

**CAMPUT Conference 2005  
Pre-Conference Workshop, Sunday May 1**

**Workshop Summary**

**ADR and other Collaborative Processes: Why are regulators jumping in and what's in it for me?**

**Overview**

CAMPUT hosted a pre-conference workshop during the afternoon of May 1, 2005. The goals for the session were to increase awareness of different approaches for managing issues; understand how collaborative, interest-based approaches could be applied in a regulatory environment; and, discuss the future of collaborative processes for regulators. Forty people attended the workshop, including the following speakers:

Kerry Brown (Facilitator), Principal, Moving Forward, Inc.  
Karla Reesor (Facilitator), ADR Coordinator, National Energy Board  
Gaétan Caron, Vice Chairman, National Energy Board  
Nikol Schultz, General Counsel and Vice President Regulatory and Transportation Policy, Canadian Association of Petroleum Producers  
Richard Miles, Director, Dispute Resolution Services, Federal Energy Regulatory Commission (FERC), Washington, D.C.

The format for the session was a combination of presentations and interactive group discussions.

**Summary and Results**

Following is a summary of the main components of the workshop. Also included is the full record of comments and ideas that were recorded on flip charts.

**1. Introductions and impressions of Alternative (or Appropriate) Dispute Resolution (ADR)**

At the outset, working in small groups, participants discussed what they found troubling or intriguing about ADR.

What is troubling about ADR?

- Parties in good faith may settle and have it “messed with” by regulators
- Resolution may be dependent on particulars of relationships between parties
- Concern about leaving regulators out of the process as they are responsible for the public interest

- Missing right answer through compromise
- Lack of clarity about when it may be appropriate
- Disclosing interests when litigation may still be a possibility
- Confidentiality
- Used as a discovery process rather than a resolution process
- How to represent the public interest
- Avoidance of responsibility by regulators

What is intriguing about ADR?

- Achieving solutions in less adversarial processes
- Less reliance on adversarial processes
- Good way to build relationships which can make it easier to reach agreement
- Reducing regulatory burden
- Better solutions with more ownership and accountability
- Perceived potential for better results
- Good alternative to court
- Opportunity for faster, cheaper settlements
- Opportunity to improve regulatory processes by being willing to deal with issues that might seem out of scope (e.g. aboriginal issues)

## **2. Understanding interests, communications strategies and applying the approaches in a regulatory environment**

Kerry Brown provided an overview of the causes and implications of conflict, generally and particularly in a regulatory context. This overview focused on the importance of exploring parties' interests and communication strategies which would assist in this regard.

Karla Reesor outlined the features of interest-based, collaborative processes and described how they could be applied at different points in a project lifecycle, including the planning phase, regulatory process phase and the decision and follow-up phase. Karla described examples of how these processes have been and continue to be applied successfully by the NEB and other regulators.

The presentation used by Kerry and Karla is attached at Appendix A.

## **3. ADR at the FERC**

Richard (Rick) Miles described how ADR is applied at the FERC and shared the results of recent cases. Rick discussed how the FERC has successfully helped in settling many difficult regulatory files through the application of ADR processes. His presentation is attached at Appendix B.

#### 4. Future of ADR in regulated environments

Nick Schultz and Gaétan Caron shared their perspective on the question: What can or should we do to capture the benefits of interest-based, collaborative processes - this year and in the next three years?

Summary of Nick Schultz's remarks:

- “Appropriate” use of ADR depends on the context
- Context will drive what will work or not work
- The goal is not to “build trust” – the goal is an agreement; trust comes by working together through a process
- To hold a hearing is not a failure. There are some issues that need a decision and to pretend otherwise may just delay the process
- Regulators can:
  - Create conditions for negotiations to happen through guidelines, frameworks, formulae (e.g. Rate of Return formula)
  - Communicate criteria and principles in decisions
  - If incentives are favoured by the regulator, then state the criteria incentives should meet
  - Provide clarity around process for reviewing settlements
  - Encourage flexibility in how objectives are met
  - Let parties shape the process
- Leadership and commitment at the outset of a negotiation are critical; otherwise, there may be a problem around motives for some parties in ADR: are they negotiating in good faith or just trying to assess positions for future litigation?

Summary of Gaétan Caron's remarks:

“What can I do to capture the benefits of interest based collaborative processes?”

- Individually:
  - Remain current on developments in the field
  - Develop the skill to recognize quickly where there is potential for ADR
  - Promote ADR internally
- In my organization:
  - Develop a culture of giving ADR a chance
  - Within our business processes, build in the question: is this a candidate for ADR?
  - Talk openly about perceptions and misperceptions, e.g. the NEB's North Bay Junction pre-hearing conference raised more issues, but resulted in a more fully peeled onion
  - Share the organization's experience with others
- Beyond my organization:
  - Use CAMPUT to create a forum for the exchange of ideas, experiences and best practices
- Straw model for debate:

- Set up a task force or sub-committee of CAMPUT, composed of highly motivated individuals who want to share their experience and advance the field of ADR
- Make soliciting the views of participants in ADR processes an integral part of the work of the group to extract the rich learnings
- Essentially, establish a CAMPUT version of the “plan, do, measure, improve” cycle inherent in ISO-9001-2000

Following Nick and Gaétan’s remarks, there was a discussion with all the participants on the future of ADR in regulated environments. Following are the comments, questions and ideas that were raised.

What can we do to take advantage of interest-based, collaborative processes in the future?

- What connection might there be with Smart Regulation?
- The application of ADR could be helpful in overlapping jurisdictions
- When faced with a conflict situation, ask yourself, “have your interests changed?” Re-examine this question before heading into litigation.
- How to get parties past just wanting an expedient decision
- Education to reach out to participants
- Should we look at a system like the FERC’s where all the staff and judges are trained?
- Use ADR more to help define issues at planning stage
- Involve everyone
  - All staff
  - Participants
- Use focus groups to get answers to where ADR could be used and to determine what is needed
- Consider pilot projects and training
- Use process to explore options for ADR at the beginning of the planning phase

## **Workshop Evaluation**

Two-thirds (70%) of the participants completed evaluation forms. Over 95% mostly or strongly agreed that the workshop topics were relevant for them. Topics proposed for additional discussion included: more specific ADR examples and case studies; how to implement specific techniques; utilities and other stakeholder views on ADR; and, the future actions that CAMPUT could take.

## **Next Steps**

For more information about the workshop, please contact one of the facilitators:

Karla Reesor, National Energy Board, 403 299-3867, [kreesor@neb-one.gc.ca](mailto:kreesor@neb-one.gc.ca)

Kerry Brown, Moving Forward Inc., 403 208-8082,

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CAMPUT will be considering the possibility of creating a sub-committee or task force to share learnings and good practices for ADR in regulated environments. For more information, contact Terry Rochefort at 403 547-3305 or [camput@shaw.ca](mailto:camput@shaw.ca).