

**Foundation of Administrative Justice '09**  
**Opening Doors: Tribunals Creating Effective**  
**Access to Justice**  
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I would like to spend a few moments talking about the role of ADR and Administrative tribunals particularly from the perspective of Alberta Municipal Affairs' Municipal Dispute Resolution Initiative and its relation to the provincial Municipal Government Board.

In order to do so I will begin by providing a brief historical overview of how the program developed.

### **Historical Context**

Three events came together at the right time, each lending credibility to the concept of some sort of mediation program for municipalities.

#### **First**

Nov 1996 Stakeholder awareness

A survey done for AUMA and AAMD&C identified problems in intermunicipal cooperation and in resolving disputes.

Regional Municipal Planning Commissions had been eliminated and intermunicipal tensions were beginning to emerge.

#### **Second**

Ministry response

In 1997 the Municipal Affairs business plan identified the need to "Encourage and foster intermunicipal cooperation and self directed intermunicipal dispute resolution" as a measure to provide effective leadership and support to help municipalities achieve success and long-term prosperity.

Early in 1998 workshops were held, sponsored by the Ministry, entitled "Working Together: Workshops on intermunicipal planning and cooperation".

Participants identified the need for support to encourage cooperation and dispute resolution.

In 1998 the department indicated that there was a budget attached to it.

### **Third**

#### Political Endorsement

Coincided with the appointment of a new minister Hon Iris Evans.

Early in 1998 when faced with three intermunicipal disputes, the Minister persuaded the municipalities to attempt mediation and she appointed mediators to assist.

The mediation process was successful in all 3 cases.

Those three events provided the impetus to the Ministry to move forward with the implementation of a mediation service.

The AAMDC, the AUMA, and the Alberta Arbitration and Mediation Society (AAMS) were identified as key stakeholders.

Senior officials from the three key stakeholder organizations worked with AMA to develop the Intermunicipal Dispute Resolution Initiative.

The early success of the program led the Minister to announce the 1999 amendments to the MGA requiring that municipalities attempt mediation before proceeding to a formal MGB hearing on either an annexation or an appeal under section 690 of the MGA.

A provision was also included to require the parties to file a statutory declaration with the MGB if mediation was either unsuccessful or not attempted.

Notwithstanding these requirements the program as implemented addresses any kind of intermunicipal dispute or disputes involving municipalities, regional service commissions, and regional boards.

It is not limited to those two areas identified by the MGA.

### **Relevant sections of MGA**

The MGA currently has three sections where mediation is mentioned:

#### *1. Annexation 117(2)*

If there are matters on which there is no agreement, the initiating municipal authority and the one or more municipal authorities from which the land is to be annexed must, during the negotiations, attempt to use mediation to resolve those matters

118(1)

On conclusion of the negotiations, the initiating municipality must prepare a report that describes the results of the negotiations and includes

118(1) (1.a)

If there are matters on which there is no agreement, a description of the attempts to use mediation, and if mediation did not occur, the reasons why.

#### *2. Landuse Sec 690 (1)*

Similar to the annexation provisions the municipalities involved in the dispute must attempt mediation and file a report with the MGB indicating why it was not undertaken, or its success or failure or indicating that it is still continuing on.

#### *3. Intermunicipal disputes Sec 570 (b)*

The Minister may, if a dispute between municipalities has been referred to him, appoint a mediator to assist the parties in resolving the dispute.

It is important to note that the mediation program and the MGB separate.

The only link is that they both report to the Minister of Municipal Affairs.

Decision was made when the program was introduced to keep the two programs separate.

Two reasons:

1. The major overriding reason was that it was anticipated that the scope of the program would be broader than the disputes for which mediation was mandated in the MGA. The Minister at the time, the Hon. Iris Evans, was quite familiar with the process and wanted to ensure that it was used to its fullest. Her vision of what the program could be was wider than what staff had originally envisaged.

A second but less important reason was

2. There was a desire to keep the two processes separate so as to avoid compromising board members.

I see the two services, mediation and the MGB, as complementary processes; with the MGB holding final decision making powers on unresolved land use related issues and recommendation powers on annexation issues.

This is in contrast to other provincial agencies, such as the Environmental Appeals Board, that have integrated mediation into their appeals process.

In the case of the EAB a Board member will attempt to mediate the appeal. If the mediation is successful the parties involved will sign an agreement and the Board member will then forward the agreement for ratification. If no agreement is reached a panel will be appointed to hear the appeal and render a decision. The board member involved in the mediation is excluded from being on the panel. Currently the EAB diverts 86% of its cases to mediation thus avoiding a formal appeal board hearing. From the EAB's perspective the mediation program has provided opportunities for the parties to craft solutions which go beyond what the Board itself might be able to order, saves time as well as costs.

### **INTERMUNICIPAL DISPUTE RESOLUTION PROGRAM**

As I said earlier to mediation program is open to any municipality involved in a dispute with another municipality, regional service commission or regional board. Within this program the Ministry;

- Meets with the municipalities involved to convene the mediation process (this includes scoping out the issues and selecting the mediator)
- Provides up to one third funding to cover the costs of private sector mediators

Mediators are normally selected from a roster developed by the steering committee who wanted mediators who were familiar with intermunicipal issues. We normally encourage municipalities to use a team of two mediators because of the number of people involved and the complexity of the issues.

To date we have been involved in a variety of disputes including:

- waste management,
- annexations,

- land-use appeals,
- senior services,
- shared services

Time spent has ranged from ½ day to 40 days.

Direct costs to a municipality for mediator services ranges from \$300 to \$35,000.

We have been involved in 77 mediations in the programs 10 years of existence involving over 100 municipalities.

We are currently in the process of convening or mediating another 6 disputes.

Resolution rates are over 90% while

Client satisfaction rates are at 85 %

The Ministry also provides a **fact-finding service** for municipalities. This service is available for municipalities if the mediation has stalled. Municipalities are given the opportunity engage a fact-finder who, upon hearing input from the Chief Administrative officer and Chief Elected Officer of each municipality, will issue a non binding report. After reflecting on the report the parties have the opportunity to reconvene the mediation or take the matter to the MGB if it is either a landuse or annexation issue. In one case the municipalities involved agreed to use the factfinders report as binding.

**Given that context I would briefly like to touch on some relevant issues:**

## **Costs**

It is hard to do an accurate cost comparison given that the internal costs for municipalities are hard to quantify. But we do have this recent article in the Sherwood Park News read “MDP appeal cost county \$557K”.

The article goes on to say that the money was paid to the county’s contracted legal team and included expert consultants the legal team hired. It also mentions that the City of Edmonton spent approximately \$220,000.

While the costs were deemed unfortunate they were seen as the costs of doing business.

Costs associated with mediating land use disputes since 2000 have ranged from \$4,588 to \$30,612 averaging out at around \$20,000. Actual time in negotiation ranged from 15 to 51 hours spread over six months.

### **Relationships**

It is often said that mediation is a dispute resolution process that builds relationships. Here is what two CAO’s on opposite sides of the mediation table said when they were separately discussing the mediation process.

“The benefits of mediation went far beyond the agreement. “This cooperation between the two parties saved the enormous expense of litigation and hearings. It was a very effective use of taxpayers’ money.”

The other added: “It gave everyone a great sense of accomplishment, but what it really did was create conditions that would benefit the intermunicipal relationship between us for years to come.”

These comments came from individuals who represented municipalities that were very skeptical when they entered the mediation process and who had an unhealthy legacy in regards to previous annexations.

On another related point it is interesting to note that while the mediation process has succeeded in building working relationships between parties it has also alerted municipal officials to considering mediation at an earlier stage. We have had a number of what I refer to as “frequent flyers”, municipalities that have used our services on a number of occasions. In these cases they have recognized the early warning signs when confronted with an emerging dispute with their neighbor. Rather than proceeding into negotiations on their own they have, based on their previous experience, sought the assistance of a mediator early on.

### **Scope**

As mentioned earlier one of the reason for setting up the dispute resolution process as a complementary process to the MGB was to allow for a wider scope in the types of disputes being addressed.

There have been a number of occasions where the presenting problem was either land-use or annexation however once the mediation was underway it became apparent that this was not the real issue and the parties were able to move beyond the presenting problem to generate solutions to the underlying issues. Had the matter been before an administrative tribunal my thought is that they would have continued on dealing with the presenting problem, a decision would have been rendered and the parties would not have been any better off

than they were before the hearing took place because those underlying issues would not have been addressed. Yes they would have a decision, a well crafted, well reasoned one but one which in all likelihood would not have come to grips with the root cause of the dispute.

### **Use of tribunal resources**

While our two programs are separate there is some interaction. Particularly in annexations where as part of the initial of the convening process both Ministry mediation staff and MGB staff will go out and make a presentation to a joint meeting of both councils about the entire annexation process. This is done to ensure that both councils receive the same information about the process and its requirements therefore minimizing misunderstandings in the future negotiations. Other than this the two programs do not have any interaction. There are occasions during the mediation where mediators do call on the MGB to provide parties with related information such as clarification of previous Board decisions, timelines, expectations, etc.

### **Timelines**

While the program is encumbered by the traditional bureaucratic red tape it has been streamlined it so that we are able to initiate the convening process within days after receiving the formal request. As mentioned earlier the convening process involves meeting with each of the parties to determine if mediation is appropriate and, in the case of annexation related disputes, it includes a joint meeting with both parties, the MGB and Ministry staff to explain the mediation and MGB process in detail.

Challenges do emerge because the MGA has clearly articulated timelines in which landuse disputes must be processed.

The MGB is mandated to hold a hearing within 60 days of receiving the appeal under section 690.

In most cases a municipality will file a landuse appeal with the MGB under 690 to ensure that they have maintained their right to appeal and then will move to mediation. This creates time pressures on the mediation process given the MGB's 60 day timeline. While the parties can request a postponement of the hearing in order to allow the mediation to continue once the appeal has been filed and the hearing opened impacted landowners are given standing. These individuals do not have a formal role in the mediation however there is some thought that they should be given the right to challenge any postponement requested by the municipalities involved. Having said that to date the MGB has been very supportive of the mediation process and adjournments have been granted.

### **Tribunals reviewing negotiated agreements**

The current arrangements call for the MGB to review annexation applications whether or not they have been mediated.

Sec 120(2) states

If no objections are filed with the Board by the specified date the Board must

- (a) consider the principles, standards and criteria on annexation established under section 76, and

(b) prepare a written report with its recommendations and send it to the Minister.

If objections do surface as a result of the MGB's advertising a full hearing is held and any affected person is allowed to appear before it to present their argument. This review process has on one occasion resulted in the MGB making a recommendation to the Minister that went contrary to the agreement reached by the parties.

Part of the Board's reasoning was that the parties had not presented adequate rationale as to why the final application differed from the original one. While the municipalities cited the confidential nature of the mediation process as a rationale for not providing the information. Subsequently municipalities have been more deliberate in the process that they follow and the reasons they provide to the Board.

### **When to commence mediated negotiations**

In annexation negotiations the MGA outlines a process which involves:

- Giving notice to the MGB and local authorities impacted by the annexation (identifying the land base, rationale, consulting public and landowners)
- Negotiating with your neighbour, and then
- If the negotiations fail enter into mediation

This process has resulted in municipalities entering into and continuing on with a negotiation process which they knew was going to be unproductive at best but one they felt the Act said they had to go through. This can create challenges for

the mediation process because the relationships between the two parties have gotten worse and positions undoubtedly hardened.

One of the things that is required when you have two complementary processes, as we do, is to ensure that one process does not negatively impact the other.

Clarity is needed, lets avoid making the situation worse as a result of poor legislation.

### **Concluding comments**

I would like to close with a few observations.

First I am convinced that ADR procedures paired with Administrative tribunals do provide better service to their clients. I use the term “clients” deliberately. Our existence is not only to ensure that the public good is met but also to provide assistance to the public in resolving disputes that they, by themselves, can not find a way out. That “public” are our clients.

The breath of solutions and timeliness that mediation offers is complemented by the quasi-judicial services offered by administrative tribunals and its ability to provide certainty to clients by issuing binding decisions in a timely manner.

Second

By not being directly tied to an administrative tribunal an ADR program has the ability to respond to a variety of disputes faced by their clients without being constrained by the tribunal’s scope as articulated in its enabling legislation. It also has the ability to respond without the constraints of legislated timelines that are often part a tribunal process.

Personally I am very pleased with how the relationship between the MGB and the mediation program has evolved. Both have retained the independence necessary to maintain the integrity and credibility of their respective programs.

Yet by their existence and through the services they offer Alberta's municipalities and Albertans in general have been afforded opportunities to achieve resolution of disputes that they would not have been able to with the two complementary programs.