Across Canada, mediators champion Alternative Dispute Resolution (ADR) tools as fast, fair, and cost-effective alternatives to court-based processes that can be time-consuming and highly expensive and that deliver uncertain outcomes. Yet these ADR alternatives have not yet been widely used in disputes arising from the implementation of Yukon's land claims settlements and self-government agreements. Why not?

There may be at least four possible reasons:

i. The lack of familiarity with and confidence in ADR and mediation tools;
ii. The refusal to participate in ADR processes built into the Yukon First Nations constitutionally protected land claim treaty agreements;
iii. The professional preference of lawyers from all negotiating parties for the courtroom setting over cross-cultural community-based ADR alternatives; and
iv. None of those now involved in implementation actually participated in UFA negotiations and therefore may not appreciate the imperatives, intent and spirit of Chapter 26.

For the above reasons, Yukon's Dispute Resolution Board (DRB) established under the provisions of the UFA is publishing this discussion paper as a continuing-education tool aimed at improving public understanding of mediation or other ADR tools as well as the content and meaning of the UFA Chapter 26.

II. BACKGROUND

II A) Umbrella Final Agreement Chapter 26

Chapter 26 provides a broad mandate. Clause 26.1.1.1 requires that Yukon treaty parties establish "a comprehensive dispute-resolution process" for resolving disputes which arise out of the interpretation, administration or implementation of Settlement Agreements or Settlement Legislation; and Clause 26.1.1.2 further defines the mandate "to facilitate the out-of-court resolution of disputes under 26.1.1 in a non-adversarial and informal atmosphere." The adjective here is important; "comprehensive" implies that the dispute-resolution processes should employ a wide range of tools and focus on "out-of-court" resolutions. So far, even these major objectives have not been met.

Chapter 26 goes on to describe the roles of the DRB, dispute-resolution panels, interested parties, mediation references and the appointment and training of mediators as well as rules and procedures.

It is useful to recall that the negotiation of Yukon's land claims and self-government agreements took the best part of twenty years. Much energy and effort was devoted to crafting its language, including that in Chapter 26. At the time, First Nations brought in mediation experts to assist in the negotiation of Chapter 26. The Yukon cabinet of the day strongly supported the use of ADR tools. And federal negotiators were well aware of new dispute-resolution processes, human-rights tribunals, ombudspersons and so on.

Every modern Northern treaty has a dispute-resolution chapter but few of them work very well, in large part because they did not follow the "self-design" best practice of mediation. Why not? During treaty negotiations, lawyers and negotiators tended to insert "off-the-shelf" or standard textbook formulas into the treaties. Fatally, negotiators failed to *test* these textbook models during treaty talks. Northern land-claims treaties and

self-government agreements created constitutional arrangements that were totally new to Canada, as was the idea of mediation processes designed by and for three parties to a dispute.

Implementation issues between the treaties' parties were bound to arise. Some of these issues the parties clearly foresaw and, had the pressure of negotiating deadlines not intruded, these foresights might have given negotiators occasion to test the workability of draft dispute-resolution formulas. Partly because federal policy prohibited litigation during negotiations, that opportunity was lost.

Had mediators been at the negotiating tables from the start, they might have argued for dispute-resolution processes, court-based or mediation alternatives, that loop back to negotiation so that the parties would never lose control of the process. They were not invited, and a wall went up between negotiations and litigation.

"Mediation Works," the dispute-resolution section, Chapter 17, in *Reconciliation: First Nations Treaty Making in British Columbia*, argues for the active use of a range of mediation tools: discussion; debate; dialogue; facilitation; conciliation; and mediation and arbitration. In every treaty-related dispute, the mediator's art involves finding the right tool, one that fits the particular problem.

A Yukoner might master the skills to construct a comfortable log cabin using an axe, but at some point in the construction process, drills, hammers and screwdrivers probably come in handy. So it may be with complicated disputes touching on a number of issues, at each point requiring a different tool to fix a different problem.

Many treaty-implementation issues involve money, a *quantitative* issue, but treaty negotiators must also face complicated

questions of a *qualitative* character. When this happens, negotiators and mediators need to recognize an underlying cultural conflict between Western intellectual traditions in law or science and the *qualitative* dimension of land and renewable-resources users' traditional knowledge. In such cases, those acquainted with the well-established Yukon practice of sentencing circles might wonder why "circles" are not yet part of the northern treaty mediation toolbox.

II B) The British Columbia Experience

Because several Yukon First Nations have land claims in British Columbia, a quick look at that province's experience with mediation may be useful. In 1992, at the conclusion of Yukon treaty negotiation, Canada, the BC government and the First Nations Summit created the tripartite British Columbia Treaty Commission (BCTC). The BCTC Agreement of September 21, 1992 mandated a six-stage treaty process which the Commission would facilitate. "3.1 The role of the Commission is to facilitate the negotiation of treaties and, where the Parties agree, other related agreements in British Columbia." Because facilitation can mean many things, it will always be an essential instrument in the mediator's toolkit.

II C) Facilitation

The 1984 compact edition of the *Oxford English Dictionary* defines "facilitate" as follows: "Facilitate: to render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process)."

Everywhere nowadays people armed with flip charts and magic markers rush about organizing meetings, "round-tables" and "break-out group" discussions. Facilitation may mean the organizing of conferences or negotiating sessions, but it can mean much more than that.

In the ADR world, facilitators may enable the negotiation of treaties and related agreements, and such work might even involve mediation and adjudication. Article 7 of the 1992 BCTC Agreement anticipates this need: "7.1 The Commission shall: (h) Assist Parties to obtain dispute resolution services at the request of all the Parties."

For example, the 1991 report of the B.C. Claims Task Force said the commission, when requested by First Nations, should make dispute-resolution services available for overlapping territorial claims issues between neighbouring nations. Unfortunately, that report did not provide many details on dispute-resolution particulars. Its recommendation was brief and blunt: "The Parties should also develop a dispute resolution mechanism to resolve disputes about matters of interpretation and implementation."

As the word is commonly understood in the labour-relations field, "facilitation" encompasses a range of activities, including everything from arranging meetings all the way to conciliation or mediation and, sometimes, arbitration. Negotiations in many other fields -- commercial, labour and matrimonial -- often require facilitators, mediators and adjudicators. Obviously, the above definitions make it clear that "dispute-resolution services" do not always limit a facilitator's role to chairing or convening meetings.

III. CONCILIATION

Conciliation is a form of mediation. Normally, conciliators act in good faith by adopting neutral, impartial positions in assisting parties to reach mutually agreed-upon solutions or in facilitating negotiations toward resolution of a particular dispute. Northerners may well recall that the parties appointed Thomas R. Berger as conciliator in the Nunavut Tunngavik Inc. (NTI) multi-million-dollar implementation funding dispute with Federal Finance.

IV. MEDIATION

For many Yukoners, their only experience with mediators may have been during matrimonial disputes or as union members.

In unionized workplaces, employer and employee representatives tread well-marked paths towards solutions. In the labour-relations field, the first step is a simple one in which a worker files a grievance – which, under the terms of the collective agreement between the company and the union, could involve anything from harassment to overtime pay to safety. If the worker or their union steward cannot immediately settle the matter with the immediate supervisor, the complaint will be handled by progressively more senior officers on both sides and rise from low-cost to higher-cost steps.

The second step has the union file a written grievance. At this point, the union's staff representative or business agent tries to settle the complaint with a more senior manager. Failing that, the two sides may refer the dispute to an outside mediator jointly selected by both parties. The mediator may move back and forth between the parties, defining and redefining issues, trying to craft a solution acceptable to both sides. If settlement cannot be found at this step, then the parties may "go to arbitration" by referring the dispute to an outside arbitrator or adjudicator jointly selected by the parties. The chosen arbitrator or adjudicator may hold a hearing with submissions from both sides before rendering a final and binding decision.

In the labour relations environment mediation is often the tool used when negotiations towards a collective agreement break down. At that point the union can choose either the conciliation strike route or the mediation arbitration route.

When the parties go into mediation, the mediator seeks verbal or written submissions from the parties on the issues in dispute

and may separate the parties and may move back and forth between the parties, defining and redefining the issues, trying to craft a solution acceptable to both sides.

As we can see, like Aboriginal government relationships, in labour relations the step-by-step approach to problem-solving embodies a "duty to consult" and a step-by-step approach to finding solutions. This means that only those issues the parties have failed to resolve at a lower level end up at the highest level of dispute resolution, namely binding arbitration.

In practice, most disputes are resolved before reaching the highest stage. In labour relations, as in treaty partnerships, dispute-resolution processes exist, not only to reach agreements but also to deal with competing interpretations of the language in agreements.

Like treaties, collective agreements can be complex documents whose wording may sometimes be read in different ways. Both sides need to know where they stand, so clarification is in everybody's interest. Each side needs to know precisely what its rights are and how they will be interpreted in practice. Building solid relationships between workers and their bosses depends on such understandings.

Of course, significant differences exist between union-management relations and treaty partnerships. For example, collective agreements are short-term (typically two-to-five-year agreements) deals between two parties. The UFA is a long-term contract - in the words of the early treaties, "as long as the sun shines" -- between three parties. Those two features represent distinct dispute-resolution challenges.

Even interim measures, Accommodation Agreements or other economic arrangements falling outside the jurisdiction of Canada's Supreme Court, allow for a wide variety of dispute-

resolution options under territorial, provincial and federal Commercial Interest Arbitration Acts. Such dispute-resolution processes can be established by contract and could, for example, include representative arbitration panels. They would permit, as stated in the Report of the British Columbia Claims Task Force on June 28, 1991, the development of resources in "preliminary or experimental ways" and build bridges to the implementation of negotiated treaties.

The B.C. Claims Task Force Report recommended a "mechanism to resolve disputes about matters of interpretation and implementation." The Task Force also anticipated the negotiation of interim measures or "Accommodation Agreements," as they later became known. "Interim measures" the report said, were intended to balance "conflicting interests until these negotiations are concluded." Such measures have concrete links to treaty negotiations. Others do not.

Either way, interim-measures negotiations and agreements could trigger disputes and require the creation of various dispute-resolution options.

V. ARBITRATION

UFA Chapter 26, Clause 7 requires the appointment of arbitrators within fifteen days of the referral of a dispute. Again, if the parties cannot agree on an arbitrator, the DRB may appoint one.

Usually an arbitrator's decision is not subject to judicial review. However, one party could appeal to the Yukon Supreme Court on the ground that "the arbitrator failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise jurisdiction." In most cases though, the arbitrator has the last word.

As with all ADR processes, arbitration requires the willing participation of all parties. Perhaps that should have been clear to the negotiators of Arbitration, Article 38, of the NTI treaty with Canada. The Inuit of Nunavut were proud to have negotiated an arbitration provision in the dispute-resolution chapter of their treaty and, in light of what happened next, why did federal representatives ever agree to it?

Logically, implementation funding agreements require stepped-up funding as a treaty's provision are put in place. When Federal Finance proposed instead to "flatline" implementation funding, NTI found itself in a serious financial dispute with Ottawa. Seventeen times NTI tried to invoke the arbitration provisions of their treaty, but each time Federal Finance stated that it did not do arbitrations. Obviously, this proved to be a nasty surprise because a key provision in a constitutionally protected treaty had been nullified by a single federal agency.

Ultimately, NTI sued Ottawa for $1 billion, and the case slow-walked through the courts until shortly before the 2017 federal election when Ottawa settled the dispute for a sum of approximately $300 million dollars, a costly and completely unnecessary consequence of ignoring the treaty's dispute resolution mechanism.

In management-union disputes, where neither side is ready to make any concessions, parties will seek out an arbitrator who will "split the difference" between them. In some jurisdictions, arbitration procedures are subject to tight rules. The problem, of course, with "rule-bound" arbitrations is that they provide little opportunity for self-design and, if the rules are too prescriptive, the first act of the potential client may be to hire a lawyer, which somewhat defeats the purpose of ADR. Notably the DRB does allow exemptions from its July 23, 2019 Arbitration Rules of Procedure.

VI. DIALOGUE

Dialogue, a consensus-building process, might not be in every mediator's toolbox but, after many years of experience with Simon Fraser University's Centre for Dialogue, ADR practitioners have come to value this kind of process, especially in "going deep" on complex and intractable problems involving a multitude of parties. True dialogue starts with active listening and open minds, then evolves into imaginative thinking. That, at least, is the idea.

An early dialogue experiment was the "Yukon 2000 Project" in 1985-86. At a time when the Territories mines were shut and land claims negotiations had broken down, the territory was ready to try something new. With no university and only a small body of recognized experts, the Yukon government chose to "mine the wisdom" of the local population. Looking back, the main value of Yukon 2000 was the *process* of bringing people together rather than in its published *product*. That's because in the modern world, even a great strategy can quickly become outdated.

A recent mediation project involved residents of an island community opposed to BC Hydro Smart Meters and the public utility. The *mediation* morphed into a *dialogue* with a surprising outcome. In passing, the community revealed that it had a garbage disposal problem and the utility offered to explore with residents a garbage-fueled energy generator for the island. Here was an example of how dialogue can generate new ideas by "digging deep."

Our legal system offers three avenues for resolving disputes: negotiation, mediation and courtroom adjudication. These can be discrete activities, or they can be combined in a variety of ways to resolve disputes.

VII. COURTS

The courts stand as alternative to ADR and mediation tools. The courts, the Supreme Court of Canada especially, do provide finality in cases such as: *Beckman v. Little Salmon Carmacks First Nation; First Nation of Nacho Nyak Dun, et al. v. Government of Yukon; and Teslin Tlingit Council v. The Attorney General of Canada.* However, given the high cost of court cases, Yukon taxpayers are entitled to ask whether even important disputes such as these might have been resolved in mediation.

Quite often, First Nations, resource companies, the federal, provincial or territorial governments and others negotiate interim measures, treaty-related measures, and other such agreements. These initiatives generally provide financial, economic and other benefits to First Nations allowing development to proceed on claimed lands, either as treaty negotiations proceed or with First Nations fiercely outside the treaty process. But when negotiations break down, the parties sometimes find themselves before the courts. As every Canadian knows, dozens of Aboriginal rights cases have gone before the courts.

Indeed, Supreme Court decisions in *Haida Nation v. British Columbia (2002), and Taku River Tlingit v. British Columbia [2002],* changed negotiating realities by asserting that governments have a duty not only to *consult* First Nations whose claims may be affected by industrial development, but also to *accommodate* First Nations' interests in the processes of issuing permits and allocating resources, particularly when government and industry are contemplating the extraction of resources from land subject to Aboriginal title claims.

For years now, Canadian courts have been urging governments and First Nations to get serious about negotiations, reconciliation and mediation. In the absence of government action, the courts have more tightly framed the issues and, it seems, deliberately

stirred public debates. Among the precedent-setting judicial decisions are: *Taku River Tlingit, Haida Nation, Gitxsan First Nation v. British Columbia [2002] B.C.J. No. 2761 2002 B.C.S.C. 1701 December 10, 2002, and Tŝilhqot'in Nation v. British Columbia [2014] SCC 44.*

Judges repeatedly emphasize that negotiations are the parties' preference. As stated by the B.C. Court of Appeal in *Haida #1*:

> Of course, as both this Court and the Supreme Court of Canada have said many times, a negotiated settlement, by Treaty or otherwise, complete or partial, is always better than a judgement after litigation pursued to the end. (para. 57).

But degrees of consultation--"deeper than mere consultation"--depends on the strength of the First Nation case.

VIII. CASES AND TOOLS

VIII A) Berger Conciliation

As with all ADR processes, arbitration requires the willing participation of all parties. In the middle of the NTI/Federal Finance implementation funding dispute, the parties appointed Thomas R. Berger as conciliator. In an interim report, Berger criticized negotiators on both sides for the vague language in the treaty and for punting difficult issues to the implementation stage. Famously, Berger also proposed an expensive Inuktitut language program that Ottawa chose *not* to fund.

The Government of Canada never did agree to arbitration in this case. Thomas Berger's final report on the implementation of the Nunavut land claims agreement delivered on April 5, 2006, said: "In December 2005, the Government of Canada and NTI reached an

agreement on implementing Berger's recommendations from his Interim Report… The Government of Canada continues to veto all attempts by NTI to refer disputes to the Arbitration Board in spite of harsh criticism from both the Auditor General of Canada and Berger."

Given this episode, it is useful to remember that, in many cases, conciliation, a mediation tool, *does* work, and, even if it achieves nothing more than to persuade the parties to reach out-of-court settlements, it has value.

VIII B) Mediation

A BCTC chair once claimed that its commissioners could also play the role of mediators, but the appointment process makes that difficult. Most of the treaty commissioners are appointed by one of the three parties to the negotiations. As such, they probably would not be recognized as "neutral" individuals, neutrality being the essential characteristic of all trusted mediators. This principle would also apply in the Yukon.

VIII C) Self-Government Mediation

UFA Chapter 26, Clause 6 lays down the rules for Yukon treaty disputes, including a requirement that parties choose a mediator within 15 days and if the parties cannot agree on a mediator the DRB shall appoint one. Also, the DRB provides for the first four-hours of the mediator's costs.

A self-governing First Nation in BC asked a mediator to meet with individual legislators and Executive Council members at odds over a constitutional question. The Nation wanted resolution of a conflict arising from disputed interpretations of the provisions of the Nation's constitution. The Nation had adopted their constitution following the finalization of a treaty with Canada and British Columbia.

Their treaty turned the Nation from an *Indian Act* band into a self-governing community, with jurisdiction over a wide range of issues. The governance dispute between its legislature and the executive seemed complex and painful, although at one level, this dispute seemed to touch on age-old conflicts between Indigenous and Canadian norms of governance.

As the contracted third-party, the mediator began work on this dispute, but several days into the project, the Nation's elders asked if he would be willing to partner with a First Nation elder. The elder encouraged the mediator to continue interviewing parties to the dispute but offered to review each of a series of draft reports before placing them before the parties for comment.

Ultimately, in this case, the core issue turned on a fundamental question of fact. That settled, the elder and the mediator presented their report and recommendations to the Nation's general assembly, where it received unanimous approval. In this case, a bicultural mediation team turned out to be the correct instrument, one not described in any agreement but designed by the parties to address a particular problem at a particular moment.

VIII D) Fact-Finders

Late in the self-government mediation described above, the parties asked the mediator to consult a former Attorney General on a single point. As already noted, facts matter in disputes, and the attorney in that case became what professionals call a "single-issue fact-finder" and that sidebar process an "early neutral evaluation."

Lawyers involved in fact-finding processes can engage another neutral expert to gather all relevant information and then to provide a factual determination of the facts in question. Of course, the disputing parties can also choose a neutral expert

to provide a professional opinion within the area of their specific expertise. In certain cases, a neutral expert might be a traditional-knowledge keeper, for example, a trapper with long-term knowledge of a particular area. This trapper's evidence might be useful in countering the view of an academic expert with only short-term experience on the same ground.

Also, every mediator knows that when a dispute is *not ready* for resolution, they should "book-out."

All the above cases show that a well-equipped ADR toolkit offers a range of tools and a spectrum of choices for mediation professionals.

VIII E) Nunavut Tunngavik Inc. Arbitration

In the NTI implementation funding case, the federal government's refusal to participate in arbitration processes built into Nunavut's constitutionally protected land-claims agreements would warn Indigenous Parties still in negotiations to take great care with drafting dispute-resolution chapters in their treaties, but one obvious solution suggests itself: *Test* the tools during negotiations.

Also, federal resistance should not prevent First Nations and territorial agents from employing the arbitration option, if that tool fits the need in some future dispute. For example, Ottawa might not participate in most treaty arbitrations, but in a dispute between the Yukon Government and a Yukon First Nation, those two parties could agree to bring in an arbitrator, even a panel of three arbitrators, with Ottawa acting as the "neutral chair."

VIII F) Arbitration and Other Panels

Faced with challenging public-policy questions, governments often appoint panels to seek citizen input and make

recommendations. In Canada, the most important panels are often called “Royal Commissions,” such as the Truth and Reconciliation Commission, an investigation into Canada’s system of residential schools for Aboriginal children, or a major public inquiry such as the one concerning Murdered and Missing Women which provide comprehensive and much-read reports.

Other panels are asked only to listen and report back.

In May 2016, Hon. Jim Carr, Canada’s Minister of Natural Resources, appointed a three-member Ministerial Panel to engage Canadians on the Trans Mountain Expansion (TMX) Project. The panel’s principle task was to travel the pipeline’s route and gather citizen views on the proposed TMX project. Specifically mandated to complement the National Energy Board’s environmental assessment and regulatory review by identifying significant outstanding issues from the public’s perspective with respect to the proposed pipeline and shipping route, the panel hosted hearings in Calgary, Edmonton, Vancouver and Victoria plus other communities along the way.

Thousands of intervenors attended the panel hearings in Alberta and British Columbia, and public demand forced panelists to add extra hearing days. Still, the panel delivered its report to the minister on schedule in the hope that it would help inform the Government’s December 2016 decisions on the project. An arbitration panel, on the other hand, may be empowered to address and solve serious or urgent problems.

The labour-relations field developed such procedures so that, in a dispute between employers and unionized employees, the parties could make their case before arbitrators, conciliators or fact-finders and mediators.

VIII G) Dialogues

On March 16, 2018, Simon Fraser University hosted a well-attended dialogue: "Reconciliation in BC: When are we going to get to the hard stuff?"

This one-day conference brought together Indigenous and non-Indigenous British Columbians to address a wide range of issues: resources, fisheries, and forests, conservation and revenue-sharing, including especially the United Nations Declaration of the Rights of Indigenous Peoples, major project (pipeline) conflicts, land and water management, Aboriginal rights and title, accommodation agreements, treaties and other reconciliation issues.

The speakers' list included then Justice Minister Hon. Jody Wilson-Raybould, BC Premier, Hon. John Horgan, BC Attorney General David Eby, INAC Senior ADM Joe Wild, BC Aboriginal Affairs ADM Jessica Wood and other senior officials. Each conference panel included both Indigenous and non-Indigenous speakers, and there was gender balance between panelists. Significantly, First Nation elders, leaders and scholars counted as forty-five percent of the attendees.

Argument, agreement, exploration, listening and learning filled the day. Dialogue processes often migrate from arguments and analysis to discussion to debate to dialogue, but "moments of true dialogue" or "deep listening" can be rare. At the end of the day, a dialogue rapporteur tries to capture those precious moments.

However, as with Yukon 2000, the *process* is sometimes the *product*. In contrast to the pettiness of noisy headlines and the bickering of party politics, it turns out that people thoroughly enjoy the experience of quiet conversation and building consensus, agreement by agreement.

Sometimes, though, dialogues produce wonderful surprises. The four-year "Imagine BC" process devoted one year to education policy questions. One fiercely argued question was the merit of Civics or Social Studies for building the values of citizenship among young people. On the other side were advocates for "practical" classes in Entrepreneurship and Consumer Education. Once the conversation evolved from loud debate to thoughtful dialogue, a surprising consensus emerged. The answer on which participants agreed was that, from their first day in school children should be treated as citizens with "rights *and* responsibilities."

When faced with complex or difficult issues, public dialogues might be a tool that Yukoners could choose to use.

VIII H) Circles

Land-claims negotiations have long debated the merits of interest-based negotiations versus positional bargaining. Some negotiators hold that interest-based negotiations work best on qualitative issues and positional bargaining works best in quantitative issues.

Most treaty-implementation disputes seem to concern *quantitative* issues, but we might consider the possibility that some questions might not be one-dimensional and that for First Nations, *qualitative* questions often arise. When that happens, mediators and negotiators need to understand that an underlying *cultural conflict* may exist between Western intellectual traditions in science or law and the qualitative dimensions of traditional knowledge of land and resources.

One of the mediation deficits in Yukon treaty disputes is Yukoners' lack of familiarity with ADR tools. By now though, Yukoners are well-acquainted with sentencing circles, a locally developed and culturally appropriate mediation tool, and its

practitioners, originally Barry Stuart and Mark Wedge. In any case, circles are priceless examples of self-design.

Sometimes senior governments hand down strict requirements for dispute resolution, including formalized steps and tight time limits. Even dispute-resolution professionals can find mediation difficult in such circumstances.

The bid terms for a federal government facilitation contract might dictate strictly governed procedures, well designed for large law firms with bid-submission departments but not for a sole practitioner working in areas such as the Yukon Territory. Rigidly structured processes with rigid time limits often amount to barriers to dispute resolution rather than supports. Such contracts are the enemies of self-design.

VIII I) Self-Design

The DRB mediation and arbitration rules of procedure actively encourage self-design and incorporating First Nation values.

Self-design stands as the cornerstone, or "key-log," principle in dispute-resolution procedures. Northern parties especially, as citizens of cross-cultural communities, should always enjoy the power to shape a dispute-resolution process to fit the issue in dispute. This design process itself we might think of as a form of self-government.

The parties to the Nunavut land-claims implementation funding dispute, NTI and Canada, might have avoided this conflict if they had test-driven their dispute-resolution chapter, explored self-design options, and, if necessary, rewritten the dispute-resolution language in their agreement, before embedding it in a constitutional document. As well, they might have sought the assistance of trained mediators from the start.

Flexible arrangements, such as conciliators, facilitators, dialogues, mediations and arbitrations, could be used both in treaty negotiations and in treaty-implementation disputes. Similarly, Yukon treaty parties and those First Nations still in negotiation could design their dispute-resolution regimes to fit the particular expertise and cultural perspectives of both the First Nation and government parties involved. Such designs would aim to enhance, not reduce, the parties' control of the processes.

Facilitation, mediation, and other non-binding processes, such as circles and dialogue, do not require a legislative framework and can be structured solely by contract. Such procedures allow the parties to:

i. Design--and, if necessary, redesign--the systems themselves;
ii. Choose their own facilitators, mediators, arbitrators, experts and neutral persons;
iii. Set their own schedules;
iv. Decide the rules of the chosen process;
v. Avoid the high cost of lawyers, litigation and court processes and create more accessible forums;
vi. Meet public expectations that agreement--not endless argument--is the goal;
vii. Achieve resolutions tailored to the parties' needs, rather than court judgements that may *please nobody*; and
viii. Focus on long-term relationships rather than short-term problems of the past.

The basic legal framework in collective bargaining is the building of a long-term negotiating relationship. This is where the parties maintain the most control. And they, not a third party, are the experts in regard to their own interests. Inevitably, however, negotiations can, at some point, reach an impasse. The parties in labour relations have devised a wide variety of processes to break such an impasse and foster long-term relationships.

One might illustrate this point with an example from one mediator's toolkit. Some years ago, a consultant colleague asked the mediator to look at a particular challenge in the Eastern Arctic.

In this location, many workplace disputes arose between English-speaking managers and Inuktitut employees. Having exhausted the usual grievance procedures of the standard labour-relations toolbox, these disputes were then referred to arbitrators, usually senior judges from outside the region. For obvious reasons, these learned judges had little local knowledge and less cultural sensitivity to the Indigenous employees. As a result, much unhappiness attended these arbitration decisions. "Might there be another approach?" the ADR practitioner was asked.

Borrowing from Expedited Dispute Resolution articles in education and health-sector collective agreements in British Columbia, the ADR practitioner proposed a practical and sensible alternative: develop a roster of fluently bilingual elders from the area--for example, retired public servants--who might sit with the aggrieved employee and their supervisor, hear out both in their respective languages, and then verbally offer a solution to the dispute. If acceptable to both, then that would end the matter. Such an Expedited Dispute Resolution tool would serve the self-design principle, starting with the selection of a bilingual mediator by the two persons in conflict.

Incidentally, a small fortune in arbitrators' and lawyers' fees would also be saved. Among the factors entering into design decisions must be time, cost, and the avoidance of unduly legalistic processes. Sadly, in this case, while Inuit politicians seemed to welcome the proposal, senior non-Inuit managers preferred the familiar and highly expensive alternative of imported-judge arbitrations. Perhaps the next generation of senior managers will see the wisdom of self-design or expedited dispute resolution alternatives.

The parties to the NTI treaty-implementation funding dispute might have avoided years of conflict if--during treaty negotiations--they had test-driven their dispute-resolution chapter, explored self-design options, and, if necessary, rewritten the dispute-resolution language in their agreement, before embedding it in a "constitutional" document.

Better yet, as one former Chief Negotiator has suggested, they might have sought the assistance of trained mediators from the start. One other solution also suggests itself: Test ADR and mediation tools during negotiations, and be prepared, if necessary, to design and redesign new tools.

For those accustomed to thinking of mediation as an activity between two parties, the tripartite character of the UFA might loom as a barrier to designing dispute-resolution tools. However, most disputes would put two parties against one, and not always the same two parties. That the Yukon treaty-negotiation tables were three-sided must be a factor in dispute-resolution design decisions.

A mediator should be able to facilitate the parties through the self-design procedures combining options and tools--dialogue, debate, negotiation, mediation, loop-backs, breaking for fact-finding and/or consultants' reports then resuming with new information, conciliation, circles and cultural values.

Not only does the DRB provide for the first four hours of the mediator's fee, it has always been an advocate for mediation. The DRB Arbitration Rules of Procedure also encourage self-design using various tools and incorporating Yukon First Nation's values.

Indeed, Chapter 26 requires the parties to "establish a comprehensive dispute-resolution process for resolving disputes which arise out of the interpretation, administration or implementation of Settlement Agreements or Settlement Legislation." Again, the word "comprehensive" suggests the use of a wide range of ADR tools. Accordingly, the Yukon mediator's toolbox should include all of the following: facilitation, fact-finding, conciliation, mediation and arbitration, but also dialogue, which can encompass everything from discussion to debate to deep thinking, also circles. Based on the sentencing-circle experience, Yukoners know that circles represent a time-tested and culturally authentic form of dispute resolution, with which the Territory has plenty of experience.

When the governments - Federal, Yukon First Nations and Yukon – are faced with negotiation or implementation disputes the DRB anticipates the parties will consider ADR under UFA Chapter 26 as an option before going to court.

Non-adversarial ADR fosters strong government-to-government relationships, advances reconciliation and upholds the spirit and intent of the Yukon First Nation Settlement Agreements.

Acronyms

UFA Umbrella Final Agreement
ADR Alternative Dispute Resolution
DRB Dispute Resolution Board
BCTC British Columbia Treaty Commission
NTI Nunavut Tunngavik Inc.
TMX Trans Mountain Expansion

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- ***"Reconciliation: First Nations Treaty Making in British Columbia", Douglas & McIntyre, 2006***
- ***Tony Penikett, "A 'literacy test' for Indigenous government?" Northern Public Affairs, 1.1, Spring 2012***
- ***Tony Penikett and Adam Goldenberg, "Closing the Citizenship Gap in Canada's North: Indigenous Rights, Arctic Sovereignty, and Devolution" Michigan State International Law Review, Volume 22, Issue 1, 2013***
- ***Terry Fenge and Tony Penikett, "Paper Promises – By avoiding treaty obligations, Canada undermines its own legal basis", Literacy Review of Canada, July/August 2014***
- ***Hunting the Northern Character, UBC Press, 2017***