A GUIDE TO IMPLEMENTING DISPUTE RESOLUTION INTO TRIBUNAL PROCESSES

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EXECUTIVE SUMMARY

British Columbia’s tribunals are intended to provide citizens with an accessible, cost efficient and timely means to resolve matters instead of going to court. However, many tribunals still use adversarial hearings as the principal means to resolve matters and, in some cases, those hearings can be as formal, costly and time-consuming as going to court. As government, judges, lawyers and others are now looking at how the courts can resolve disputes more quickly and at lower costs by using alternatives to formal hearings, tribunals need to examine whether other alternatives could be more appropriate to resolve disputes, either as an alternative to, or in support of, formal hearings.

Tribunals that use a range of alternatives to resolve disputes provide their users with the flexibility to achieve resolution in a manner that best meets the parties’ needs. And, perhaps most importantly, alternatives other than hearings can facilitate a shift in users’ attitudes -- from adversarial, win-lose scenarios to a more cooperative, interest-based approach that can result in solutions that give users what they really want and provide them with a greater overall sense of satisfaction with the outcome.

A primary barrier to utilization or increased utilization of dispute resolution (DR) is determining when it is appropriate. Tribunals and other decision-makers need to determine their own DR processes and how those processes will work. This Guide is intended to assist tribunals and others in determining how a tribunal can incorporate, support, and possibly expand DR as part of the tribunal’s own processes. The Guide is part of the Ministry of Attorney General’s overall justice transformation strategy to provide earlier solutions and faster justice.

The Guide is divided into four parts and sets out a “step by step” process, to try to ensure that critical matters are not overlooked. However, users should be prepared to re-evaluate determinations made at earlier steps as the issues
identified and discussed in subsequent steps may impact on those earlier matters.

Part 1 is a brief introduction and overview.

Part 2 discusses how to make an initial assessment of a tribunal’s potential to incorporate DR processes.¹ Considerations may include the nature of the tribunal, the dispute and the persons who are involved in the dispute, the statutory authority and the expected goals of a DR program.

Part 3 sets out some criteria and considerations in deciding how and when an alternative dispute process may be used. Considerations may include who makes the decision, when the decision is to be made and who should provide the DR services. And, recognizing that each tribunal has unique circumstances, various factors that may assist in making tribunal-specific determinations are included.

Part 4 examines organizational and administrative issues that may have an impact expanding a tribunal’s DR options, for example, the resources necessary to develop and sustain an effective DR program. The culture of the individual organization can also have a significant effect on the incorporation of DR processes.

To make the Guide easier to use, a Glossary that defines or explains the words and concepts that are bolded in the text, a document describing the range of possible DR options that might be incorporated into decision-making processes, a list of resources, and a process checklist are all included as appendices.

¹ In discussing dispute resolution by tribunals the descriptor “alternative” is generally thought to be unnecessary because tribunals are already an alternative to adjudication by the courts.
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PART 1 - INTRODUCTION

Purpose of the Guide

The Guide is intended as a resource to assist tribunals, other decision-making entities and government policy advisors in considering how to best implement or expand DR processes into an existing or new administrative justice scheme that is intended to resolve disputes as an alternative to the courts.

The Guide provides a broad framework that can be used to assess implementing a range of DR processes, setting out the various factors and asking questions about the application and use of DR processes. Considerations and criteria are set out that may apply in determining the appropriateness of DR options in various settings. If DR processes are to be provided, the Guide also sets out and asks questions about the various elements that will assist in determining which process may be most effective.

Much of the process in the Guide, and the determinations it suggests be made, are inter-related, with some overlap being inevitable. Setting out the various elements in an order that would “make sense” to all readers in all programs posed a problem, and involved making choices about the order of presentation, not all of which will work for all readers. Some readers may find the Guide more beneficial if they start at the third step – DR process options, first. In any case, it is expected that it will be necessary to read and consider the whole Guide before reaching any conclusions. It is also anticipated that preliminary determinations will need to be re-evaluated, and possibly changed, as other elements, identified later in the process, are considered.

Given the vast range of administrative decision-making processes, not all factors will apply the same or even at all, to all schemes. No hard and fast rules could or should be made as to how any factor will apply, or the conclusion that should be
reached, without information about the program or policy context of the decision-making process. Users will need to bring their own evaluative experience and consider the various factors in the context of their applicability in the particular circumstances. Users of this guide are encouraged to contact the Administrative Justice Office and the Dispute Resolution Office about specific circumstances.

**What Is Dispute Resolution?**

DR is usually defined as any method that may be used to resolve disputes, other than formal **adjudication**. In a tribunal context, DR can include pre-hearing conferences, settlement meetings and early screening, among other things. Under the **Administrative Tribunals Act (ATA)**, \(^2\) “dispute resolution process” is defined as “a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute”.

DR encourages parties to determine and share information about their underlying concerns or interests, so they can work toward reaching a mutually satisfactory agreement, instead of taking and pursuing adversarial positions in an effort to “win”.

DR and adjudication processes are often described as being on a spectrum – at one end are those DR processes where the parties have a high degree of control over what happens – at the other end are formal hearings, where parties have very little control over the adjudicated outcomes.

**Interest-based** DR options, such as **negotiation** and **mediation**, encourage the parties to clarify their underlying concerns or interests in the dispute – what is it that they really want to happen – and to share that information with each other, so they can work toward agreeing on a mutually satisfactory outcome. This

\(^2\) SBC 2004, c. 45, section 1.
replaces the conventional approach where parties simply take an adversarial position in an effort to ‘win’, which may not in fact be the real outcome desired.

**Why Use Dispute Resolution?**

DR processes can improve access to justice so that citizens can solve their problems more simply, quicker and at less cost. DR can provide the parties with greater control over outcomes; conversely, in a traditional, adjudicative hearing process, parties will typically have little or no control over the outcome.

When made an integral part of an efficient case management system that matches the dispute to the appropriate process, DR processes can mean a streamlined resolution process and result in savings of time and costs not only for the tribunal but for the users.

DR processes also tend to offer a range of other benefits to the parties. The parties not only benefit from a greater degree of control over and participation in the process, but also have a stronger perception of privacy and fairness when participating in DR. Other benefits may include less stress, increased confidentiality and greater flexibility in crafting an appropriate outcome.

Perhaps more importantly, DR users typically report higher satisfaction with both the process and the outcomes. The non-adversarial approach of DR can help preserve on-going relationships and foster open, honest communication between the persons in dispute. For parties with ongoing relationships, DR processes can have significant benefits beyond simply solving the dispute at hand. In fact, preserving ongoing relationships is a common reason parties might choose DR over a more formal adjudicative process.

An additional advantage is that parties are more likely to comply with the outcomes and carry out any obligations, when those outcomes reflect a mutually
acceptable agreement, thereby eliminating or reducing the costs of enforcement or the need for judicial review.

Collectively, these factors can combine to produce a powerful impetus for positive systemic change towards a system that can provide earlier solutions and faster justice for users who have traditionally looked to the adjudicative model as being the only option to achieve a fair outcome.

The administrative justice sector, by supporting and implementing DR options where appropriate, can create opportunities for early solving of problems and mutually satisfactory resolutions of disputes by providing a more streamlined, proportionate and timely way to resolve disputes.

**Applying a Principled Approach**

The Guide suggests using a principled approach to address the policy and practical factors that may help determine what, if any, DR processes should be offered. The intent is that by applying a principled approach, all relevant factors will be considered and the processes selected will provide persons in dispute with the best possible options to resolve them.

To assessing the use of DR processes in an administrative justice scheme, the following overarching principles will assist:

**Accessibility** - DR processes (including adjudication where necessary) must be affordable, understandable and timely.

**Fairness** – the parties must have equal and adequate opportunities to express and achieve their desired outcomes.

**Proportionality** – DR processes (including any hearing processes) will need to be proportionate to the matters in issue.

**Efficiency** - the system must use the parties and the tribunal’s resources wisely and efficiently.
Public Confidence - parties must consider the system trustworthy and accountable and have confidence that it will meet their needs.

Justice - to the greatest extent possible, a fair and just resolution results.

By applying a principled approach, the persons involved in the dispute and the public will be able to more easily understand why particular DR processes are provided, and can help support the change to a more cooperative, interest-based search for solutions.
PART 2 – ASSESSING THE USE OF DISPUTE RESOLUTION PROCESSES

Step One – Establish an Assessment Team

Establishing a team with a wide range of knowledge, skills and expertise can be a valuable first step in assessing the use of DR processes at a tribunal or by other decision-makers.

The team members should bring a comprehensive understanding of the administrative decision-making process for which DR is being considered, including:

- the context in which the decisions are made,
- the persons impacted by the decisions, and
- the consequences of the decision.

For this reason, a cross-disciplinary team that brings a variety of perspectives and experiences is recommended. The team may involve tribunal members, staff, legal counsel and also possibly ministry policy staff and program staff, who can each bring informed, but different perspectives. If possible, tribunal users or those impacted by the decisions and, where appropriate, their legal counsel should be involved early in the process, as this will generally lead not only to better results but to greater acceptance of the DR processes that may be adopted.

The Ministry of Attorney General’s Dispute Resolution Office and Administrative Justice Office may also be able to provide specific expert assistance. Depending on the DR processes selected, other input and expertise may be beneficial, for example, information and technology experts may be of assistance in matters relating to implementation.
For the team to be effective, a team leader with sufficient authority to make key determinations at the various decision points should be designated and each team member should be committed to fully participating in the process.

Once the assessment team is established, the next step, information gathering and sharing, can begin.

**Step Two – Information Gathering and Sharing**

The next steps for the team will likely include:

- determining what information may be necessary and how to obtain it,
- identifying the tribunal or other decision-maker’s goals for using DR,
- considering what successful DR would be and how that could be measured.

Another preliminary task the assessment team may want to consider is to develop a plan for communicating with users (if not already represented on the assessment team) and others about the intent to consider DR and how to provide them with information and involve them in the process that will be followed.

**Information Gathering:**

This step in the process generally includes an overall look at the tribunal or other decision-maker’s mission and the environment it operates in: the nature and number of disputes; the methods currently used; and the results achieved. This will help to focus the assessment on the “big picture”, looking at what is happening in the specific system as a whole, in order to tailor the DR outcomes to the particular organization. Much of this information may be easily available from the tribunal’s annual report or on its website, or from team members.

This information could include:

- the number and different types of disputes,
• the resolution processes used and their costs,
• what is working well and what is not and any preliminary comments on why that may be, and
• any early identified opportunities to improve.

**Identify the Tribunal’s DR Goals**

The tribunal’s goals with respect to DR will influence the ways in which the tribunal resolves disputes and which DR processes it might choose to implement. Goals of a DR program may include:

• providing streamlined processes to be responsive to the needs of the persons involved,
• promoting resolution of preliminary or collateral issues, to focus resources on the real issues in the dispute,
• resolving cases earlier in the process to
  o reduce the costs to the parties and the tribunal and related demands on the limited public resources
  o avoid any backlogs that might develop if delays occur,
• ensuring fair, equitable outcomes that
  o preserve confidence in the justice system
  o are satisfactory to the persons involved
  o can be long term and enduring
  o preserve ongoing relationships
  o protect the interests of vulnerable parties,
• encouraging the use of DR as an alternative method to resolve potential disputes in the future, and
• achieving cultural change to support a more collaborative environment, including the legal profession.

**Consider what success in DR would look like and how to measure it**
When assessing implementing a DR process, it is important to envision what the success of that program will “look like”, to ensure that the process, when successfully implemented, will meet the tribunal’s goals. And success in a DR process should be measurable, so that an important element of implementing the process will be to include an evaluation component.

For example, if a tribunal’s goal is efficiency, the success of DR might be measured in terms of speed of disposition, and cases that can be dealt with quickly would be appropriate for DR. Other indicators of success can include the nature of those resolutions, user satisfaction with the process and/or outcomes, a reduced demand on tribunal resources, rates of compliance with outcomes and improved post-dispute relationships. (Indicators of success are discussed more fully in Step 3 of this Part.)

Indicators should be measurable; best practises for implementation should include an evaluation of the DR process in meeting the goals. The AJO and the DRO are working on developing and piloting a guide to evaluating DR processes, which should be available in early 2009.

Once the information gathered and shared among the assessment team, the next step, to identify and assess opportunities for DR, can begin.

**Step Three – Identify and Assess Opportunities for DR**

Assessing the opportunity to use DR will begin with a review of the many DR processes available and a consideration of the various factors to help determine where and how DR can best fit in the tribunal’s system. This is done in order to match the processes that may be best-suited to resolve the types of disputes administered by the tribunal.
The information gathered by the assessment team in Step 2 will help answer the questions that follow, which are intended to help identify and assess the opportunities for DR within the tribunal. None of these questions and answers will be definitive about the use of DR or any particular DR option, and each answer will need to be considered in the context of the other answers. Answers to earlier questions may need to be re-assessed, and perhaps changed, in consideration of answers to later questions.

**Identify Potential DR Options**

**Joint Fact Finding** – This may be described as mediation within mediation – an attempt to come to agreement on the facts that form the foundation of the dispute. It is a collaborative process in which information and resources are shared. This can be a particularly valuable process in complex, multi-party matters where there may be also be significant public policy consequences (as in conflicts involving environmental impact, whether affecting the environment per se or the property interests of private parties). It is most effectively advanced under the guidance of a skilled facilitator (a neutral third party) – see the description of Facilitation later in this chapter. Where the factual environment is strongly technical and contains a number of “unknowns, a fact-finding team comprised of experts and decision-makers representing both sides of a particular dispute may be useful. In logistically smaller matters, as would be common with the majority of tribunal work, joint fact-finding would likely involve the parties themselves reaching agreement on the factual context under the guidance of a facilitator, who may or may not be a subject matter expert relative to the substance of the dispute.

**Advisory Opinion** – A neutral third person – sometimes referred to as a “trusted expert”, as this describes both the person’s role and the qualities needed for the task - reviews each person’s view of the facts and how they say the law and policies apply to those facts (but does not conduct an independent investigation).
and then offers an objective assessment of each case and an opinion of the likely outcome if the case proceeds rather than settles. The opinion is not binding but is instead meant to provide a realistic view which the persons involved may choose to accept.

**Facilitation** – A process that is built around the trusted leadership of a neutral third-party facilitator who has no authority to bind the parties to a position or outcome. The intent of facilitation is to provide a safe, structured environment in which parties to a dispute can begin to communicate openly and on a “without prejudice” basis. The facilitator uses a variety of techniques to encourage communication and minimize the impact of any negative emotion. Through divergent (expansive, brainstorming style) and convergent (filtering and assessment) thinking models, the facilitator enables the parties to collaborate in the generation and analysis of ideas and options, and move in a consistent direction toward consensus and ultimate agreement.

Facilitation differs from mediation in that the context for the facilitation exercise is often broader and more complex, involving groups of parties with multiple members – for example, an environmental conflict involving a governmentally-licensed industrial facility, local residents, environmental interest groups, the local Chamber of Commerce, etc. A multi-party facilitation may have dozens of people in one location meeting on successive occasions as they make incremental progress; this is normally done face to face, although “remote” facilitation may also be accomplished through videoconferencing. As well, the outcome is usually less structured or predictable and often involves a greater range of potential options than would normally be encountered in a classic two-party mediation model.

**Mediation** - A neutral third party – the mediator – attempts to facilitate a settlement between persons involved in the dispute. The mediator and the
persons involved in the dispute meet, preferably in person. Mediators are trained to facilitate discussions between the parties to arrive at a mutually acceptable resolution of the dispute. The mediator has no authority to make any decisions and the process is not binding. The focus of the mediation will be either rights-based or interest-based; usually a tribunal will adopt only one model, but not both.

Rights-based Mediation: The dispute is analyzed in terms of opposing legal rights and duties. In this model, the focus of the mediation session and the outcomes are on identifying which party is right or wrong. Rights-based mediation will most often be appropriate in the context of a closely-defined statutory framework; the mediator will seek to promote a consensus or “meeting of minds” about the intent of the legislative framework within the context of the facts that the parties bring to the table. This can produce a more lasting resolution than a binding declaration issued by a tribunal that produces a “win/lose” result.

Interest-based Mediation: The dispute is considered, not in terms of legal rights but rather in terms of the parties' underlying concerns, goals, and needs. It recognizes that the “positions”, or what parties say they want in a dispute, and the underlying interests motivating those positions are often very different. The mediator helps the parties identify the real issues and desires that motivate them and the outcomes that will really satisfy those desires. In conducting the mediation, the mediator tries to help the parties avoid getting locked into inflexible positions based on rights, but to focus instead on interests. Interest-based mediation may be most appropriate in scenarios where the tribunal is empowered to make orders with a “creative” element intended to serve the public good by responding in a flexible manner to unique circumstances. This concept, applied to DR in the context of the tribunal’s process, would in turn empower the
mediator to encourage the parties to look broadly, creatively and collaboratively at solutions designed to satisfy the needs of all parties to the dispute.

**Negotiation** – Instead of involving a neutral third party, the persons in dispute attempt to resolve the dispute themselves, without the aid of a neutral person. Negotiation can take place directly between the parties or indirectly through agents, such as lawyers, who act in the interests of the parties.

**Neutral Evaluation** – In this process an experienced (and possibly expert) neutral third party gives a non-binding, reasoned evaluation of the case. Because the neutral third party is selected by the persons involved in the dispute, the evaluation is expected to have greater persuasive value and the parties are more likely to agree to it as being a fair and reasonable outcome. The availability of resources to pay the third party may be an issue, with both parties usually paying for the evaluation.

**Settlement Conferences, Case Conferences, Pre-hearing Conferences** – These case management processes involve a dialogue between a tribunal chair, member or senior staff and all of the persons involved in the dispute and their legal counsel, if any. Objectives can include dealing with preliminary issues like jurisdiction and other validity issues, analyzing the nature and complexity of the dispute to direct it into a particular process stream that requires more or less steps in process, clarifying the issues in dispute and setting parameters and dates for pre-hearing activities like production of documents and experts reports, and discussing potential resolution of the dispute. These processes look to ensure the amount and nature of the process are proportionate to the nature and significance of the dispute. The person undertaking the process for the tribunal needs to have an in-depth knowledge and appreciation for the tribunal’s processes and sufficient stature and authority within the organizational structure.
that his or her directions are followed. The tribunal, or one of the persons involved in the dispute, may trigger the process.

Case management reduces unnecessary activities, keeps the process moving in a timely way and, if a hearing is required, improves the efficiency of the hearing thorough more advance preparation; however, caution needs to be exercised that the case management process requirements do not exceed the needs of the dispute.

**Conciliation** – This can also go by the designations of “shuttle diplomacy” or “mediated communication”. The goal of the conciliator is to bring two or more parties who refuse to meet face-to-face to a stage where there has been sufficient exchange of information to start to build trust – or at least to enable the parties to conclude that face to face mediation (or similar activities) would not be a waste of time. In this manner the conciliator tries to reduce tension to a level where direct in-person communication can occur and issues can be discussed in a mediated setting.

**Negotiated Rule-Making (or ‘reg-neg’)** – This DR process operates to bring together representatives of various stakeholders to collaboratively develop (or negotiate) a proposed rule or regulation that will apply to the dispute. This method is used extensively in the U.S. and is more frequently used for very complicated issues with large numbers of parties, often with a significant public policy interest.

**Considerations**

The next step in the assessment process will be determining the appropriateness of DR to the tribunal. Preliminary considerations should include determining the legal authority, articulating the expected goals of a DR program, and looking at the nature of the tribunal, the persons involved and the types of disputes. In
addition, the evaluation team may want to be aware of contextual influences and their possible impact on the DR process. Since each tribunal is different, it is expected that context will play a key role in DR considerations.

The assessment team must be aware of the obvious interplay between, and overlap of, many of the factors. The tribunal, the persons involved in the dispute and the dispute itself are all influenced by context, and by the particular goals chosen by the tribunal. What is applicable to one tribunal may not be relevant to a different tribunal. What works for one kind of dispute may not work for another. The goals of some tribunals may be similar but there will be contrasts as well. Many of the following questions will help the assessment team keep in mind the overarching interests - accessibility, proportionality, fairness, public confidence, efficiency and justice – and to use the answers to those questions to determine the best process to resolve the dispute.

**Does the tribunal or entity have the legal authority to adopt DR processes?**

Many BC administrative tribunals have express legal authority to conduct DR processes, either by virtue of section 28 of the *ATA* or a similar provision being adopted by the tribunal’s own legislation. For others, indirect authority may be found in the common law, which considers administrative justice agencies to be “the masters of their own procedure”. As a result, the generally accepted position is that unless there is specific legislation that says otherwise, a tribunal can establish and implement DR processes. Other decision-makers may need to consult with their legal counsel.

Generally speaking, both the legislative and common law authorities that support DR processes are enabling; that is, they permit but do not require that DR processes be adopted. Instead, that decision is left to the tribunal or other

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3 For example, see *Safety Standards Act*, [SBC 2003] Chap. 39, s. 44.
decision-maker as being in the best position to know what will work the best in their particular circumstances.

**Are there any legislated or other timelines that may impact on the extent of the DR options that may be available?**

If a tribunal is required to make a final decision within a short timeframe, the opportunity to undertake DR may be more limited, however, some schemes permit timelines to be extended, for that reason legal advice may be helpful to confirm if that is an option.

**What is the nature of the dispute? More specifically:**

- **Does the role of the tribunal lend itself to adopting DR processes?**

Tribunals, by their very nature, each have a unique role, with many having multiple functions -- for example: regulation and/or investigation functions may be combined with a complaint or appeal/review function. While DR is now broadly accepted as a legitimate and effective way to resolve complaints and appeals/reviews, some have questioned how DR can be used in regulatory and investigatory functions. In fact, a DR approach can work well to promote compliance with a regulatory scheme, and even in investigations has been effective by providing an opportunity to be involved in the process as participants rather than simply “subjects of an investigation.”

Investigative bodies such as the Ombudsman Office have used a “systems approach” to determine root causes of recurring problems, and in the course of investigation have involved a multiplicity of affected persons and groups in order to gain a deeper, more accurate and more insightful perspective. Pursuing such a course emphasizes the point that the investigating body is looking for workable solutions rather than “targets”. Other organizations with a specific regulatory mandate, such as the Farm Industry Review Board, have found and continue to find that this type of broad, solution-oriented approach to community conflict
involving agricultural activities yields more lasting and cost-effective solutions than on order issued by the Board.

- **Can the tribunal’s statutory mandate permit compromise solutions as a way to resolve the dispute?**

  While some tribunals may be limited in the types of orders they can make or the outcomes they can endorse, most statutory schemes will have some room for a compromise to be reached on at least some of the elements of a dispute, even if it is only the manner in which the hearing will proceed. In these circumstances, DR can be used to achieve agreement on aspects of the hearing process such as the nature of documents to be produced and when they are to be produced, the extent and how expert evidence will be presented, or other matters directly related to the hearing process. This can mean more expeditious hearings to arrive at a final outcome.

- **Is there a range of possible outcomes that could resolve the dispute?**

  In a DR process, agreement can be reached on the facts or the law, with the facts determined by the parties participating in a cooperative “assisted fact-finding” exercise. Once the facts are agreed on, the parties may be able to then agree on what the law requires, based on earlier tribunal or court decisions, or the parties may be able to go further and co-operatively develop an agreement on how the law would apply, bringing some creative thinking to the task that an adjudicator in a traditional hearing process may not be able to provide. In this way DR can expand the range of possible outcomes and give the parties greater responsibility for developing their own tailor-made result.
• Are there systemic problems to be addressed, broad policy questions to be answered, legal issues under discussion or precedential value in the outcome of the dispute?

In some cases, even if agreement can be reached on the facts, how the law applies to those facts may be unclear. In these cases, if agreement cannot be reached or a definitive answer by the tribunal is necessary for future similar circumstances, then a hearing may be required. However, the hearing can be much quicker and less costly if the parties reach agreement on the factual basis.

Are there other benefits, other than achieving outcomes, that DR could help achieve?

Even if the final outcome cannot be mediated, other benefits can be achieved by using DR to resolve elements of the dispute. As noted above, using “assisted fact-finding” to reach agreement on the facts can mean less time necessary to determine how the law applies to those facts. And using DR to set the process for how the hearing will be conducted can mean reduced time and costs to complete the hearing. Another important benefit from using DR can be an increased perception of fairness, especially if it is used to bring out and address underlying interests that are not immediately apparent in the dispute.

Who are the persons involved in the dispute and what are their characteristics?

The capacity and ability of the persons involved in the dispute to participate in DR may vary. This can affect the level of their participation in DR, which may affect the choice of DR options.

In many DR settings, the persons involved in the dispute are given substantial control over the DR process, with direct involvement in identifying what the dispute is really about and in developing a resolution that meets their unique situation. A tribunal will need to determine the capacity, ability and level of
participation that can be expected from its users to be directly involved for those processes to be effective. Looking at the capacity and ability of the persons involved in the dispute may include social, economic and educational backgrounds, language and culture, expectations and assumptions, as well as access to resources. Questions to ask might include:

- **Is there one party, two parties or multiple parties?**
  It may be easier to implement DR when only a small number of persons are involved in the dispute. However, while a large number of persons involved in a dispute may make DR a bit more complex, that factor alone does not mean DR is not appropriate; it may simply mean certain forms of DR, such as multi-part or group facilitation, are more appropriate.

- **Are the persons involved on their own behalf or on behalf of a group, a corporation or another organization?**
  If the persons represent a group, corporation or other organization, then it will be important to ensure that they can effectively participate in DR processes and have clear authority to take the steps necessary to resolve the matters in dispute using DR.

- **What are the goals of the persons involved?**
  If the goals of the persons involved in the dispute are directed more to an actual outcome they can live with than the process of getting there, then DR is more likely to be successful. If the persons involved in the dispute care more about the publicity of a hearing or having their “day in court” than the actual outcome, then DR to resolve the issue may not be as successful. However, even in these circumstances, DR can be helpful to “settle” the various steps in the hearing process.
How knowledgeable will most users be about the tribunal? For example, is the dispute a “once in a lifetime” occurrence or will many users have a series of similar disputes?

Persons who are involved in a once in a lifetime occurrence may have different goals than persons who are involved in an on-going series of disputes. For persons with a once in a lifetime dispute, adversarial hearings may be intimidating and these persons may be more agreeable to having the matter resolved using DR. Persons who are involved in a series of similar disputes may not find adversarial hearings as intimidating and may even want to get a clear legal ruling on their rights that could then be applied to subsequent disputes. Persons involved in a series of disputes may have more realistic expectations about outcomes than persons who have no experience in relation to the dispute.

What is the relationship between the persons?

If there is an ongoing relationship between the parties that needs to be considered - for example, neighbours or members of a regulated industry - DR may be highly appropriate. Because resolutions achieved through DR reflect agreement by the parties, the outcomes can be easier to enforce and are more likely to be respected over the long term.

Is this an emotionally charged dispute?

DR can be very useful to reduce the emotional aspects of a dispute by giving the persons involved a more effective opportunity to really communicate what is important to them, providing a structured setting for them to speak and listen to each other, with skilled assistance in clarifying what is really being said.
➢ **Are there issues users may wish to keep private or even confidential?**

Because most DR processes are conducted in a private setting, DR may be a good - or even the best - option when parties want to keep personal or business information confidential.

➢ **What is the likelihood the persons involved in the dispute will be motivated and/or committed to participating in DR processes like mediation?**

Some types of disputes and/or persons involved in them may be more likely to be motivated to resolve a matter than others. For example, some persons and corporations may want to avoid the negative publicity that can come with an adversarial hearing and subsequent order.

➢ **Will most users have a similar level of knowledge about the matters before the tribunal or will they have different levels of experience?**

*If there is a difference in direct knowledge, will users typically have a similar level of sophistication so they can gain the knowledge? Or will users likely have varying degrees of ability to gain knowledge?*

When users have similar knowledge, or the ability to gain knowledge about the matters in dispute, it may be easier to use DR without having to make adjustments to "level the playing field". Differences in knowledge or the ability to gain knowledge may require different DR techniques be used. In such circumstances the parties may derive maximum benefit from a facilitative process designed both to enable learning and agreement on disputed facts. Having a neutral subject matter expert (or experts) work with the parties within a facilitated environment that stresses collaboration both in learning and in problem-solving may have multiple positive consequences: greater involvement in and commitment by the parties to the process; enhanced trust by collaborating in learning, and greater
sense of ownership of the outcome – the agreement that formally resolves the dispute.

➢ What is the likelihood of the persons being represented by legal counsel?
Because of their background and training, legal counsel sometimes bring a perspective and expertise in favour of an adversarial hearing. However, recent changes to the Court Rules promote mediation and DR is gaining wider acceptance in the legal culture, with many lawyers now using DR as part of their everyday practice.

Who else may be involved with and/or impacted by the outcome?
Not everyone who is affected by a dispute is a “party” to the tribunal’s processes to resolve the dispute. In fact, many tribunals are intended to consider and reflect other interests than just the parties. However, that does not necessarily mean DR is inappropriate. It may simply mean the DR processes used need to be structured to reflect those other interests. Questions to ask may include:

➢ Is there a public interest in the possible outcomes and if so, how can that be accommodated if a DR process is used?
The most effective tool to address public interests may be crafted by using one or more DR options tailored to fit the circumstances of the case. For example, a multi-stage process beginning with facilitated meetings with the directly affected parties, to generate consensus about disputed facts, and to develop ideas and options for possible resolution. This could then be followed by further facilitation or mediation among selected parties chosen to represent the various affected interests or constituencies.
➢ *Will the dispute affect persons or groups who are not parties to the hearing?*

Any DR processes used should be structured to reflect those interests. The preceding paragraph offers a model that may be applicable in such a scenario.
PART 3 – DETERMINING THE APPROPRIATE DR PROCESS

The selection of the appropriate DR process is always highly context-specific; this is especially true in the administrative justice sector where tribunals have very specific and individual mandates, users and operating environments. For many tribunals several different or a combination of DR processes may be desirable.

Determining the appropriate DR processes for any given tribunal will involve consideration of the full range of options. The various options are set out in Part 2 of this Guide.\(^4\) The choices include an *interest-based, problem solving* resolution model or a *rights-based, adversarial* model, or some combination of these. Which one best fits will be a matter of policy. Using a variety of options may meet the principle of proportionality, as a selection of DR options that the tribunal or the parties can make use of depending on the circumstances.\(^5\)

A DR system can thus be made flexible enough to fit within most tribunals. In this way, an appropriate choice can be made as to which options would be suitable, drawing on the full range of DR choices to ensure that the resolution process is responsive, accessible and efficient.

In addition, consideration of the options will also require consideration of

- whether DR will be mandatory or voluntary
- if voluntary, who will decide when and if DR will be used in a particular dispute, and
- who will conduct the DR process.

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\(^4\) It will be important to remember that more than one DR process can be used and some DR processes may be more effective if used in combination with others - for instance, mediation may be combined with an Advisory Opinion process, which might apply if mediation “stalls”.

\(^5\) For example, a mediation – arbitration model may be seen as an optimal process, but it would require resources. For a busy tribunal the ideal dispute solving model may involve dedicated mediation officers, who would be independent, neutral and have expertise in the area.
Information to assist in making those decisions is provided in this Part, followed by considerations that may assist in making tribunal-specific determinations. Those considerations are classified as principle-based criteria or indicators of success. Principle-based criteria help to determine which DR processes may be appropriate; indicators of success are those factors that may have a bearing on how successful that DR process might be in the specific environment. Not all considerations will apply to all tribunals, but the ones that are applicable will provide a solid starting point for determining the DR processes that may be best.

Is the DR process to be voluntary, mandatory or some combination?

If participation in the DR process is voluntary, a party can chose whether to participate in DR or can refuse and proceed directly to adjudication. This gives any one party to the dispute the ability to determine the process, regardless of the needs of the other parties or the tribunal.

In a mandatory DR process, the persons involved have no choice on whether to participate - a person’s participation in DR is a condition of the tribunal continuing to accept the dispute within its scheme. Making DR mandatory is based on an assumption that the DR process will add value, with a high likelihood of successful resolution without a hearing. A mandatory DR process that applies in all cases may work best when the disputes are highly similar and there are few differences in facts, the applicable law, the types and nature of the parties.

If a mandatory option is selected, in order to be effective, the tribunal must be able (and willing) to impose sanctions for failure to participate in the DR process. Those sanctions can vary and could range from limiting a person’s right to advance certain evidence or positions at a hearing, to awards of costs, to outright dismissal of the dispute - in effect denying the person the opportunity to an adjudication.
Although some might suggest that DR processes need to be voluntary to work – that is, the persons involved need to “buy in” to make the process work – that is not always the case. For example, various DR processes are now mandatory under the Court Rules. Others might suggest making DR mandatory can be a good way to “convert” reluctant participants to a new way of resolving issues.

If the decision to participate in DR is to be voluntary, effecting a cultural shift from a known adversarial hearing process to a new unknown process may be difficult. A tribunal considering adopting voluntary DR may also need to consider how to promote participation in DR. It may be that offering an “advantage” to using DR will be required to promote its use. Costs awards when DR could have been used, but was not, might be one such possibility.

An alternative to strictly mandatory or voluntary DR may be to adopt a more evaluative assessment model. In this alternative, the individual dispute is reviewed by the tribunal and the applicability of the various available DR processes considered in those circumstances, with the tribunal having discretion whether to compel parties to participate in DR. This permits the tribunal, using its knowledge and past experiences, to identify those case that have a greater chance of successful resolution using DR. And by using this model, the DR process can be specifically matched to the dispute, with individual variations adjusted for. This evaluation may be reviewed throughout the entire process and adjustments made as circumstances change.

A different combination of voluntary and mandatory participation in DR is to provide the ability for any person in the dispute (which could include the tribunal) to trigger the application of DR, so that all others would then be forced to

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6 For example, mediation is now mandatory in Small Claims cases at certain Provincial Court registries in British Columbia.
participate in the process.\textsuperscript{7} This provides a way for the parties to self-identify when DR may have some chance of success.

**Who should make the decision whether the parties should use DR?**

If DR is to be voluntary, someone will have to decide if and when it should take place. And even where participation in DR is mandatory, there can still be a need for someone to decide which option will apply and/or how soon the DR process should take place.

These decisions can be made by any of a number of persons. Often the person making the decision is the tribunal chair, a tribunal member or senior tribunal staff, or perhaps all or some of these persons will have that authority. The decision to utilize DR could also be made by the persons involved in the dispute and/or their legal counsel (if any).

The choice of who makes the initial decision will depend in part on how much discretion there will be as to whether DR will be used – the higher the level of discretion on whether and when to use DR, the greater the need for expertise and knowledge of DR generally and of the tribunal’s DR processes in particular. The ability to exercise good judgement combined with a high level of commitment to DR as an effective process can assist in making DR an integral part of the tribunal’s process.

**Who will provide DR services?**

This choice may depend, at least in part, on the DR process to be used. DR services can be provided in-house by tribunal members or could be done externally through individuals or organizations appointed or approved by the

\textsuperscript{7} This type of quasi-mandatory mediation, triggered on a request by one of the parties to an action, may be effected under several regulations (General Notice under the *Law and Equity Act*, Motor Vehicle actions under the *Insurance (Motor Vehicle) Act*, and construction cases under the *Homeowner Protection Act*) and is being piloted in some family law cases at specific registries.
tribunal, or chosen jointly by the persons involved from an accredited list or selected independently by them.

Some people think that the person providing the DR process should be part of the tribunal’s own internal resources – the chair, a member or staff – because these persons are best able to ensure the tribunal meets its overall public obligations to support fair and just outcomes, ensure systemic consistency as appropriate, and have the necessary flexibility in terms of availability and timing. This view likely reflects the selection of tribunal members and staff based, at least in part, on their experience in the successful delivery of DR services or where the tribunal provides the training, mentoring and opportunity necessary to acquire that expertise in DR. This option may be attractive when there is a large volume of disputes.

Others think that persons who are not directly part of the tribunal may be able to provide more experience and greater skill levels in DR, provided they clearly understand the extent of the tribunal’s mandate and the range of outcomes the tribunal’s legal authority allows to be accepted or sanctioned. This view likely reflects where an experienced professional, well briefed on the tribunal’s mandate, has been retained. This option may be attractive when there is a low volume of complex disputes, but such an individual might also provide DR training services to tribunal members with a view to possible direct involvement by those members in future DR efforts if case volume increases. (The BC Mediator Roster, which sets high standards for membership, may be a useful starting point in selecting skilled DR experts.)

**When should DR take place?**

Generally, the research implies that there is no automatic right or wrong time for DR. The timing for DR processes may depend on the tribunal’s goals. For example, a tribunal or agency with the goals of client satisfaction and cost-
effectiveness may make early DR a priority whereas a tribunal with the goal of high settlement rates may want to engage in DR later in the overall process since the parties will have more information and may be more emotionally ready to settle later in the process. Timing may also be important as a dispute may become more or less amenable to DR at different stages of the process, indicating a need for ongoing assessment of appropriateness.

**DETERMINE TRIBUNAL-SPECIFIC REFERRAL CRITERIA**

No one single set of criteria can address the wide variety of administrative agencies, disputes and persons involved with disputes. These factors and the context-dependent effectiveness of DR processes, make it difficult and unrealistic to set out a single set of criteria capable of identifying disputes suitable for DR. In order to determine the appropriateness of referral to DR, a tribunal must develop its own referral criteria depending on its goals, process parameters, and numerous other considerations.

A number of broad considerations may have a bearing on the appropriateness of DR in a particular context. Such factors can be classified as:

- **Principle-based criteria**: matters of principle indicating features essential to a minimally fair process or to allow the DR process to function at all; and
- **Success Factors**: considerations thought to have a bearing on the success of disputes resolved by way of DR processes.

These considerations provide a basis for review and analysis that will help administrative tribunals determine when DR is appropriate. Not all factors will apply to all tribunals and the list should not be construed as exhaustive.
Principle-Based Criteria

The overarching principles for selecting the best resolution processes are:

- **Accessibility** - DR processes (including adjudication where necessary) must be affordable, understandable and timely.

- **Fairness** – the parties must have equal and adequate opportunities to express and achieve their desired outcomes.

- **Proportionality** – DR processes (including any hearing processes) will need to be proportionate to the matters in issue.

- **Efficiency** - the system must use the parties and the tribunal’s resources wisely and efficiently.

- **Public Confidence** - parties must consider the system trustworthy and accountable and have confidence that it will meet their needs.

- **Justice** - to the greatest extent possible, a fair and just resolution is ascertained and results.

In addition, the following additional principles need to be considered:

- **Capacity**: To participate effectively, persons involved in a DR process must have the capacity to understand and express their own interests and the potential impact of any agreed upon outcome. This may include consideration of an unmanaged mental illness or an intellectual disability. An option may be to consider whether the person can be linked to or provided with an appropriate advocate (which does not in all cases mean a lawyer).

- **Personal Safety**: Persons involved in a DR process must be able to participate in it without fear for their physical and emotional safety. In some contexts, this may include consideration of personal security such as fear of violence by another person or concerns about containing highly aggressive outbursts.

- **Power Balance**: The existence and nature of any power imbalance, and the extent to which any power imbalance can be redressed, are important
considerations in any decision to use DR. The assistance of a neutral third party may help redress any apparent imbalance, provided there is sensitivity to the source and type of imbalance. While some suggest that a power imbalance that arises as a result of an information disparity may make DR inappropriate as a matter of principle, because that power imbalance cannot be addressed, it may be difficult to reconcile resorting to an adversarial hearing on that basis alone, as an adversarial hearing may only exacerbate that imbalance.

- **Cultural Factors**: Cultural factors may need to be considered in a decision to apply DR, as these may have a bearing on power balance and the parties’ overall capacity to participate effectively in a DR process. However, since most DR processes are flexible in nature, it is probable that it can be easily adapted to accommodate a variety of cultural concerns where power is not the overriding issue.

- **Flexibility**: The need for, or possibility of, more flexible outcomes may be a significant consideration in a decision to use DR in the particular case, particularly where the tribunal’s goals reflect a problem-solving orientation.

- **Relative Costs**: The relative costs of DR and adjudication for both the parties and tribunal, compared to the benefits of each, is an important consideration. DR processes are widely seen as less costly and quicker than adjudication, but this should not be presumed to occur in every case, since cost and time savings will typically be achieved only if the DR actually results in a satisfactory resolution of some or all the elements of the dispute.

- **Public Interest**: In applying a DR process, tribunals may need to consider the need to balance the public interest with the rights and needs of the parties involved. DR can be appropriate when the dispute does not affect the rights of others who may not be direct parties to the dispute or when the circumstances of the dispute do not raise a broader, systemic issue. If the public interest is at stake or broader, systemic issues are
raised, formal adjudication or perhaps a DR process that involves a broader group or can address systemic issues may be more appropriate.

Success Factors
The following generally held indicators of DR success can help select the right DR option. Some of these indicators may have more importance and significance than do others.

- **Authority to Resolve the Issues**: The individuals participating in the DR process, either on their own behalf or as a representative of a party involved in the dispute, must be able to come to the process with the authority to enter into an agreement to resolve the dispute as part of that process. Simply attending at a DR process, without the ability to accept a compromise or other outcome as part of that process, can waste all participants’ time and money.

- **Value Conflicts**: The fundamental values of the persons involved in the dispute must be sufficiently capable of being reconciled, to permit agreement on the outcome. Where fundamental, non-negotiable values are in conflict, the potential for achieving benefits by using DR processes may be low. And when the costs to try to reach an agreement are considered in relation to the limited likelihood of success, adjudication at an adversarial hearing may be the better option. However, DR processes like case management can still be very useful to clarify the issues and information to be presented or set the processes for a hearing.

- **Intensity of Conflict**: The relationship between the parties must permit a basic level of communication necessary to participate effectively in a DR process. Where one or more parties are so entrenched in their positions that a DR process is likely to lead to more, not less, frustration, that DR process may not be effective. Again, even in these cases, DR processes like case management can still be very useful to clarify the issues and information to be presented or set the processes for a hearing.
Legal Representation of the Parties: Legal representation may have a bearing on the prospects for success, depending on the attitudes, knowledge and skill of the lawyer. Where a person’s capacity is an issue, fundamental values are at stake, or the intensity of the conflict is high, legal representation may be an important predictor of success. However, if only one party has legal counsel, power balance issues may arise.

Practitioner Skill: Some research suggests that the skill and behaviour of the person providing the DR services may have a more significant impact on success of DR processes than other frequently identified criteria. The skill of the practitioner has also been found to be a significant factor in the level of the party’s satisfaction with the process.

Factors that hold less significance, but may still be relevant:
Generally the research on these factors is inconclusive; however, they may still be worth considering in the context of the tribunal’s overall scheme and users.

Type of Case: Currently, there is insufficient evidence to suggest that certain types of cases are more amenable to DR than others.

Factual Disputes: Some commentators suggest that factual complexity may impair the prospects for successful DR; others maintain that this is not a significant factor in whether a case settles or an outcome achieved by DR is considered satisfactory.

Multiple or Complex Issues: The impact of multiple or complex issues on DR success is unclear. Although some suggest complexity is a reason to opt out of a DR process, in some types of disputes, family law for example, mediation is thought to work better when there are multiple issues rather than just one or two.

Money at Stake: Some studies find a correlation between the amount at stake and the success of DR, with others finding no relationship. A dispute where a large sum of money is a central issue could be very
straightforward, while one with a small amount of money could involve a
number of other, complex factors.

➢ **Multiple Parties:** Some studies indicate that multi-party disputes in the
environmental context are amenable to resolution through DR. A dispute
concerning “community issues” is often the type of dispute where multi-
party participation is common. The BC Utilities Commission frequently
conducts successful multi-party settlement discussions as part of its
overall DR initiatives.

➢ **Social Characteristics:** Generally, the literature suggests that
demographic factors (sex, age, education, economic status, etc.) are not
significant considerations in predicting the success of DR. One study
found that some ethnic, gender and cultural factors had an impact on
outcomes for DR and litigation, which may underscore the need to
consider social and cultural context in DR system design.

The above criteria and factors can be applied in the manner of checklists to
determine systematically whether DR is likely to be an appropriate and
successful addition to the tribunal’s mandated process. At the conclusion of such
a systematic analysis, it is useful to step back and try to visualize the process
from a number of perspectives:

- That of a tribunal member: does the DR system “look right” and does it
  appear to be a good fit with, and add value to, the tribunal’s statutory
  mandate? Or is it merely a less formal duplication of what the tribunal
  normally does in the course of an appeal?

- That of an appellant or interested party: does the DR system inspire
  confidence? Does it make the individual feel they are being treated fairly
  and are truly being listened to? Does it offer the real prospect of solutions
  that are at least as beneficial as the result obtained by a formal hearing by
  the tribunal?
• That of a member of the public: Does the system look fair, honest and transparent – or at least to the extent that it can be without compromising appropriate levels of confidentiality? Will the public have faith that the process that is being used, to the extent the outcomes may affect the public, will afford an appropriate opportunity to participate in broader public policy discussions?

Looking at the tribunal’s process with a fresh perspective can be a valuable and rewarding tool to ensuring the best processes are made available. Engaging others in that exercise can bring additional insights, with the Ministry of Attorney General’s Administrative Justice Office and Dispute Resolution Office offering valuable resources in that regard. Consultations with a DR practitioner or administrative law practitioner with a strong DR background can also be extremely beneficial in applying the appropriate criteria and coming to the appropriate outcomes about the role of DR in resolving disputes before the tribunal.

**Evaluation**

Evaluation is an integral and on-going element of any DR system. Building in an evaluation component will ensure the program is working in the manner intended and achieving the intended outcomes. It will help to identify strengths and weaknesses in the DR processes and support on-going improvements.

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8 The AJO and DRO are currently working to develop an evaluation toolkit that tribunals can use to evaluate DR programs. Check the AJO and DRO websites for further developments on that project.
PART 4 – ORGANIZATIONAL AND ADMINISTRATIVE ISSUES

Various “environmental” factors may have a bearing on the appropriateness of DR in the tribunal context. These organizational and administrative issues can present potential challenges to successfully implementing changes and, as such, may have an impact on DR system design.

This part will also identify possible pitfalls to be avoided in trying to effect changes and make suggestions on obtaining the support and commitment of the organization’s leadership and stakeholders to the overall scope of change.

Resource Constraints
To design, implement and support an effective DR program requires sufficient resources. Limits on the available time, budget, or expertise can impact on the success of making changes and can influence the various decisions to be made regarding implementing DR options. Tribunals will likely need to be creative about how they approach these resource challenges.

Time and budget dollars can be hard to free up, but the experience by many has been that DR can save both over the longer term. The DRO may be able to assist with both an assessment of those resource requirements and how to develop a business plan to assist in accessing additional resources. The DRO may also be able to provide other information that will allow building on other earlier efforts, thus reducing the resource requirements.

With respect to expertise, the DRO may be able to provide some assistance, either directly or by providing information on selecting experts, or suggesting options such as a small-scale pilot program as a first step in implementing DR processes, to reduce costs and associated risks.
**Limited Case Volume**

Case volume may have a bearing on implementing DR processes. Some tribunals with low case volumes may be too small to adopt new DR processes. For these, the benefits of DR processes (e.g., time savings and cost effectiveness) may not outweigh the cost of integrating the processes into the case management system. On the other hand, some have suggested that with low volumes, every case should be dealt with in a non-adjudicative process. And limited case volume, considered alone, may be a misleading factor if the magnitude of the case is large with respect to number of issues, impact on individuals or communities, dollar value of the dispute, or number of interested parties. Ultimately, a rational cost-benefit analysis considering these factors should be carried out and integrated into a review of all other relevant factors.

**Organizational Culture**

DR should “fit” within the organization’s culture which, in some cases, may require a re-orientation of perspective and/or critical leadership to reflect the growing trend across the justice system to resolution without hearings when possible.

Tribunals in particular need to be alert to changes in the practises and culture of the justice sector generally. With the courts looking at adopting new proactive processes, tribunals and others will need to be “out ahead” of the courts, if they are to be a true alternative.

Tribunals should expect to undertake strategies to reduce costs and time for the parties by ensuring proportionate effective processes. And with limited available resources, tribunals must also use their own resources wisely. Tribunals that do not support DR may appear to lack leadership or the commitment to providing effective problem solving.
Limited Demand for DR

DR is widely promoted as the most appropriate way to resolve disputes, providing an opportunity for cheaper, faster, more durable and better outcomes. For these reasons, it is assumed that DR should appeal to most, if not all, tribunals and their users. However, in a recent survey of tribunals, five of seven identified “limited demand” (users prefer hearings or are sceptical about settlement processes) as a barrier to increased utilization of DR.

Scepticism and reluctance on the part of the persons involved in disputes may be indicative of their misunderstanding of DR or lack of awareness, which in turn suggests a failure in program design. A key element of DR design is to ensure that the persons who will use the process will have the necessary knowledge and skill to choose and use DR. Alternatively, reluctance to participate in DR may stem from a person’s expectation for the issue to be decided by an adjudicator after a hearing, or a genuine desire for a “day in court” to be proven right.

Training (skill development) and education (building a knowledge base) are integral parts of the design of a DR system. The DRO has a training curriculum and may be able to offer specialized training on DR for tribunals and its users. The DRO may also be able to help develop informational materials to assist tribunals in educating their users about the DR options available to them and how to access those processes so they can be confident in using the tribunal’s DR processes to resolve their disputes.
CONCLUSION

DR processes, while potentially beneficial for a wide range of cases, are not always universally appropriate, nor are they a solution that can or should completely replace rights-based adjudicative hearing processes. More likely, processes such as mediation and various kinds of settlement conferences are a useful addition to, not a replacement for, existing processes.

Even if a tribunal concludes DR will not be appropriate to assist in resolving disputes, the very activity of a rigorous examination of the potential application of DR can be useful in refining the tribunal's appreciation of its processes.

The general belief is that for the majority of tribunals and their users DR processes will be beneficial and well worth expending the resources necessary to incorporate those processes as a functional component of the tribunal process. As tribunals gain more experience with DR, the merits of a process and outcome “owned” by the participants will be demonstrated in the form of durable resolutions and high levels of participant satisfaction. In addition, if using DR to involve a broad spectrum of interested parties to craft solutions that provide optimum benefit for the greatest number, significant “spin off” impacts in terms of refinement of the public policy may be achieved.

DR is no longer simply an “Alternative”, but has, instead, become a critical and effective decision-making model in the administrative justice sector, such that formal hearings should be reserved as a last resort, to be used in only a minority of disputes.

For further information or advice on DR in tribunals, please feel free to contact:

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<tr>
<th>Administrative Justice Office</th>
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<td>Phone: 250 387-0058</td>
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<td>Website: <a href="http://www.gov.bc.ca/ajo/">http://www.gov.bc.ca/ajo/</a></td>
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APPENDIX 1 - GLOSSARY

**Adjudication** – The process where a neutral third party, usually a judge or tribunal member, hears each person’s evidence and arguments and then makes a binding decision as to the outcome. The decision is usually based on objective standards and may, in limited cases, be appealed to another court or tribunal.

**Adversarial** - In the context of DR, the term adversarial describes DR processes where there are two or more parties, often characterized as opponents or contestants, with differing positions, only one of which can win. The current legal system in Canada is described as an adversarial system.

**Distributive** - This is a term that, when used in a DR resolution context, suggests that the parties in dispute are competing over the distribution of limited or fixed resources. Each side is thought to be in conflict over who gets more of the fixed resources; a gain by one side necessarily means a loss by the other side.

**Early Screening** – This is a process where staff or decision makers examine the nature of the dispute, the parties and any other pertinent factors to determine whether the dispute would be appropriate for DR referral.

**Impartiality** - Impartiality implies a lack of a real or a perceived bias on the part of the person hearing or mediating the dispute.

**Integrative** – In a DR context, “integrative” refers to the idea that disputes have more potential solutions than are first apparent; there is always the possibility that the parties’ interests can be combined or “integrated” in ways that “enlarge the pie” - the win-win solution - by creating value beyond that achievable through an adjudicated outcome (win-lose) in which one party’s interests are favoured at the expense of the other’s.

**Interest-based** – Interest-based bargaining is an approach to negotiation where the focus is on underlying interests rather than positions. An *interest* is a want, need, desire, fear or concern that influences behaviour in a negotiation. A
*position* is a desired outcome in a negotiation. The parties’ interests serve as motive for their positions.

**Neutrality** - Neutrality implies that the third-party neutral (the mediator or other person hearing the dispute) has no preference for any possible outcome of the process.

**Positional** - Positional bargaining is a negotiating process where each party puts forth its ideal view or demand for resolving the dispute. Each side then refines its position in the hope of moving towards an acceptable solution. Positions are often so contrary that the best hope lies in one or more parties agreeing to compromise. When parties concede their interests or compromise, the solution is often unsatisfactory for all.

**Without Prejudice** – In the context of DR, this means that statements, offers or communications made during negotiations cannot be used later as evidence if no resolution is made.