RESOLVING RESOURCE AND ENVIRONMENTAL DISPUTES: THE CANADIAN RESPONSE

S. Glenn Sigurdson

THE CORE CHALLENGE

Building the process in the image of the problem; not defining the problem in the image of the process - that is, I believe, the essence of ADR.

ADR works best in a spirit of invitation, not imposition. Authority structures, whether wearing the blue suits of Ministers or directors of agencies, or the robes of adjudicators, impose their own process and solutions upon the problem. ADR is about parties with a stake in a problem designing their own process through which to attempt to develop their own solution.

The acronym ADR needs to be revisited. Dispute Resolution is a continuum, not a series of compartments. ADR involves a range of activities:

It is not a place : It is an approach

It is not a set of techniques : It is a way of dealing with problems

It is not confined to disputes : It also deals with differences

It involves negotiation : It includes dialogues

It is not only about settlements : It is about how we make decisions

It recognizes rights : And deals with relationships

Alternative has a self-deprecating quality - as if there was some other real place. I suggest we should think of ADR in these terms:

Approaching Differences and Diversity Reflectively and Responsively.

THE CANADIAN REALITY

In terms of resource, land use and environmental issues, Canada is not a big place as you might think. Its geography is characterized by forests and rivers, vast prairie expanses with small towns, and a few big cities. The dominant factor, in this context, are the river systems - as they have always been in the history of the country. Once dominant transportation arteries that provided the “highways” through which the native people traveled and for those who came later to explore the Canadian landscape, they now provide the context for clashes of rights and interests over resources and land use, and nesting grounds for environmental concerns. They are also often the forum for complex jurisdictional clashes between levels and layers of government. Whether it is in relation to pulp mill effluent, soil based contaminants, or fisheries issues, it is the river system that magnifies the problems and energizes concerns. And it is on these

waterways that authority structures stumble and struggle with each other with the greatest intensity - federal, provincial, municipal, and First Nations.

WHAT DO WE INCLUDE IN "ENVIRONMENTAL DISPUTE?

"Environmental dispute" has developed as a term of art with the elasticity to include a wide range of contexts tied together by the common theme that the natural environment is involved. Contexts in which such "disputes" may arise include: proposed legislation, policies, or regulations; approval of plans or projects; issuing permits; compliance and enforcement; and legal suits between parties.

THE RECORD OF EXPERIENCE

The record of experience of using negotiation based approaches to deal with environmental disputes is not as well developed in Canada as it is in the United States. That probably reflects the fact that the level of such activity may not have been as extensive on the Canadian side of the border. However, it goes beyond that. Literature searches will not effectively capture the experience base in Canada. Why is that, you ask - I suggest the following:

1. Statistics and Records - No agency or authority has responsibility to maintain them, although increasingly, there is a growing recognition of the need to assemble and chronicle this information base.
2. Negotiation based resolution of issues is often a "front-end" activity, backstopped by authority structures, and unlike a hearing in a court or before a tribunal, nor formal record is maintained.
3. Because the process is voluntary, often no record exists, or if it does, it is not readily accessible.
4. Confidentiality, or at least minimizing publicity, is often a motivation involved in the resolution of such disputes especially when private litigants are the protagonists.
5. Research and academic activity in the area is only now starting to grow.

WHAT ARE THE INSTITUTIONAL RESPONSES THAT EXIST?

Environmental Assessment Legislation in many parts of Canada explicitly contemplates the use of negotiation based approaches with the possibility of mediation, as an adjunct or alternative to more conventional hearings before panels. Such legislation now exists federally, and in the provinces of British Columbia, Manitoba, Ontario, and Nova Scotia.

Similarly, in respect to contaminated sites and waste management, British Columbia, Alberta and Nova Scotia have enacted legislation that provides for dispute resolution initiatives.

Land use planning was energized in British Columbia through a Commission on Resources and the Environment (C.O.R.E.) which relied extensively on consensus based processes. A Growth Management Act has recently been passed with similar reliance.

Specific examples of legislated provisions include:

Canadian Environmental Assessment Act

Initial referral to mediator or review panel
29.(1) Subject to subsection (2), where a project is to be referred to a mediator or a review panel, the Minister shall
(a) refer the environmental assessment relating to the project to
(i) a mediator, or
(ii) a review panel; or
(b) refer part of the environmental assessment relating to the project to a mediator and part of that assessment to a review panel.
Condition on reference to mediator
(2) An environmental assessment or part thereof shall not be referred to a mediator unless the interested parties have been identified and are willing to participate in the mediation.
Subsequent reference to a review panel
(4) Where at any time after an environmental assessment or part of an environmental assessment of a project has been referred to a mediator, the Minister or the mediator determines that the mediation of any issue subject to the mediation is not likely to produce a result that is satisfactory to all the participants to the mediation, the Minister shall terminate the mediation of the issue and refer the issue to a review panel.
Appointment of mediator
30.(1) Where a reference is made under subparagraph 29(1)(a)(i) in relation to a project, the Minister shall, after consulting with the responsible authority and all parties who are to participate in the mediation,
(a) appoint as mediator any person who
(i) is unbiased and free from any conflict of interest relative to the project and who has knowledge or experience in acting as a mediator, and
(ii) may have been selected from a roster established pursuant to subsection (2); and
(iii) fix the terms of reference of the mediation.

***32.** (1) A mediator shall, at the conclusion of the mediation, prepare and submit a report to the Minister and to the responsible authority.*

(2) No evidence of or relating to a statement made by a mediator or a participant to the mediation during the course of and for the purposes of the mediation is admissible without the consent of the mediator or participant, in any proceeding before a review panel, court, tribunal, body or person with jurisdiction to compel the production of evidence.

(emphasis added)

Waste Management Amendment Act, 1993

Allocation panel - 20.51
(1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.
(2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:
(a) whether the person is a responsible person;
(b) whether a responsible person is a minor contributor;
(c) the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination where the costs of remediation are known or reasonably ascertainable.
(3) When providing an opinion under subsection (2)(b) and (c), the allocation panel shall, to the extent of available information, have regard to the following:
(a) the information available to identify a person's relative contribution to the contamination;
(b) the amount of substances causing the contamination:
(c) the degree of toxicity of the substances causing the contamination;

(d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
(e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;
(f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;
(g) in the case of a minor contributor, factors set out in section 20.6(1) (a) and (b);
(4) A manager may require, as a condition of entering a voluntary remediation agreement with a responsible person, that the responsible person, at his or her own cost, seek and provide to the manager an opinion from an allocation panel under subsection (2).
(5) A manager may consider, but is not bound by, any allocation panel opinion.
(6) Work performed by the allocation panel shall be paid for by the person who requests the opinion.

(emphasis added)

Commissioner on Resources and Environment Act (SBC 1992) Chapter 34

Section 4 - Commissioner's mandate
4.(1) The commissioner shall develop for public and government consideration a British Columbia wide strategy for land use and related resource and environmental management.

(2) The commissioner shall facilitate the development and implementation, and shall monitor the operation, of
(a) regional planning processes to define the uses to which areas of British Columbia may be put;
(b) community based participatory processes to consider land use and related resource and environmental management issues, and
(c) a dispute resolution system for land use and related resource and environmental issues in British Columbia.

(emphasis added)

Forest Act

Part 14 - Appeals, Regulations, Penalties Division (2) - Regulations

Section 158.4 -
Mediation and arbitration under contracts and subcontracts

158.4 The Lieutenant Governor in Council may make regulations respecting mediation and arbitration of all or certain disputes that have arisen or may arise between the parties to a contract or subcontract, including, but not limited to, regulations
(a) establishing a system of mediation and arbitration and making the system applicable to
(i) contracts, or
(ii) subcontracts
that do not make any provision or do not make adequate provision for mediation and arbitration,
(b) respecting contracts to which or subcontracts to which the system of mediation and arbitration established under this section is made applicable, including, but not limited to, regulations prescribing the following types of requirements for those contract or subcontracts;
(i) requirements under which the parties to the contract or subcontract, as the case may be, are obliged, under the system of mediation and arbitration established under this section, to settle by mediation and in the event of unsuccessful mediation, by arbitration,

(A) all disputes, or
(B) certain disputes as specified by regulation
that have arisen or may arise between the parties under the contract or subcontract;
(ii) requirements under which the parties to the contract or subcontract, as the case may be, must select the mediators and arbitrators to be used in the settlement of disputes under the contract or subcontract only from the Register of Timber Harvesting Contract Mediators and Arbitrators established under section 158.5,
(c) prescribing, for use in contracts or subcontracts, standard provisions representing the requirements prescribed under paragraph (b) (i) and (ii),
(d) prescribing what constitutes making "adequate provision" for the purposes of paragraph (a), and
(e) adopting by reference for the purpose of the system of mediation and arbitration established under this section any provisions of the Commercial Arbitration Act, either without variation or with variations that the Lieutenant Governor in Council considers necessary or desirable.

(emphasis added)

Institutionalization of negotiation based approaches has taken another "distinctly Canadian" form. Canada's response to the Bruntland Commission - the World Commission on the Environment - was the development of multi-sector task forces - Round Tables - mandated to struggle with the big policy issues associated with achieving sustainable development, or sustainability as it has come to be known.

Struggling with the concept was one thing; transforming definitional debates into practical outcomes was another. Within these Round Tables there was increasing recognition that essential to building a sustainable future was understanding the nature of the processes that could be developed to enable meaningful participation by those with an interest - the "stakeholders" - to give shape to a mutually acceptable outcome.

Under the leadership of the National Round Table, a broadly based dialogue was developed with a view to capturing, in a set of Guiding Principles, the fundamental characteristic of a *Consensus Process*. Over two and a half years of negotiation, Ten Principles and Key Steps in making consensus work were captured in a "user friendly" publication - of which over 25,000 copies are now in circulation and can be found as an attachment on several international agreements. The Guiding Principles[1] in summarized form, are set forth below:

Consensus processes are participant determined and driven - that is their very essence. No single approach will work for each situation - because of the issues involved, the respective interests and the surrounding circumstances. Experience points to certain characteristics which are fundamental to consensus - these are referred to as the Guiding Principles.

(1) Purpose Driven

People need a reason to participate in the process.

(2) Inclusive Not Exclusive

All parties with a significant interest in the issue should be involved in the consensus process.

(3) Voluntary Participation

The parties who are affected or interested participate voluntarily

[1] *Building Consensus for a Sustainable Future, Guiding Principles, An Initiative Undertaken by Canadian Round Tables.*

(4) Self Design

The parties design the consensus process

(5) Flexibility

Flexibility should be designed into the process.

(6) Equal Opportunity

All parties must have equal access to relevant information and the opportunity to participate effectively throughout the process.

(7) Respect for Diverse Interests

Acceptance of the diverse values, interests, and knowledge of the parties involved in the consensus process is essential.

(8) Accountability

The parties are accountable both to their constituencies, and to the process that they have agreed to establish.

(9) Time Limits

Realistic deadlines are necessary throughout the process.

(10) Implementation

Commitment to implementation and effective monitoring are essential parts of any agreement.

SOME OF THE CHALLENGES

- *Inadequate institutional arrangements* -- "Legislating" ADR involves the risk of rigidity and orthodoxy; on the other hand, it has the effect of legitimizing its use within institutions and governance structures. By doing so, it may enable those within organizational structures to exercize a greater degree of flexibility in pursuing a range of options and approaches in the resolution of disputes, and in managing relationships. Absent such "institutionalization", the organizational pathways to authorize participation in such activities may frustrate their utilization. Finding the balance between a rush to orthodoxy and prescription while preserving voluntarism and flexibility is the challenge.

- *Existing power structures* -- the currency of authority structures is "control". The conventional wisdom of control is that it is best exercised through prescription - as to what can be discussed, who can participate in the discussion, within what structure and timelines. "Inclusivity", "self-design of processes", "flexible and moveable timelines" - wise counsel for consensus building - are still often seen as danger points, not comfort zones.

- *Value systems and beliefs* -- democratic values are often seen solely through the lenses of voters and votes, governments and majorities. Consensus building makes participation safe because it is based on the right to say no while agreeing to search for ways to say yes. For some this raises the troubling prospect that minority interests are being given the opportunity to veto the will of the majority. The

pragmatics of getting the people who need to be part of a solution in one place at one time to attempt to wrestle down one problem still attracts philosophic detractors.

- *Professionals and the status quo* -- professionals do best what they are used to doing the most. New processes require new skills - whether the hat is one the head of a lawyer, an engineer, a biologist. Professional retooling of attitudes and skills is a slow process - but this is evolving as the professionals are starting to see new possibilities, as opposed to only threats.

STRENGTHS

- *The public interest* -- a misused and abused word. What is it you ask? To me, the most important thing to consider in relation to the public interest is who gets to define it. I ask this question when this concern is raised: Do you think that the "public interest" will have been "captured" effectively through a consensus involving all of those with an interest, direct or indirect in an issue, or by one person, or one agency, empowered to determine it? Such a consensus, in an environmental context typically takes the form of a "recommendation" to a statutory decision maker. Such a decision maker preserves the right to reject the consensus as a matter of law, but at its political risk - which is likely to be substantial. Nonetheless, if there are failings in the consensus reached, or the process followed, the State has the capacity to act as the "backstop". Hence, the State maintains its mandate to determine what is in the public interest while at the same time having access to a powerful new tool to help define it.

- *Procedural justice* -- people measure satisfaction not only in relation to outcomes, but also in terms of participation -- how they were involved in its resolution. In a world of technologically empowered and intelligent citizens, consensus based processes provide the opportunity to engage in a way that more closely coincides with the citizen's expectation of how they should be engaged in problems.

- *Implementation* -- with agreement the parties are more likely to do what they agree upon than if someone else imposes a solution upon them. We do not have the capacity in our society to have a "fish cop" on every boat, or a conservation authority hiding behind every tree. A greater level of commitment to implementation is an inevitable consequence of reaching agreement amongst those with a stake in the conservation and management of resources and the environment.

- *Decision Making* -- these processes, with agencies and ministries at the table as partners, build the capacity for government to reconcile its own internal inconsistencies, whether between one level of government and another, or across line and between layers of government. The public authorities can pull off their masks and get down to business - with the different constituency of interests they reflect at the table beside them, not worrying about what these interests may think or do after the fact, but rather as part of the fact.

I am reminded of the words of Albert Einstein - "The problems we have today cannot be solved by thinking the same way we thought when we created them." That wisdom knows no geographic limitation and is wise counsel wherever we are in the world - be it Ottawa or Berlin - as we struggle to achieve sustainability on a global basis.