Process with promise:
MUNICIPAL ADR – Part 1

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Whether in terms of relationships, trust, or the bottom line, the cost of unresolved conflict is extremely high. This is true whether we measure costs in financial or human terms. Municipalities are not immune from the rising direct and indirect costs of conflict. But, there are now well-developed alternatives to litigation, or avoidance, as the dispute resolution methods of choice. This is the first in a series of three articles exploring the potential for expanding the use of Alternative Dispute Resolution in the municipal context.

Negotiation, Arbitration and Mediation

Negotiation, arbitration and mediation and are the three most common types of Alternative Dispute Resolution (ADR) although there are several others, including some hybrid processes.

Direct Negotiation – is basic, unassisted, face-to-face, negotiation between directly involved parties. It can take many forms from positional rights-based approaches to collaborative interest-based ones.

Arbitration – is a form of adjudication, except that the arbitrator is selected by the parties and decides disputed issues after hearing evidence and arguments by the parties. Arbitration can be binding or non-binding.

Mediation – is negotiation with the assistance of an independent party. The basic difference between negotiation and mediation is that mediation has an impartial third party present who manages the process and assists the parties in moving towards agreement. It is not an adjudicative process. There is also a continuum of mediation processes from facilitative interest-based to evaluative rights based. There is currently no legislation governing the practice and procedure of mediation in Canada, although various organizations have Codes of Conduct for mediators.

ADR is sometimes called "Appropriate Dispute Resolution" and this may indeed be a better definition, since there is a need for traditional tribunals, courts and appeal mechanisms in certain cases. It is important to note that the use of interest-based processes in ADR does not generally involve giving up legislated or other rights.[1]

Mediation has been used for decades, and especially over the last 10 years plus, with greater frequency, and success, in everything from community, la-

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1 Interest-based negotiation and mediation developed from the concepts of Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project, and their groundbreaking work, *Getting to Yes: Negotiating Agreement. Without Giving In,* 2nd ed; (New York: Penguin, 1991). A very recent refinement, and development of the concepts is found in Deborah M. Kolb and Judith Williams, *Everyday Negotiation: Navigating the Hidden Agendas in Bargaining* (San Francisco: Jossey-Bass Publishers, 2003).

bour, environmental, land use and commercial disputes. In Ontario, the Mandatory Mediation Program requires, with few exceptions, that mediation be attempted in all civil cases commenced in Ottawa, Toronto and Windsor courts.[2] This program will eventually be expanded province-wide. There are similar programs in use or in planning stages in most other provinces. As a result, mediation will increasingly become a dispute resolution tool with which municipalities and their professional advisors will need to be more familiar.

Many provincial statutes also contain provisions for mediation as the preferred method of dispute resolution. The increased use of ADR processes recognizes the inadequacy of litigation in circumstances where parties have an ongoing relationship. By using the appropriate ADR process, municipalities can avoid the win/lose outcome of litigation, and bring about more creative and flexible results. Further benefits include saving time, and decreasing the costs, financial and otherwise, of resolution.

Features and Benefits of Mediation

Mediation is really nothing more than assisted negotiation. It is the ADR process most appropriate for many community type disputes. Mediation holds several advantages, such as:

- encouraging exchanges of information;
- helping parties to understand each other's views;
- helping negotiators realistically assess alternatives to settlement;
- encouraging flexibility;
- shifting focus from the past to the future;
- stimulating the parties to suggest creative settlements; and
- bringing about solutions that meet the interests of all parties.

Mediation can be used in a wide variety of disputes. These include disputes arising from the day-to-day business dealings of municipalities, through to those arising from hearings or meetings, neighbourhood issues, and disputes between different municipalities.

When compared to the formality of proceedings in court or before an administrative board or tribunal, mediation offers distinct benefits:

- It is generally less costly, both financially and in terms of time.

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- Mediation can be convened in days or weeks unlike the months or years of other processes.
- Since the parties are responsible for the outcome, they are more likely to reach an agreement that is realistic. They are also more likely to comply with it.
- Mediation can build the framework for an improved and less adversarial working relationship.
- The mediator does not have decision-making authority, and no one can impose an agreement on the parties.
- Mediation can be ended at any time if the parties are not satisfied with it, and other dispute resolution opportunities such as litigation or tribunal remedies are still available.
- Mediation is generally confidential.

Sometimes, mediation cannot settle everything; but, it can help resolve or at least narrow some of the issues in dispute. This can lead to a speedier or less expensive adjudicative hearing, providing a positive return on the investment of time and effort.

Larger conflicts strain traditional decision-making processes. Decisions coming out of these processes are unacceptable to many participants. Although the short- term costs of resolving conflict by consensus may sometimes seem high, the long-term costs of the alternatives are significantly higher.

Mediation Process

As noted above, mediation is an opportunity for parties to discuss matters openly with the reassurance their dispute will remain private and the outcome will remain in their control. "Facilitative" or "interest-based" mediation, which is the dominant model in North America, is based on five general principles of confidentiality, voluntariness, self-determination, neutrality/impartiality and informed consent.

Confidentiality – All information received from the parties will be kept private, in order that parties will feel free to explore the issues and potential solutions. Any exception to this principle is made clear to the parties prior to their consent to participate in mediation.

Voluntariness – This principle acknowledges the parties' right to freely enter both the mediation process and any agreement reached in that process. The parties have a right to withdraw from mediation at any time.

Self-determination – The principle that recognizes parties to a dispute have the ability and right to define their issues, needs and solutions and to determine the outcome of the process without advice or suggestions from the mediator.

Neutrality/Impartiality – The principle that the parties have a right to a process that serves all parties fairly and equally.

Informed consent – The parties have the right to information about the medi-

2 See the Ministry of the Attorney General's website for further details at: <www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/>. Last visited December 12, 2003.

ation process and access to information about their rights and options, often in the form of independent legal advice, before consenting to participate in mediation and/or to the terms of any agreement they reach in mediation.

Apart from these principles, the actual mediation process will vary from dispute to dispute and by mediator. In general, most mediations are conducted around clearly defined stages such as introduction, information gathering, defining issues and agenda making, brainstorming and option generating and bargaining. Models range from 6-stage to 12-stage processes.[3]

There is no single correct model that should be used. Because of this, it is important for the parties to know the mediator and his or her approach to the mediation process.

Appropriateness of Mediation

There is a common view that mediation only works with simple disputes that do not involve a lot of money or resources. The success of the Mandatory Mediation Program in Ontario clearly shows that this is incorrect.[4] Another common misconception is that mediation only works when people trust or like each other. Although interest-based processes work best with trust on both sides, it is not a prerequisite. Mediation can actually help warring parties develop enough trust to reach agreement. This is not an option in more formalistic processes.

Equally incorrect is the view that mediation should be used for every dispute. There are conflicts where other dispute resolution mechanisms are more appropriate. In general, mediation can be used successfully when a dispute has one or more of the following characteristics:

- direct negotiations have not worked;
- a less expensive and speedy resolution is required;
- the parties would like to end the dispute on positive or at least neutral terms;
- poor communication or distrust is blocking the resolution of the dispute;
- sharing information would produce a better mutual understanding of the issues; and
- the issues underlying the dispute are ones that cannot adequately be addressed by a tribunal or court.

However, mediation is not the appropriate dispute resolution process and should not be used where:

- a vital service, legal restriction or principle is involved;
- a legal precedent is required;
- there is no motivation to settle;
- one party gains an advantage by delaying the commencement of proceedings; or
- one side refuses to settle as a way to send a message to parties not directly involved in the dispute.

In many provinces, municipalities are being given greater flexibility and responsibilities in the organization and delivery of services. The flip side of this is that wider powers and responsibilities also bring with them a greater range of potential conflict and disputes.

Among the significant powers granted to municipalities in Ontario, for example, is the ability to establish corporations for municipal purposes, facilitating public-private partnerships for the delivery of services. In negotiating these arrangements, care should be taken to include alternative dispute resolution provisions in the final contract documents.

Mediation can also be used to resolve disputes between municipalities. While neighbouring municipalities have many interests in common, disputes can arise from land use conflicts, cost sharing and uncoordinated development. By committing to the use of ADR, municipalities develop better processes and build the skills needed to negotiate faster and more appropriate solutions. The process of seeking consensus also builds good working relationships.

Unresolved conflict, in contrast, costs far more than we generally anticipate. Municipalities should evaluate and assess how they currently handle disputes, and then develop dispute resolution systems that place a high priority on prevention and de-escalation. Locally developed ADR offers the greatest prospect of positive outcomes, that are responsive to local needs and interests. *MW*

3 The definitive Canadian work to date is Andrew J. Pirie's, *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000). See pp. 171-174 on the stages of mediation.

4 See the Mandatory Mediation Evaluation Report, executive summary, available at: <www.attorneygeneral.jus.gov.on.ca/english/courts/ manmed/execsummary.asp>. Last visited December 12, 2003.