Yukon Dispute Resolution Board

Resolving Conflict: Finding the Way Together

Alternative Dispute Resolution and Chapter 26 of the UFA

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www.drbyukon.ca

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Purpose

The Yukon Dispute Resolution Board (DRB) is providing this paper to Yukoners to increase awareness and understanding among all of us on different ways that disputes can be resolved between governments of the Yukon First Nations, Canada, Yukon, and the public. The DRB's focus is on helping where there are different views on the meaning of and commitments made in Yukon Land Claims Agreements (Final Agreements) and Self-government Agreements (SGAs). There are 11 Final Agreements all based on the Umbrella Final Agreement (UFA, 1993). Chapter 26, "Dispute Resolution", is found in all Final Agreements. It provides ways disputes can be resolved, and it is this Chapter that provides for the creation of the DRB. This paper explains why alternative dispute resolution (ADR) options are useful in many cases to secure lasting understandings among parties "in a non-adversarial and informal atmosphere" (UFA, s. 26.1.1.2).

"[The UFA] sets out how a unique and dynamic partnership will work now and in the future between First Nation and non-First Nation Yukoners. It is a key part of the Yukon social contract. All Yukoners are affected by it and are partners in how it works - all Yukoners are treaty people."

– The First Principles Project: 40@-40° (2020)

We still have a long way to go. Even with our Land Claim and Self-government there is little reflection of our Indigenous history in the public-school curriculum. I learned nothing about my rich history until my Native Grad and a short course I took at Yukon College. I now teach Indigenous and non-Indigenous people about our history through the experiential blanket exercise and I always hear that "we did not know!" from Indigenous and non-Indigenous participants alike.

– Teagyn Vallevand, Kwanlin Dün First Nation

Background

The vision for the UFA and today's Final Agreements and SGAs was first given voice in "Together Today for our Children Tomorrow". This short, yet powerful document was presented to Canada's Prime Minister by Yukon First Nation leaders in Ottawa in 1973.

It reflects a number of foundation values that the Elders and leaders believed and still believe must be the basis for the relationship among all people residing in Yukon: respect, trust, benefit to all from economic advancement, and partnership in land, resources and environmental stewardship. This document was accepted by the Prime Minister as the basis for negotiations of Yukon land claims. A theme throughout "Together Today…" is that Yukon Indigenous people do not want "hand-outs" but want equal footing for

> *Good relationships reduce the prospects of taking disputes to the courts. First Nations envisioned a dispute resolution process that respected traditional ways of resolving issues in harmony, not just the adversarial process built into the court system. This method accommodates the ability of everyone to participate, even at the village level. Since this chapter was developed, however, it has almost never been used.*
>
> – The First Principles Project: 40@-40° (2020)

building capacity to thrive in a modern world. At the same time, economic advances must not destroy the diverse cultural heritage First Nations have embraced for thousands of years. The key message is about partnership in progress while respecting riches in diverse cultures.

For two decades negotiations took place. The UFA was finalized in 1993 and after that the 11 Final Agreements and SGAs were negotiated. The Final Agreements are true Treaties among the peoples of Canada, and enjoy protection from Canada's highest law, the Constitution Act, 1982.

Negotiators knew disagreements were inevitable among the parties. They designed various options for dispute resolution in Chapter 26. That Chapter ultimately says that the formal, rigid and adversarial framework set out in the courts system is not the only way parties can resolve differences. Positive dialogue and resolution with other parties using a range of alternatives can lead to success in very different ways. In some cases, the Courts are the right forum to address matters such as treaty rights, but in many cases it is believed that a more flexible and less formal approach would be the better way to gain lasting agreement. The Courts should be the last resort.

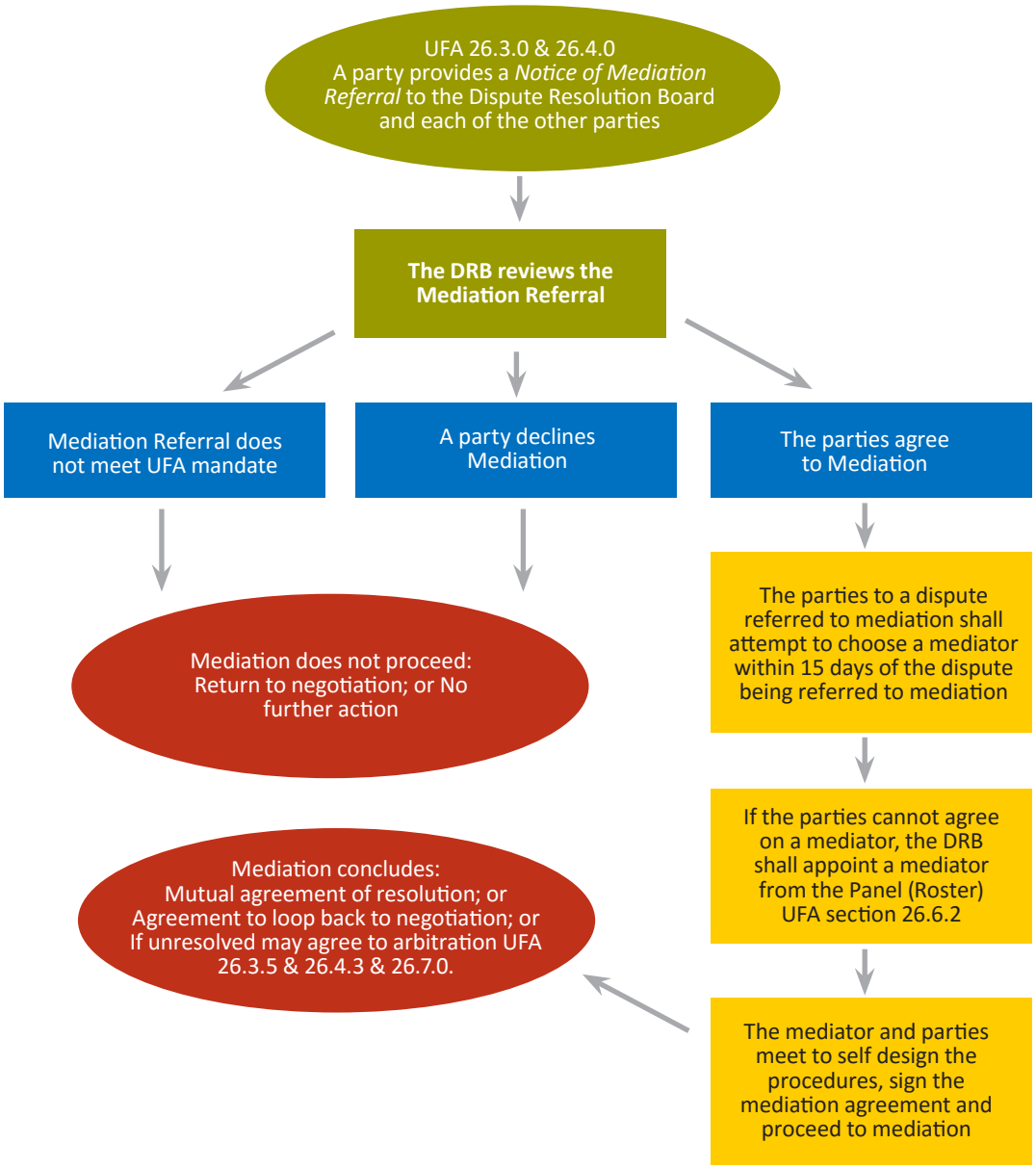
Despite the alternatives provided in Chapter 26 these have not often been used in the three decades since the UFA was finalized.

What's in Place Today?

The following table captures the process used now by the Yukon Dispute Resolution Board.

Mediation Referral Process

Umbrella Final Agreement Chapter 26
Mediation Rules and Procedures can be found at the website: www.drbyukon.ca



What Is Alternative Dispute Resolution?

"Alternative Dispute Resolution" (ADR) is the phrase used to capture all other ways to reach agreement outside of the Courts. Ultimately when negotiations break down, parties can agree to look at the nature of the dispute and decide what "tool" would best fit to address the issue.

The following table gives the range of options from collaborative dialogue at one end through to the formal, controlled, rules-based Courts system at the other end.

Alternative Dispute Resolution Spectrum

Collaborative Dialogue Implied in UFA (s.26.6.2)	Negotiation Implied option in UFA	Mediation UFA (s.26.6.0)	Arbitration UFA (s.26.7.0)	Courts
- Very informal	- Positional	- Somewhat informal	- Formal	- Formal
- Can be designed by parties entirely	- Determine own negotiator	- Mediator can be selected by parties	- Strict procedures (witnesses, documents etc.)	- Strict procedures
- Parties may or may not include outside facilitator(s) to encourage success	- Negotiate rules for negotiations	- Can determine own procedures	- Can cut down time	- Adversarial
- End result and timelines may be unpredictable	- Mandates set up front and may be amended by the parties	- Financial support from DRB	- Parties agree on arbitrator or one can be assigned	- Litigious
- Potentially expensive	- Main table and subject tables set	- Very flexible on who can join to provide input & advice	- Arbitrator's decision only appealable to Courts (binding)	- Lengthy
	- Often complicated	- Can determine location and timing of sessions	- Can break to seek outside input	- Western legal rules
	- Often lengthy	- Considered confidential unless parties agree otherwise	- Questions of Law to Yukon Supreme Court	- No control over who will be Judge
			- Can determine location	- Recourse is to a more senior Court
			- Rules state most information will be considered confidential	

The tailoring of the process to exactly the circumstances is a capacity you have under the rules and procedures of the DRB.
– Gordon Sloan, Lawyer/Mediator

Mediation is the first option in Chapter 26. It has been used the most when parties have dealt with issues. Indeed, the other avenue, arbitration, set out in the Chapter has never been used. Mediation is a very flexible process, and usually moves through five general stages: (1) introductory meeting where parties share thoughts on the nature of the issue and discuss what they want to see happen; (2) story telling by the parties of their experience and view of what is not happening right; (3) brainstorming so that "out of the box" ideas can be put on the table for consideration; (4) evaluation of alternatives with the "pros" and "cons" of these; and (5) closure where there is an agreement reached by the parties. The mediator may move back and forth through a number of phases where parties do not agree.

Key Advantages of ADR

There are a number of advantages to the two ADR approaches set out in Chapter 26 – mediation and arbitration – when compared to the formal Courts system.

Courts tend to be rigid, formal, highly rules-based and time consuming. There is no ability to control the timing when you will be heard, and you have no ability to control who will be the Judge. You are putting yourself in the hands of the Court.

Mediation and arbitration provide more simplified processes and are therefore less time consuming. With mediation, parties can control the design of processes to a considerable extent, which can result in a greater chance of acceptance of the outcome by all parties involved in resolving the dispute. Many topics are sensitive in nature and therefore UFAs. 26.6.7 sets out that mediation will be confidential unless the parties agree otherwise. The rules state that arbitrations will be private and confidential unless the parties agree otherwise, or unless the law requires disclosure. Where there is doubt about whether something is confidential or not in the proceedings, the arbitrator decides.

A key difference between mediation and arbitration is that parties control the final outcome of mediation, whereas through arbitration they are putting the decision in the hands of the arbitrator. However, both options are less formal with potential to lead to better acceptance of the outcomes.

Carving out options for ADR

A roster has been set up by the DRB of qualified mediators and arbitrators that parties can choose from. Thus participants can choose who they trust as mediator or arbitrator.

Timing of ADR is in the hands of the participants. The parties can call for time to allow them to consult with Elders and community opinion leaders to get what they need to facilitate resolution of the issue.

What's In Chapter 26?

> *The difference between western values and indigenous cultures is the value of negotiation, this was not in the agreement but in the relationship.*
> – Barry Stuart, Yukon Chief Land Claims Negotiator

Chapter 26 is all about dispute resolution. The DRB oversees support for dealing with disputes set up in this Chapter with the appointment of its three members by the three parties to the UFA, the Government of Canada, the Council of Yukon First Nations and Government of Yukon. The DRB has been in place since April 1996 and facilitates resolution of disputes through a first stage of mediation. If that is not successful, the dispute can go to a second stage of binding arbitration.

Most disputes can be addressed through mediation. Mediation is used in three areas: (1) where the UFA refers an issue to dispute resolution, (2) where other agreements (including Final Agreements and SGAs) refer matters to the Chapter 26 processes, and (3) any other matter that the parties to a Final Agreement refer to mediation whether or not they are about a Final Agreement or SGA. Each party is asked to provide its view of the issues that need resolution and any useful documents to support the argument.

The DRB provides four hours of mediation free of charge, and after that, if more time is needed, the cost is divided among the parties. Some other costs can also be covered relating to travel and other costs to individuals who are involved in the mediation.

Another useful service provided by the DRB is the upkeep of a roster of mediators and arbitrators that the parties can choose from. The DRB ensures that the people on this roster have good training and that they know the history and values that are set out in the UFA.

"I believe it is the responsibility of Yukon First Nations to come to the table, to the fire, as teachers. As we revitalize our cultural values, our approach to governance is evolving. In the spirit of the Agreements, we must move past 'us versus them' and extend our hands to walk our Yukon path together as 'we'. To me, current practices such as 9-5 office work and rigid policy must evolve to reflect our obligation to the land and each other. We must be honest, resilient, strong, and capable. It is our responsibility to share the innovation and awe of our awakening with our partners. Yesterday, our leaders fought and sacrificed; today, we connect and innovate; so tomorrow, our children, land and society can thrive in contentment and dignity."

– Jocelyn Joe-Strack M.Sc., Champagne & Aishihik First Nations Citizen and passionate Yukoner

Experience with ADR

The Chapter 26 processes have been relied on with various degrees of success since 1996.

Out of the starting gates in 1997 a referral to mediation was resolved through a meeting before mediation was formally started.

2002 saw success at mediation through a four-hour session relating to a trap line concession holder.

Other topics that have been considered for mediation under Chapter 26 procedures include land use overlap, human resources and social development, education programming, Income Tax, child and family services, resource royalty sharing, obligations under Financial Transfer Agreements, and hunting rights.

Unfortunately, four of these matters did not proceed due to one of the parties not accepting their eligibility for a mediated settlement.

Where mediation did take place, five disputes were resolved through mediation or pre-mediation. One success story involved using the flexibility of the process by breaking for more research and information sharing, demonstrating the values of a more flexible process.

In only one circumstance did the DRB decide that a matter was outside of its mandate.

To date there have been no referrals from mediation to arbitration. However, at the outset of a process started through the services of the DRB, the parties can decide to have a combined mediation and arbitration process. Once common ground is worked out through the mediation process, an arbiter can be asked to reach a final decision based on the materials considered appropriate through mediation.

These processes are not stagnant processes. We recognized that they would evolve over time as understanding, trust and respect grow.

- Dave Joe, YFN Negotiator Counsel

Conclusion

The leaders who gave direction to the UFA negotiators shared an interest in setting the stage for a strong and prosperous Yukon. The territory would be one in which everyone could benefit from its riches. These benefits would not jeopardize the cultural and heritage values of peoples but would use these as the foundation for shaping common direction.

It was envisioned that the parties to the UFA would, from time to time, hold different views on how the UFA should be interpreted and how it should be implemented. They saw the value of alternative ways to deal with disputes, and that is why Chapter 26 was written.

Both mediation and arbitration are provided for in Chapter 26. Their advantages come from the involvement of the parties in designing those processes and in choosing the neutral people who can help them resolve issues. Set in an environment of respect and collaboration, these ways of settling differences can save time, and reach conclusions which parties can embrace. Unlike the Courts system where outcomes often result in “winners” and “losers”, successful work by mediators or arbitrators is often seen as “win-win”.

As the First Principles Project notes, “all Yukoners are treaty people”. In this context working through challenges to find shared outcomes is the right way forward.

Ultimately, we have only had 25 years of experience with the new relationship set out in the UFA. That is not a long time for a multi-generational vision for the future. It is the DRB’s wish to bring more awareness of the ADR processes set out in Chapter 26 to the parties to the Treaty and to all Yukon residents, including future generations who will be taking up the Treaty cause.

Sources

There are a number of places you can go to learn more about ADR and the specific opportunities set out in the UFA.

The following references may be useful.

Dispute Resolution Board of Yukon website
https://www.drbyukon.ca/

DRB Arbitration Rules pdf
http://www.drbyukon.ca/wp-content/uploads/2019/10/Arbitration-Rules-of-Procedure-2019.pdf

Umbrella Final Agreement and "Understanding the Yukon Umbrella Final Agreement: A Land Claim Settlement Information Package." Fourth edition, 1997:
https://cyfn.ca/agreements/umbrella-final-agreement/

"Together Today for our Children Tomorrow"
https://cyfn.ca/agreements/together-today-for-our-children-tomorrow/

Alternative Dispute Resolution Institute of Canada
https://adric.ca/

For a chronology of land claims negotiations see
Marilyn Jensen and Ingrid Johnson, "Yukon First Nation Land Claims Chronological Listing of Events from 1973-1993" by LegendSeekers Anthropological Research, 1997.

Justice Institute of BC website
https://www.jibc.ca/

THE FIRST PRINCIPLES PROJECT: 40@-40° Summary of discussion
http://polarconnection.org/wp-content/uploads/2020/02/Final-FPP-Jan-30-2020-copy.pdf

Acknowledgement for compiling this document for the Dispute Resolution Board is credited to:

The Northern Governance Institute (nGI) is Whitehorse based, primarily serving Yukon First Nations and public government with all things relating to how these organizations govern themselves. **Kirk Cameron** is the President of nGI, and offers services in the following areas: legal and constitutional development, strategic planning, government organization, meeting facilitation, training and communications.

and

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'CHAK' BY WILLIAM CALLAGHAN

Artwork by **William Callaghan** with permission from Pearl Callaghan. Photographed by **Minnie Clark Photography**.

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