Reaching Resolution

A Guide to Designing Public Sector Dispute Resolution Systems

BRITISH COLUMBIA

Ministry of Attorney General
Justice Services Branch

Contents

Forward

The Dispute Resolution Office

It is undeniable that mediation and other dispute resolution techniques are important tools. The Ministry of Attorney General established the Dispute Resolution Office (DRO) in 1996 with a view to developing and implementing the widest possible range of dispute resolution options in the court system and in government generally. To this end, the DRO provides advice and information, develops dispute resolution policy and programs, conducts research into dispute resolution-related issues, and acts as a liaison between dispute resolution resources both inside and outside of government. **The DRO exists to help people use mediation and other dispute resolution processes better and more often.**

How to Use Dispute Resolution Processes in Your Organization

As knowledge of the benefits of dispute resolution techniques grows—namely, savings of time and money, party satisfaction, and procedural streamlining—so, too, has the need for advice and guidance on how to design processes to achieve those benefits. Since its inception, the DRO has seen the number of public bodies interested in dispute resolution options increase dramatically. Many such bodies seek to strengthen already existing dispute resolution mechanisms. Others are looking to build a dispute resolution system from scratch or are simply assessing the potential usefulness of such a system.

In response to the demand for information about public sector dispute resolution design, the DRO has developed this guide. While it is not an exhaustive resource, it is a useful starting point for agencies or organizations interested in the use of mediation or other collaborative approaches to conflict.

Part 1:
Dispute Resolution Systems and Design

What is an Alternative Dispute Resolution System?

Simply put, a dispute resolution system is the mechanism used by an organization to resolve conflicts. Sometimes this process is an explicit, formalized one. For example, some environmental regulatory agencies manage disputes according to an established complaint cycle. Other times, disputes are managed informally on a case-by-case basis.

Clearly, a well planned and articulated dispute resolution system is not only preferable but crucial to the efficient functioning to most public agencies or bodies. A strong system is one in which processes for dealing with disputes are organized along a continuum. At one end are dispute resolution options which afford disputants the most control over the process and the outcome (e.g. negotiation and mediation). At the other end are options in which disputants exercise little control over the process and the outcome is imposed (e.g. adjudication).

Dispute resolution design attempts to tailor the conflict resolution options to the specific needs of an organization, including the volume and frequency of disputes with which it is faced. Any organization can benefit from considering dispute resolution design since even undertaking an initial assessment of whether a dispute resolution system is appropriate raises awareness of the organization's structure and functioning.

Part 2:
Steps in the Design Process

Overview:

There are a number of overarching principles that the DRO incorporates into any design process. These are:

1. **Access:** that appropriate options for preventing conflicts and resolving them at every stage of a dispute be available and easily accessible.
2. **Community Participation:** that conflict resolution resources exist within various communities and that these communities, in appropriate circumstances, assume an active role in resolving disputes.
3. **Individual Satisfaction:** that dispute resolution options maximize individual involvement and satisfaction with the process.
4. **Equality:** that dispute resolution processes be structured to balance power inequities between the parties.
5. **Quality of Resolutions:** that settlements be fair and equitable and that the parties honour them.
6. **Efficiency:** that dispute resolution options:
   (a) be well-matched to the dispute,
   (b) be cost-effective, and
   (c) minimize delay in reaching resolution.
7. **Awareness:**
   (a) that the public be aware of alternative dispute resolution options;
   (b) that individuals understand how co-operative approaches to dispute resolution work.

STEP 1 – The Design Process

A. What is a Design Team?

Designing a dispute resolution system is not always a complicated task, and a design team consisting of just a couple of people may suffice. However, for many government organizations a more elaborate design team is required. Members should be selected on the basis of their knowledge of the organization, the disputes it faces, and general principles of dispute resolution design. In addition, they should also have adequate time and enthusiasm to bring to the project.

Design team members may be drawn from both internal and external sources. Possible internal stakeholders include:

- decision makers within the current dispute resolution process (e.g. tribunal members)

- decision makers within the organization (e.g. senior executive)
- legal specialists
- human resources specialists
- program managers
- system administrators
- policy specialists
- relevant employees
- union representatives

Possible external stakeholders include:
- disputants from regulated sectors
- organizations representing disputants (e.g. professional bodies, advocacy groups)
- contractors
- dispute resolution design consultants

In the end, conflict management systems will be more effective if they are designed with, not for, those who use or are affected by them. This has not been the traditional approach, but it is strongly recommended. While it can add time and complexity to the task of designing the system, this approach has two important implications. First, those who use the system can provide a great deal of practical information about what will and will not work. Second, stakeholders who have participated in the design ultimately own the design, with the result that there is better buy-in, significantly reducing the number of potential implementation problems.

Resources and time permitting, engaging external stakeholders should go beyond a simple public consultation stage and embrace an active collaborative process. A collaborative process is not simply submitting public feedback and responding to the concerns raised. In a collaborative process, stakeholders work directly with the agency in building or improving the agency's dispute resolution system.

There are many other advantages of engaging the users of a dispute resolution system in its establishment or renovation. Collaborative design processes are useful for building trust among diverse communities. Second, such processes can help to ensure that issues, especially those which cut across jurisdictional lines, are dealt with in a comprehensive way. This, in turn, will not only improve the quality of dispute resolution options but ensure public resources are used in the most efficient way possible. Third, directly involving stakeholders in the design process provides an excellent educational opportunity since they will return and report their progress to their constituencies. Finally, it is an effective way to establish or to improve ongoing relationships. As people work through differences to reach a collaborative approach to dispute resolution design, hopefully, they will develop a greater sense of understanding and camaraderie, which will forge a stronger base for future cooperation.
Particular attention should be paid to those stakeholders who seem resistant to the introduction of changes. Including them on the design team may prove an effective way to offer reassurance. The more they participate in designing the ultimate dispute resolution system, the more likely they will embrace the new changes.

B. Develop the Mandate of the Design Team

Once the organization has chosen the design team, it is vital that participants understand their role, as well as the role of the other members of the team. For example, it is important to clarify whether team members are speaking only for themselves or as representatives of a larger body. Equally important is the need to identify those with decision-making authority. If the team cant make decisions, then provision for a reporting mechanism must be made.

Effective communication between members of the design team lies at the heart of ensuring that the team acts with a common purpose. Members of the team bring different experience and knowledge with them to the table. Some may be very knowledgeable about dispute resolution. Others may possess extensive information about the organization and its history. Allowing team members to educate one another so that everyone is working with the same basic information ensures that the team best capitalize on its full potential.

C. Workplan

The next step for the design team is to create a work plan outlining specific tasks, deadlines and the people responsible for those targets. Such a plan provides focus to the design project and helps to ensure that the project does not get bogged down.

STEP 2 - Organizational Assessment

While it is tempting to jump immediately to consideration of various dispute resolution options, the first step in the design process is to analyze the current dispute resolution environment. This exercise will highlight the strengths and weaknesses of any existing dispute resolution systems and provide insight into the kinds of dispute resolution options best suited to help fulfill the organization's mandate. The development of goals and objectives to support and guide a design project are dealt with at this stage.

Organizational Assessment

- ✓ *The Organization's Mission and Structure*
- ✓ *The Disputes*
- ✓ *The Current System*
- ✓ *Potential Barriers to Change*

A. The Organization

It is important that everyone involved in the design process shares a common understanding of the mission and culture of the organization. Questions to consider include:

- What is the organization's mission and structure?
- What is the organization's legislative or administrative framework—are there any legislated requirements?
- What is the decision-making structure?
- What is the organization's communication structure?
- What are the existing strengths of the organization that might support an effective dispute resolution system?
- What staff and other resources are available to design and implement a new dispute resolution system?

B. The Disputes

A significant portion of the initial assessment should be devoted to a "conflict inventory"—an analysis of the disputes faced by the agency or public body and how these relate to the body's mandate. This analysis is critical to the development of an appropriate dispute resolution system. The design team should consider the following:

(1) Nature of the Disputes

- Are the disputes external (e.g. the body is a public complaints commission) or internal (e.g. the dispute resolution system is intended to mend a troubled work environment)?
- Are the disputes about fact or law?
- Do they involve disagreements over technical issues or interpersonal interactions?
- When and where do the disputes arise?
- Are there typical disputes?
- Is precedent important in the resolution of disputes?
- Is confidentiality important to the parties?
- Are the disputes time-sensitive?

The answers to these questions will greatly impact the design process. For example, if the purpose of the agency is to resolve external disputes, such as a human rights body or a public complaints commission, then it is more likely to establish a sophisticated array of dispute resolution options. On the other hand, if the disputes are internal, then perhaps a less formal mechanism, with an emphasis on improving the organization's communication structure would be most suitable.

The roots of disputes are equally influential for the design team. Consider a government body that is faced with public resistance to land-use decisions based on environmental concerns. Assume that the public agency is responsible for building a pipeline, and the public fears that owl habitant will be detrimentally affected by the planned project. Factual information about owl habitat and nesting areas is at the heart of finding a workable resolution. Such fact-driven disputes may lend themselves to dispute resolution techniques such as joint fact-finding sessions.

In contrast, if the dispute is interpersonal, an apology might be the necessary first step to resolution. Unaddressed emotional needs may block other dispute resolution techniques.

(2) Number

- How many disputes does the organization experience?
- Which disputes are most prevalent?
- How frequent are disputes?
- Does the volume of disputes fluctuate over time?

Again, the answers to these questions will influence the design of a dispute resolution system. If few complaints arise, then an organization may choose to focus on improving how those disputes are addressed rather than using its resources to try to prevent disputes in the first place.

An analysis of the frequency of conflicts may provide valuable insight with respect to structural roots of conflict or bring to light any important facts. For example, if the level of conflict suddenly spikes after the implementation of a new policy, it may be a sign that

the organization is engaged in healthy growth; it may be the result of poor communication and training in implementing the new policy; or it may be that some aspect of the policy unintentionally creates conflict. If the latter is the case, then modifying the policy may be the solution rather than developing a particular dispute resolution process.

(3) Disputants

- Who are the parties to a typical dispute?
- Do the same parties appear time and again?
- Are they sophisticated users of the system?
- Are they normally represented by lawyers or advocates?
- Is the preservation of ongoing relationships important?
- Is there an actual or perceived imbalance of power between disputants?
- Are they individuals or organizations?
- Does the agency have an ongoing relationship with the parties?
- Does the agency always serve the same pool of disputants?

Any dispute resolution system must carefully consider the needs and expectations of its users. If the users of the system are unrepresented members of the general public, then the dispute resolution options should be straightforward and easy to use. This is less important if the users are professional advocates or lawyers.

If ongoing relationships are at stake, then dispute resolution options that are weighted to party control of both procedure and outcome are likely preferable. Parties that actively participate in crafting a solution to a given conflict are more likely to abide by that agreement and are more likely to be satisfied with it than those on whom a solution is imposed by a third party.

C. Current System

- If there is one, what is the current process for resolving disputes?
- Is there legislation that prescribes any aspect of the process?
- Are there written policies and guidelines that govern the process?
- How is the system tracked?
- How much does it cost?
- Do disputants, staff or other stakeholders express dissatisfaction with the process? If so, how do they express that dissatisfaction, and what are their concerns?
- What are the strengths of the current system? What makes them work?

Of course, it is not sensible to begin a new design project without first taking stock of what is already present. If there is an existing dispute resolution system, then building on its strengths whilst attempting to correct its weaknesses will be an important task for the design team. Mandatory elements of the system, such as those required by legislation or policy will need to be taken into account.

Furthermore, as public bodies come under increasing budgetary pressure, pragmatic decisions will need to be made about how to ensure the best value for the organization. For example, if the resources of an organization are being sapped by the sheer volume of disputes, the design team may wish to consider both ways to prevent those disputes from formulating in the first place and establishing early dispute resolution options before positions become entrenched.

D. Potential Barriers

Planning for possible resistance is also a necessary part of the design process. Change is often met with suspicion or fear, even if it represents an innovation. Identifying the nature and sources of such resistance makes it easier to address.

RESISTANCE CAN FLOW FROM . . .	MAY SOUND LIKE . . .
Fear of the unknown	"It will be worse than what we already have."
Investment in status quo/fear of loss of power	"That would never work with our disputes."
Inertia	"We already do that."
Reform fatigue/bunker mentality	"Here we go again. We've tried that, it doesn't work."
Organizational culture	"We cannot settle a dispute without discovery."
Personal options about dispute resolution	"Mediation is just a fad."

Other barriers to change may lie in objective circumstances. The organization may be strapped for resources or lack the leadership required to spearhead change.

STEP 3 - Guiding Principles and Project Objectives

A. Principles

The first substantive task of the design team is to develop guiding principles and objectives for the project. The organizational assessment, described above in Step 2, should assist in this task.

Guiding principles are the values the organization wishes to include in dispute resolution system under review. They may include things like:

Fairness – People using the system must be and perceive themselves to be treated fairly.

Accountability – The system must provide quality outcomes and be accountable to statutory authority.

Options – The dispute resolution system must retain the availability of and access to existing adjudicative process while offering alternative approaches to resolving disputes.

Law – Processes and outcomes must be consistent with the law as articulated by the courts or as set out in legislation.

Public Interest – The system must be able to deal with any public interest aspect of disputes.

Public Confidence – The system must have the support of those who use it.

Principles

Fairness
•
Accountability
•
Options
•
Consistency with Law
•
Public Interest
•
Public Confidence
•
Self Determination
•
Flexibility
•
Informed Decisions
•
Coordination
•
Quality

Self-determination – The dispute resolution process should provide participants with the opportunity to make informed, uncoerced and voluntary decisions.

Flexibility – The system must take into account the needs of a multicultural or otherwise diverse client base.

Informed Decisions – Where participation in processes is voluntary, parties should be given sufficient information and guidance to enable them to make an informed decision as to whether and how to participate in the process.

Coordination – The delivery of the dispute resolution process should be coordinated with all other agency or ministry functions.

Quality – Standards for training, service delivery and professional performance should be of the highest level and guaranteed by regular evaluations and assessments.

B. Objectives

Dispute resolution processes should be applied only where they can be effective, and they should not be overburdened with expectations. Possible objectives include:

SUBSTANTIVE OBJECTIVES . . .describe what the dispute resolution system should do.	**PROCEDURAL OBJECTIVES** . . . describe how the dispute resolution system will operate.
• earlier resolution of disputes	• using collaborative dispute resolution techniques
• faster resolution of disputes	• managing conflict toward resolution not adjudication, where appropriate
• a simplified process	• recognizing and addressing power imbalances
• reduced costs for parties	• staffing by individuals well-trained to deal with cases in a collaborative manner
• reduced costs for the agency	• dealing with disputes in a more sensitive or humane manner
• increased access	
• dispute resolution	
• enhanced privancy and confidentiality	

Ultimately, the success of the project will be measured against these objectives and guiding principles.

C. Policy Values

A number of fundamental policy values underlie the DRO's approach to dispute resolution design:

Policy Values

- ✓ *Collaborative Problem Solving*
- ✓ *Managing to Resolution*
- ✓ *Dispute Prevention*
- ✓ *Integrated and Comprehensive*

Collaborative problem solving – Most existing public dispute resolution systems are predicated on a rights-based model rather than an interest-based one such as mediation. (For further information about the difference between rights-based and interest-based mediation, please refer to page 12.) Experience has demonstrated that interest-based approaches, with their emphasis on collaborative problem solving and facilitated negotiation, provide simpler, less expensive, "user-friendly" dispute resolution for many cases. This is not to suggest, however, that mediation or other collaborative dispute resolution processes are universally appropriate or that they should displace rights-based adjudicative processes. Rather, the DRO views mediation and other collaborative processes as a helpful adjunct to, not a replacement for, existing processes.

Managing to resolution – The traditional approach to dispute resolution has been to place all disputes on a procedural track aimed towards adjudication, relying on the fact that most will resolve before actually reaching the hearing. In other words, even though most cases settle, they are still managed and administered as if they will be adjudicated. An alternative approach is to recognize that settlement is the norm not adjudication and, thus, to design systems and create policy to support settlement at every stage of case administration. Adopting this latter approach facilitates earlier settlements by expressly managing for and towards resolution.

Dispute prevention – Ideally, a comprehensive dispute resolution system design should include mechanisms to prevent disputes. As well, incentives to resolution and disincentives to dispute can be built into most systems.

Integrated and comprehensive dispute resolution policy umbrella – Beyond managing disputes to resolution rather than adjudication, it is helpful to analyze the entire organization in order to support and maximize the effectiveness of dispute resolution processes in general. The focus is not just on how to resolve disputes once they reach whatever formal dispute resolution process is in place, but approaching the resolution of disputes at every level in a collaborative fashion, thus changing the culture of the organization. This may mean, for example, training regulatory staff to use a collaborative approach to solve problems in their day-to-day work. As commentator Alan Reid wisely noted:

> *Bringing ADR into administrative law involves more than just simply engrafting upon the mandate of an agency additional statutory powers authorizing mediation and arbitration. It requires thinking deeply about regulation, government, law and administration.*

STEP 4 - Examine Key Design Issues

A. Dispute Resolution Processes

One or more of the following processes might be part of a dispute resolution system:

Negotiation is any form of unfacilitated communication in which opposing parties discuss steps they could take to resolve a dispute between them. Negotiation can occur directly between the parties or indirectly through agents acting on behalf of the parties, such as lawyers.

Mediation is a non-binding process in which a neutral, impartial third party with no decision-making authority attempts to facilitate a settlement between disputing parties. Mediation is generally a private dispute resolution process.

Conciliation can range from a approach that is essentially mediation with a more interventionist third party or shuttle negotiations where the third party neutral shuttles between the disputants who are unwilling to meet in person.

Facilitation includes the use of techniques to improve the flow of information in a meeting between parties to a dispute, or in a decision-making meeting.

Joint fact finding involves disputants choosing a neutral fact finder who investigates, reviews documents, and interviews witnesses to determine the facts in a dispute.

Negotiated rule making or "reg-neg" brings together representatives of various stakeholders to negotiate the body of a proposed rule or regulation. This method is used extensively in the U.S.

Shared decision making is a consensus based approach to dispute resolution in which those with authority to make a decision and those who will be affected by that decision are jointly empowered to seek an outcome that accommodates the interests of all concerned.

Neutral evaluation is a process in which parties obtain from an experienced (and possibly expert) neutral third party a non-binding, reasoned evaluation of their case on its merits. The opinion or assessment is expected to have persuasive value, especially because the neutral third party is jointly selected.

Settlement conferences, case conferences and pre-trial conferences are case management processes that involve an informal dialogue between a tribunal member or members, legal counsel and/or the parties, leading up to a hearing. They tend to focus on either settlement or hearing. Objectives can include settlement of the dispute, expediting the disposition of the action, discouraging wasteful pre-trial activities, and improving efficiency of the hearing through more thorough preparation.

Med-Arb, short for mediation-arbitration, is a process in which one person acts first as a mediator and then as an arbitrator. If the initial mediation is unsuccessful, the mediator becomes an arbitrator and makes a binding decision.

Arbitration is a dispute resolution process in which disputes are submitted to a neutral adjudicator through presentation of evidence and arguments. The arbitrator is empowered to

render a binding decision. Arbitration is generally a private, voluntary method of adjudication; however, government sometimes requires that certain disputes be submitted to arbitration (e.g., residential tenancy disputes). Also, a contract may provide that disputes will be resolved by arbitration rather than litigation.

Adjudication refers to any dispute resolution process in which a neutral third party hears each party's evidence and arguments and renders a decision that is binding on them. This includes arbitration and litigation.

B. Rights-Based or Interest-Based Approach to Mediation

As mediation is one of the most commonly used dispute resolution tools, it is worth noting that there are different styles of mediation. The first is a rights-based mediation in which the dispute is analyzed in terms of opposing rights and duties. In this model, the mediator provides direction to the parties about appropriate settlement terms, but the focus of the sessions is still to identify who is right or wrong.

Interest-based mediation, in contrast, involves framing the dispute not in terms of legal rights but rather in terms of the parties' underlying concerns, goals, and needs. These are the reasons behind the bargaining position of a party. The job of the mediator in this model is to help the parties avoid getting locked into inflexible positions while identifying the real issues and desires motivating a parties' bargaining stance. Positions, what parties say they want in a mediation session, and the underlying interests motivating those positions are often very divergent. For example, in a family mediation where the custodial parent wishes to relocate to a different city to take up a new job, the non-custodial parent's opening position may simply be an abject refusal. The underlying interest may be the desire to play a meaningful role in the children's lives. Clearly, taking the dispute to the level of the parties' deepest needs and desires creates more room to craft a creative solution.

Not only is interest-based approach attractive due to the increased range of potential solutions, but also because it does not generate losers and winners. As a result of its consensual nature, it is an invaluable tool for agencies that are seeking to increase party satisfaction rates and more enduring agreements.

Generally, the DRO promotes the use of interest-based mediation. Its strength is its ability to uncover and address the true roots of conflict, resulting in resolutions that are more satisfying to the parties. However, in some circumstances, a more evaluative approach may be appropriate, particularly where resolutions must conform to statutory standards. This is discussed in greater detail below, in Section F.

C. Selecting the Right Dispute Resolution Processes

While there are no universal rules, certain kinds of disputes lend themselves to certain kinds of dispute resolution methods. This section discusses why one dispute resolution technique may be chosen over another.

Beginning with the least involved dispute resolution options, **negotiations** are well suited to disputes that are uncomplicated or to disputes where the parties enjoy similar degrees of power. Thus, when two levels of government disagree about the funding levels of a cost-share program, the natural starting point is negotiation, something which would likely not take place if the dispute involved an individual and the state.

Mediation and **conciliation** are particularly useful in disputes in which an ongoing relationship is important. Mediation can be a very effective process for resolving disputes about tenancy or employment matters. It is less formal and therefore less intimidating than litigation, and it delivers a resolution grounded in consensus. Consensual solutions offer the advantages of increased party satisfaction and individual buy-in to the solution, thereby reducing the risk of the dispute resurfacing in the future. Mediation is also likely more timely and less expensive than adjudication, with corresponding benefits to both families and governments alike.

Neutral evaluation is often used in tandem with mediation. It is particularly useful when the parties are close to reaching an agreement but where unrealistic expectations are creating a stumbling block. Unrealistic expectations on the part of the disputants may arise in any conflict but may prove to be a special challenge for those bodies whose purpose is to resolve disputes of unrepresented people. For example, many human rights commissions are built around the notion that disputants will not have lawyers until a complaint is referred to a hearing. Thus, for the bulk of the complaint process, parties are unlikely to have received independent advice from a neutral party. To compound the problem, parties often have had no previous experience with administrative tribunals and so may have no idea as to typical settlement terms. In such situations, a neutral evaluation session conducted by an impartial third party expert may prove invaluable as a "reality check." After the neutral evaluation session, parties often resolve the dispute by negotiation or mediation.

If an organization deals frequently with factual disputes, then **joint fact finding** may be an important option to build into any dispute resolution system. Disputes that involve asset valuation provide a good illustration. Consider a public body that wishes to expropriate private property for a public project such as a highway. A factual determination of what the land value will always be at issue. Rather than engaging in a battle of the experts, it may save time and resources for both parties to agree on the person to carry out the property assessment at the beginning. It may also be an important way to build trust between the parties early on in the process and to balance power between an individual and a government.

Negotiated rule making is useful in developing regulatory legislation. For example, American law makers have used this dispute resolution tool extensively in drafting environmental standards legislation. The idea is that such laws are proactive rather than reactive—appropriate standards should act to prevent disputes from arising in the first place. However, in order to make such legislation meaningful, it must be based on something more than the bargaining sessions between polluters and regulators. Hence, the importance of negotiated rule making which expands participation in environmental regulation to other key stakeholders, such as NGO's, community groups, and other interested parties through the collaborative development of the regulatory scheme.

Settlement conferences, case conferences, and pre-trial conferences can be very helpful to agencies with quasi-judicial adjudicative functions, especially for that portion of the caseload which is more complicated than normal, or for decision-making bodies with very large caseloads. These case management tools can be used to identify those cases which are likely to be responsive to early settlement processes. Factors to consider in applying case management options include the number of parties, issues, and the presence of highly technical matters.

Pre-trial conferences **hasten the dispute resolution process by providing the opportunity to come to an agreed** set of facts, to narrow issues, and to settle key procedural questions like appropriate time limits for the presentation of witnesses and the length of the hearing. Large-scale pay equity cases before human rights tribunals provide a concrete example of where pre-trial conferences would be useful.

Research reveals that **settlement conferences** are a useful tool for public bodies whose mandate is regulatory in nature. For example, a provincial energy board used settlement conferences when deciding how to tie natural gas rates to environmental costs and benefits. The board reported that holding settlement conferences was particularly well suited to these kinds of multi-party disputes.

Arbitration is another common dispute resolution mechanism. It is often used in disputes that would normally go to court. The advantages of arbitration lie in its flexibility: typically it takes less time than waiting for a court date. It allows parties to choose an adjudicator that has special knowledge over the subject matter of the dispute and to agree on the procedure to be followed. Another advantage is that the dispute remains private, and finally, the award may be easier to enforce on an international level than an order of a domestic court. Typical examples of disputes which are arbitrated are labour and international commercial conflicts. In both examples, timeliness of resolution is a crucial point.

Finally, **adjudication**, particularly court decisions, remains an important dispute resolution option. Author John Wade compares litigation to surgery, noting that while both options have been criticized for overuse, they remain essential techniques. As one example, adjudication may be necessary in areas that are devoid of precedent. In such cases, negotiations or other dispute resolution techniques may fail since there are no objective guidelines around which to structure talks. Aboriginal land claims are one example. In these disputes, evolving jurisprudence seems to drive negotiations.

D. Selecting Cases for Dispute Resolution

(1) General

There are a number of ways conflicts enter non-adjudicative dispute resolution streams:

Voluntary – In a purely voluntary system, parties choose whether or not to participate in non-adjudicative processes. In many cases, a purely voluntary process does not attract sufficient participants to have a measurable effect on the system. While parties are typically very satisfied with collaborative approaches to dispute resolution, inertia or distrust of the unknown may prevent them from trying out such alternatives. Where agencies adopt a purely voluntary system, they should consider strategies for promoting the use of their collaborative processes.

Mandatory – In a mandatory regime, there is a presumption that parties in each case must attempt to settle the dispute using a non-adjudicative process before being given access to the time consuming and expensive adjudicative system. Studies have shown that mandatory mediation produces comparable settlement and satisfaction rates as voluntary mediation. Furthermore, requiring participation increases party experience and, therefore, knowledge about the benefits of using collaborative dispute resolution processes. As well, there are potential cost savings both in terms of economies of scale and earlier settlement rates.

A number of implications flow from the decision to implement mandatory dispute resolution. For example, the consequences of non-compliance will need to be addressed. In addition, issues of quality control and evaluation of such a program are important. Finally, consideration must be given to the degree of coercion to be employed. Most mandatory dispute resolution systems contemplate exemptions. Jurisdictions that have adopted mandatory mediation in family disputes may screen out cases involving violence or mental illness, for instance.

Mandatory by order of tribunal – Tribunals can be given the power to order parties to mediation or other dispute resolution processes. This type of power fits well with a closely case managed system, where the tribunal provides oversight and direction for each case and so has more knowledge about how the case might best be resolved.

Party driven – In a party driven process, one party to the dispute can compel the other parties to participate in the non-adjudicative process. This is a process unique to B.C., where the "Notice to Mediate", as it is called, is available for most civil, non-family actions in Supreme Court. To date, it has not been used outside the court process but remains an option to consider for organizations that want to go beyond a voluntary model but are not prepared to embrace a fully mandatory one.

(2) When Disputes are Ill-suited for Non Adjudicative Dispute Resolution

In the enthusiasm for conciliatory processes like mediation, it is easy to overlook the fact that some disputes are still best resolved by adjudication. Factors that may indicate the necessity of an adjudicated decision include:

- The dispute involves a decision over which a statutory decision-maker had no discretion. In some cases, in the presence of certain factors, a statutory decision maker is required to make a certain decision. On an appeal of that decision, mediation, for example, is pointless since there is no negotiable issue.
- A legal precedent is needed to govern similar cases in the future. However, many tribunals are not bound by precedent and so this factor may not apply.
- An issue of law, public policy or interpretation needs to be clarified on the record. The tribunal may desire an elaboration of a particular issue of law or policy and, in some cases, a hearing may be seen as the best way to accomplish that.
- Public access or participation in the decision or resolution is desirable and cannot be accomplished in the non-adjudicative process. It should be noted, however, the collaborative dispute resolution has been used very successfully in many multi-stakeholder processes involving broad stakeholder participation.
- People who are not parties to the dispute might be prejudiced by the outcome. One of the tenets of collaborative decision making is that the interests of those affected by the outcome should be represented at the table. If that is not possible, a hearing may be required.
- The constitutional validity of an act or law is challenged. Obviously, a tribunal is not going to submit questions of constitutional validity to a collaborative decision making process. However, getting parties around a table discussing their interests in the substance of the dispute can sometimes forestall constitutional or other challenges that may be being used in a tactical way.
- The case is genuinely frivolous or opportunistic—tribunals will not want to waste resources on attempting to settle with parties bringing truly frivolous or vexatious cases, particularly if the hearing process allows for some type of summary determination and dismissal.

- A party is acting in bad faith such as attempting to use non-adjudicative process to cause delay and expense to the other parties.
- There is fear of violence between the parties. The safety of the participants must be ensured in any dispute resolution process.
- The conflict involves both parties with a history of high personal conflict and low resources since the extended conflict underlies an inability to negotiate and the small resources offer little incentive;
- The disputants thrive on negative intimacy meaning that a dispute has taken on its own meaning in their lives and thus any settlement will represent a loss; and
- One of the parties is not emotionally ready such as in family matters where one party has moved through the grieving process much earlier than the other. The person surprised by the separation may be devastated and further angered by the fact that the other spouse seems so untouched. This raw emotional response may block negotiations or mediation.

(3) Timing of Dispute Resolution

Research suggests that the earlier dispute resolution tools are applied to a conflict, the greater the likelihood of reaching agreement. Higher settlement rates are attributed, in part, to the ability to reach disputants early enough to avoid polarization of the issues. When conflicts are left to fester, parties may become entrenched in their positions, making settlement more difficult.

For quasi judicial adjudicative agencies, a balance must be struck between providing an early opportunity for collaborative resolution and ensuring that the agency has sufficient information to screen out frivolous complaints. Some commentators point out that pre-investigation mediation may be unfair and unnecessary if the complaint is unfounded. On the other hand, if the agency waits too long, the benefits of early settlement may be lost.

One possibility is to provide information about the agency's dispute resolution processes as early as possible (e.g. at formalization of a complaint) rather than to provide the services themselves. The advantage of this option is that it is timely and may help avoid entrenched and defensive positions while at the same time making no assumptions about the merits of the conflict.

E. Confidentiality

Confidentiality is fundamental to some DR processes. In particular, mediation, where the parties are more likely to engage in a frank discussion of their interests - and be open to considering a range of solutions—if they can be sure that the information shared will not become evidence in an adjudicative proceeding. There are three issues to consider in developing policy or legislation around confidentiality: compellability, non-disclosure, and freedom of information legislation.

Compellability – Parties may want to ensure that no one who attended the mediation or other DR process can be compelled to give evidence in subsequent proceedings (for example, court proceedings or hearings by a tribunal).

Non-Disclosure – Parties also want to ensure that parties cannot disclose information shared during the mediation in subsequent proceedings.

Freedom of Information – All information held by provincial government bodies is subject to the Freedom of Information and Protection of Privacy Act (FOIPPA). This includes information produced by or for a consensual DR process. Statutory confidentiality provisions cannot protect information from disclosure under the Act, unless the statute expressly states that FOIPPA does not apply. In addition, types of exemptions are provided for under FOIPPA, including exemptions that prohibit disclosures harmful to: the financial or economic interests of a public body, the business in interests of a third party, or personal privacy. The exemptions in the Act do not appear to recognize the privacy interests of non-profit organizations.

Although information released under FOIPPA may become public, it will continue to be subject to any non-compellability and non-disclosure provisions in the legislation. In other words, just because information is released to a person or organization under FOIPPA, that does not mean it can be used in any other process.

Confidentiality is protected in a number of ways:

Legislation – Some administrative tribunals have confidentiality provisions providing which include non-disclosure provisions, as well as non-compellability provisions. Legislation occasionally exempts the application of the FOIPPA, although such exemptions are rare and must be justified on public policy grounds.

Agreement – Parties are usually asked to sign an "Agreement to Mediate" which includes confidentiality provisions.

Common law – The common law, the law developed by judges on a case by case basis, protects the confidentiality of settlement discussions by the doctrine of settlement privilege or the "without prejudice rule". This rule of privilege has been applied to protect the confidentiality of mediation discussions.

F. The Dispute Resolution Provider

Before implementing a dispute resolution system, it is important to identify a source of reliable, consistent, high quality dispute resolution providers. Providers may include mediators, adjudicators, or experts to perform neutral evaluation. There are at least three possible sources.

(1) Agency Staff

Drawing from the agency's own staff is the most cost effective option. It has the added advantage of developing an internal corps of well-trained dispute resolution providers, which is especially attractive to organizations faced with a large volume of disputes. Staff providers also develop subject matter expertise into the disputes experienced by the agency and, in some cases, may enjoy a relationship of trust or respect with the disputants upon which they may draw. In addition, there is further flexibility in the sense that staff need not be solely dedicated to a conflict resolution function.

On the other hand, one potential disadvantage of using staff is that of perceived bias. First, the performance of staff mediators and their ability to succeed within the organization may depend on their ability to resolve cases. This might mean that they pursue settlement too zealously and are not objective about recognizing when the

collaborative process should be terminated. Second, disputants may worry that the staff mediator is on the side of the agency. This may be an issue if the agency is ultimately responsible for resolving disputes by adjudication. In that case, care must be taken to separate non-adjudicative and adjudicative functions. In particular, information from mediations and other collaborative dispute resolution processes must not be permitted to spill over into an adjudicative stage without the prior consent of the parties.
Other administrative issues to consider include:

- Will existing staff be used, or will new staff be hired?
- Will staff be dedicated solely to a dispute resolution function?
- What will be the minimum training requirements?
- Will the agency fund or provide training for staff?

(2) Board Members

Administrative tribunals or regulatory agencies may wish to use board members who normally act as decision makers as neutrals in non-binding processes. In particular, using knowledgeable board members as dispute resolution providers may be suitable if staff with sufficient expertise is lacking or if the agency is required to make a decision in every case. Like staff neutrals, board members have the advantage of bringing subject-matter expertise and familiarity with statutory and policy mandates to the job. Reliance on board members is not recommended for agencies that have a high turnover rate or where members do not possess adequate training in dispute resolution.

As with staff mediators, concerns about bias or the perception of bias may need to be addressed. For example, board members who have previously acted as neutrals in a case may be barred from sitting as adjudicators if the matter does not settle. Exceptions to this principle may apply to processes which envision the neutral becoming an arbitrator (e.g. med-arb) or where parties expressly consent to the board member's dual role.

(3) External Providers

External providers are useful if an organization has only a few disputes or where particular dispute resolution skills are required. In comparison to staff mediators, they may enjoy a greater depth of dispute resolution experience, at least initially. They also provide additional assurance to the appearance of neutrality which may make the parties feel more comfortable with the process. Further, real or perceived problems regarding confidentiality do not arise.

The risk of relying on external neutrals is twofold. First, they are often quite expensive: the cost of a professional mediator for a two to five day hearing may range from $5,000 to $30,000. Second, private contractors may not be familiar with the specific subject area or regulatory context of a dispute. This, in turn, may generate distrust as one party may doubt the ability of the neutral to truly understand "our type of disputes." This problem is sometimes overcome by the development of specialist neutrals known to have subject-matter expertise and the particular dispute resolution skills needed in a particular sector. Labour arbitrators and mediators, for example, are a specialized subset of dispute resolution professionals.

If external mediators are used, their qualifications and experience will be important. Existing rosters, such as the B.C. Mediator Roster, with high standards for membership provide a useful starting point.

Regardless of the source of dispute resolution providers is used, it is important that there be a code of conduct and adequate oversight of neutrals. This can include a complaints process, regular review of written agreements, monitoring settlement rates, and continuing education requirements.

G. The Role of the Dispute Resolution Provider

Dispute resolution providers, such as mediators, adjudicators and evaluators are usually required to be neutral. However, many agencies have public interest mandates or legislated objectives or standards, which may infringe that neutrality. To illustrate this point, an environmental appeal board may use mediators to attempt to increase settlement rates. At the same time, that board may be working within a statutory framework that requires them to promote sustainability. Such agencies will have to determine how these mandates should be woven into the dispute resolution processes it offers disputants.

One way is to require the neutral to be more directive or evaluative. To explain, there is a continuum of styles of mediation. At the facilitative end of the continuum, the mediator tries to help parties reach a settlement on their own terms without intervening in the substance of the dispute. At the evaluative end, the mediator asserts a greater degree of control over possible outcomes, providing information to the parties about appropriate settlement terms.

Consistency is key. Whether the agency mandates its dispute resolution providers to be strictly neutral or whether the provider is to attempt to shape the dispute resolution process to conform to the agency's public interest goals, the agency's expectations of its dispute resolution providers must be clearly articulated. Inconsistent approaches result in inconsistent outcomes and undermine not only the dispute resolution process but the agency itself.

This being said, adopting a more directive or evaluative role in collaborative processes, such as mediation raises difficult issues. For example:

- in a process where the parties do not require the agency's intervention to resolve the dispute, disputants who are not satisfied with the directive role taken by the neutral could take their dispute entirely outside the agency's process and therefore remove themselves from the public policy goals of that agency;
- dispute resolution providers playing a more interventionist role must have sufficient knowledge, experience and insight with respect to the range of acceptable outcomes and must act consistently; and
- in contrast to an adjudicative process, if a dispute resolution provider is incorrect in his interpretation of the acceptable outcomes and steers parties to a particular outcome on the basis of faulty information, the parties may have no recourse.

It is debatable whether public funds should be used to support a dispute resolution system that does not reflect and promote its mandate. There are alternatives. Agencies may choose to exercise their supervisory roles not through the vehicle of the mediator but rather by approving settlements or by streaming cases involving significant public policy issues to more adjudicative processes.

H. Power Imbalance

All disputes are characterized by some degree of power imbalance. A power difference may arise when:

- there is an inequality of age, race, class, sexual orientation, financial resources, or gender;
- only one party has a lawyer;
- one party is more emotionally vulnerable;
- one party is more anxious to settle;
- gender or culture-specific socialization patterns exist;
- the parties are in a pre-existing relationship marked by an existing power differential (e.g. employer/employee, doctor/patient); or
- where self blame is present (some types of victimization, such as sexual harassment, are characterized by self blame).

Some commentators believe that only formal adjudicative processes are able to protect the weaker party to a dispute. The DRO believes that the real issue is not about adjudication but about fairness. Where power differentials become so great as to render consensual dispute resolution processes meaningless, those processes either should not be employed or, if they are, the dispute resolution provider has an obligation to end the session. While power balances are sometimes difficult to recognize or predict and can shift in the course of a dispute, experienced dispute resolution providers in carefully designed dispute resolution systems can address this potential problem by employing strategies such as:

- dealing with parties separately (e.g. shuttle negotiations or caucusing)
- allowing parties to bring advocates or other support people to the process
- funding lawyers or advocates
- providing sufficient information to allow parties to make an informed choice about participating in the process and in arriving at fair settlements
- training dispute resolution providers about power imbalances
- allowing a "cooling off period", that is, enough time for the parties to consider their agreement before committing themselves to the settlement
- requiring or encouraging parties to seek independent legal advice on settlements
- allowing the parties to opt out of the dispute resolution process without penalty
- allowing the dispute resolution provider to terminate the mediation if there is gross inequality
- providing that agencies must approve settlements.

I. Outcomes and Enforcement

(1) Outcomes

One of the advantages of a collaborative approach to disputes is that resolutions can be tailored to the parties' needs. In this way, a broader range of solutions is available compared to traditional adjudicative processes. However, as mentioned earlier in the discussion about the role of the dispute resolution provider, one possible constraint on outcomes may be legislative or policy mandates.

At a minimum, agencies should ensure that settlement terms are committed to writing and signed. In addition, for long-term planning purposes, agencies may also wish to oblige parties to file their agreements with them (perhaps anonymously to protect confidentiality),

or simply to record whether or not an agreement was reached. Agencies with public interest mandates may go further and require that settlements be approved by them.

Of course, not all disputes will be resolved in their entirety or at all. The design plan will need to address what will happen to these cases. For example, if collaborative approaches do not result in agreement, then parties may be routed back to an adjudicative track to resolve the remaining issues.

(2) Enforcement

There are a number of approaches to monitoring and enforcing mediated settlements. The approach taken by the agency depends on the extent to which it wishes to exercise oversight over the outcome of the dispute resolution process. Options range from least intrusive to most intrusive as follows:

Withdrawal – Parties who have reached agreement can simply withdraw their case from the agency's conflict resolution process.

Parties file settlement – The agency can act as a depository for settlement agreements. This may raise issues of confidentiality.

Agency order confirming that a settlement is reached – This agency simply records the bare existence of a settlement via an order and then closes the case.

Agency order reflecting the settlement terms – The agency makes the terms of settlement public through the vehicle of a formal order. As well, the agency's enforcement powers will be engaged by any breach of the agreement.

Settlement approval – The agency takes an active supervisory role by approving terms of settlement.

The less intrusive enforcement options such as withdrawal are well suited to public bodies that do not have a strong public interest mandate and which encounter few conflicts. Such bodies are unlikely to be constrained by statutory or policy considerations and consequently have less of an interest in fulfilling a supervisory role.

Agencies in which dispute resolution is a primary function may be more inclined to track typical settlement terms. However, a distinction must be drawn between those agencies that are designed to influence behaviours or exert moral suasion and those whose principal task is simply to manage and resolve large volumes of disputes as effectively as possible.

Agencies with a public interest mandate are more inclined to track settlement terms closely and publicize them. Thus, bodies entrusted to protect constitutional or quasi-constitutional rights such as human rights agencies may prefer public orders or settlement approval. Those in the second category such as commercial arbitration boards are more likely to choose options that preserve greater confidentiality such as the settlement depository model.

STEP 5 - Training and Qualifications

A. Training

The importance of training dispute resolution providers cannot be overemphasized. A comprehensive resource manual developed by the U.S. Department of Justice on alternate dispute resolution (ADR) program design outlines five types of training:

1. **ADR system design training** – For those responsible for designing and implementing the system. The objective is to provide a framework (such as this one) to guide systems design.
2. **ADR awareness training** – For executive, senior managers, lawyers, supervisors, operational staff and clients. The objective is to introduce basic concepts, show the benefits of ADR and gain support and overcome resistance.
3. **ADR methods and skills training** – For program managers and staff actively involved in ADR. The objective is to provide the knowledge and skill in the use of ADR methods needed to build an effective ADR program.
4. **Program specific ADR systems and procedural training** –For program managers and staff actively involved in ADR. The objective is to provide agency specific information to those who use ADR methods.
5. **ADR skills, training (advanced)** – For neutral third parties.

While comprehensive training in all five categories may not be required, the list provides some insight of where training might be beneficial.

Training can be obtained from established programs such as those offered at the Justice Institute of British Columbia or private trainers. It may also be possible to use mentors. Pairing less experienced dispute resolution providers with more senior people can be a very productive way to build skills and confidence.

Regardless of whether training is effected internally or externally, it is important for dispute resolution providers to have a clear and common understanding of the agency's mandate, the goals and principles of its dispute resolution process, and their role within that process. Furthermore, training should be offered to as broad a range of staff as possible in order to create a collaborative ethos throughout the organization. Initial training should be reinforced by ongoing opportunities to upgrade and refresh skills and knowledge.

B. Qualifications

All dispute resolution providers should adhere to some minimum qualification standards. Such standards could be set by the government agency itself or by an established roster or professional body. There is a large body of literature on dispute resolution qualifications to guide the design team in this area.

STEP 6 - Implementation

Pilot projects are an excellent way to begin implementing a dispute resolution design. Trying a new dispute resolution process on a small scale allows an organization to evaluate its usefulness. Even if it a dispute resolution process is obviously suitable, a pilot provides an opportunity to identify and iron out any problems early on. Of course, before undertaking a pilot project, it is critical to consult with key stakeholders including staff. A pilot project may be jeopardized by opposition from staff if they perceive that they are being unfairly singled out for improvement. Thus, establishing a pilot where staff are keen may reduce administrative obstacles as well as increase its potential for success.

Another idea is to set up an implementation team including staff from the pilot's location. This allows for fine-tuning of the design option being tested in the pilot and ensures integration with operational practices. Integration of design and operations is so important because staff are more likely to oppose a pilot project if they perceive it as simply an additional layer to their workload.

Another option is to implement the dispute resolution design in stages. The advantage of this strategy is that it is easier to marshal the resources required for the project over time.

Whatever approach is adopted, there will always be room for continued improvement. As a result, the agency should develop ways to monitor the success of its design plan and make changes as needed. A public feedback or complaints process would be an invaluable tool to that end.

STEP 7 - Evaluation and Performance Measures

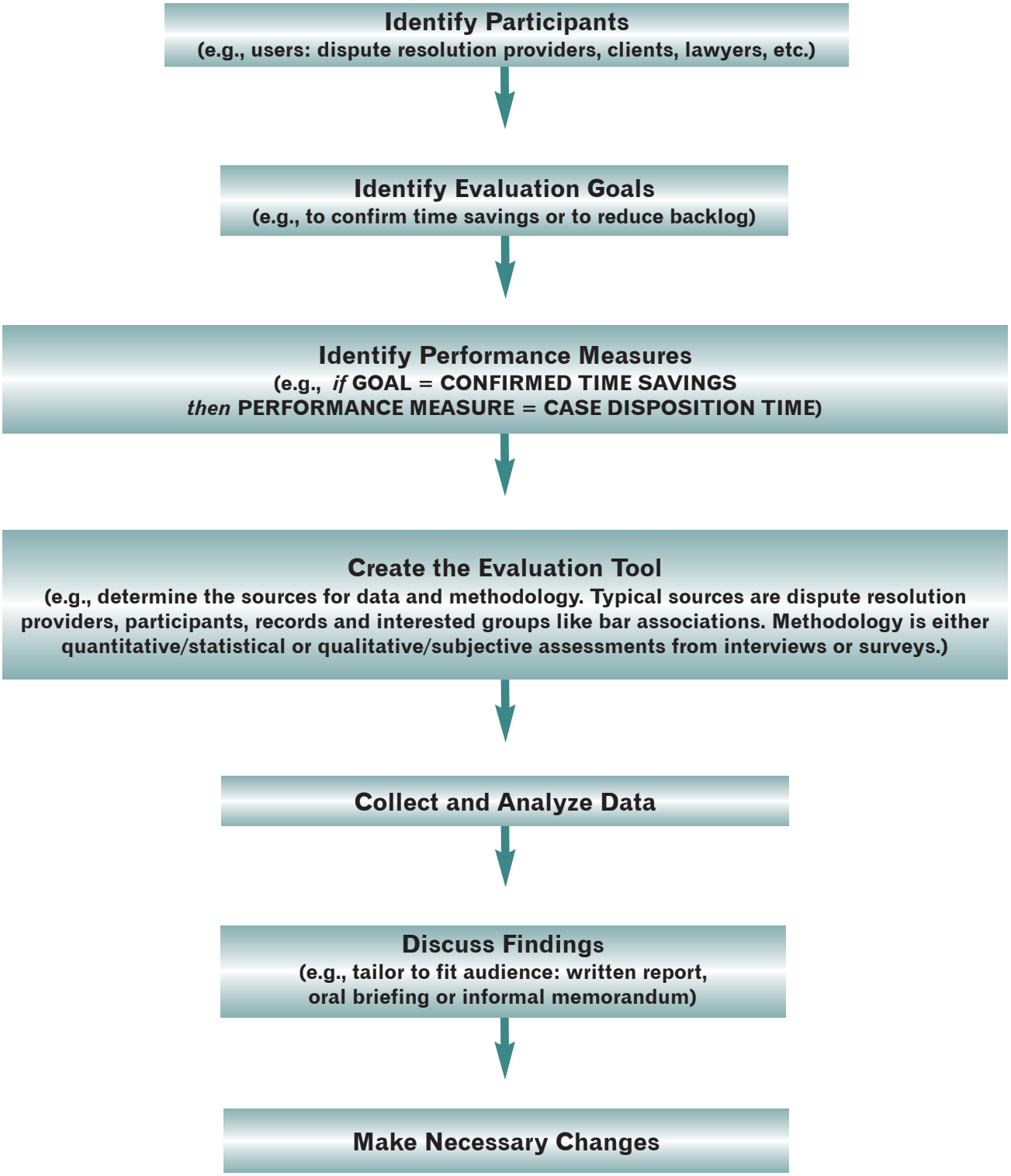
A. Why Evaluate?

Evaluation is an integral and ongoing element of any dispute resolution system. There are several sound reasons for building in an evaluation component to any dispute resolution design plan. First, subsequent monitoring and evaluation are the only way to ensure that the program is working effectively. Second, such analysis reveals the strengths and weaknesses of the program. Its strengths can be used in order to promote public awareness about dispute resolution generally or about a specific program of an agency or organization. Its weaknesses, once identified, can be improved. Third, having an organized evaluation aspect including in the original design process promotes a consistent and proactive approach to continued improvement in contrast to organizations which conduct one-time reviews in response to a given problem. Finally, evaluation can serve a basic management purpose by, for example, identifying bottlenecks in the process and ensuring sufficient staffing levels.

B. Evaluation Plans

Evaluation methods will vary depending on what aspect of the program is at issue. Organizations implementing a dispute resolution system from scratch will likely wish to conduct a general assessment. Those wishing to improve or streamline an existing dispute resolution program may wish to undertake a more focused evaluation, such as determining

whether client satisfaction levels have increased since the introduction of mediation. Whether the goals of the evaluation are general or specific, the following flowchart may be useful in outlining the basic steps in an evaluation process:



C. What to Evaluate?

Typically, designers of a dispute resolution system wish to evaluate some or all of the following:

- uptake of dispute resolution options by the target population;
- compliance of the program with legal or policy requirements;
- cost savings to both the disputant and to the agency;
- time savings;
- participant satisfaction, including perception of the dispute resolution providers and generally whether participants felt fairly treated;
- settlement rates; and
- quality of settlements, including whether settlements were more creative, more detailed, more durable, and whether an ongoing relationship between disputants was maintained or improved.

D. Choosing the Evaluator

As in the choice of dispute resolution provider, the agency will need to decide between an internal evaluator and an external one. An external evaluator will lend credibility and objectivity to the assessment process and likely possesses specialized skills in this field. The disadvantage is that external assessors are often very expensive. Internal evaluators are more cost effective and will likely possess a great deal of knowledge about the organization or program area under study. Care should be taken, however, in choosing an internal evaluator not to draw a person who is too close to the program area in question. In other words, it is important to choose an employee with knowledge of the dispute resolution program but not someone who works directly in it since objectivity is a crucial aspect of any effective evaluation.

Ministry of Attorney General
Justice Services Branch
Dispute Resolution Office
PO Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7
Tel: (250) 356-8147 • Fax: (250) 387-1189
E-mail: dispute.resolution.office@ag.gov.bc.ca

– JUNE 2003 –

#AG03103