

November 28, 2001

To: Association of BC Professional Foresters  
54<sup>th</sup> Council

From: Gord Rattray  
Chair, Discipline Review Task Force

**RE: Discipline Review Task Force Report on the ABCPF Discipline Process**

On behalf of the Discipline Review Task Force (DRTF), I present the discipline process review report which was requested by Council.

The report outlines the current status of the process, summarizes the discussions of the DRTF over five meetings and proposes a series of recommendations for Council consideration in amending the current process.

Council will note there is additional work required arising from the report findings, specifically completion of proposed and amended Terms of Reference for the committee structure proposed. Subject to Council's support for the recommendations, DRTF members would be pleased to provide additional assistance in completing these tasks. Members would also be pleased to address any questions or requests for further action requested by Council, subsequent to your review.

Thank you for the opportunity to prepare and present this report.

/Attachment



**Report of**  
**Association of BC Professional Foresters**  
**Discipline Review Task Force**

**November 26, 2001**

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## **1. Introduction and Background for Review**

This report summarizes the background, activities and recommendations of the ABCPF's Discipline Review Task Force (DRTF), a group established by Council during the spring of 2001 to look into the current discipline process.

Beginning in the early-1990's, the Association of BC Professional Foresters carried out a major review of its discipline process. The catalyst for the review was advice received from internal legal counsel that the *Foresters Act* required discipline procedures to be formalized in a bylaw. Further, the council of the day had concerns over the association's management of discipline complaints and recognized that developments in administrative law had occurred since the last time the discipline process and procedures were reviewed.

The comprehensive review that was undertaken resulted in a major overhaul of the discipline system with subsequent bylaw amendments being approved by the membership. The amendments resulted in establishment of three distinct committees:

- Standing Investigations Committee:

The Standing Investigations Committee (SIC) was established under the bylaws and was tasked with the duty to manage all complaints referred to it by the Registrar. The Registrar's role was to screen complaints using four criteria:

- (1) Does the association have jurisdiction to act over the subject member?
- (2) If proven correct, do the allegations give rise to a breach of the *Foresters Act*, the ABCPF bylaws, or policies established by the profession?
- (3) Where appropriate, have steps been taken to resolve the issue between the parties?
- (4) Can the matter be resolved with the aid of the Registrar and the complaint be withdrawn?

If the matter passes the first two criteria but fails the latter two criteria, the matter is referred to the SIC for consideration. The SIC was given the latitude to direct that further alternative dispute resolution (ADR) steps be attempted or to establish an Investigation Committees (IC) to conduct further investigation into the complaint. The SIC can also dismiss the complaint.

- A Panel:

The A Panel was established to: (1) be the final adjudicator in discipline matters involving ADR proposals (conditional admissions); and (2) receive reports from Investigation Committees looking into member conduct to determine what additional steps, if any, are appropriate. In so doing, the A Panel terms of reference charged panel members as follows:

In deciding whether a matter goes to hearing, the Discipline Committee "A" Panel shall at all times have regard to the public interest in practice of professional forestry and may consider such further factors as without limitation:

- (a) The relative severity of the matter;
- (b) Novelty of issue;
- (c) Whether issues raised are of general importance to the profession as a whole;
- (d) The need to develop consistent set of practices, principles, and interpretations in application of *Foresters Act*, Bylaws or Code of Ethics;
- (e) The need to establish clear and consistent standards of practice;
- (f) Whether the matter can be resolved through alternate resolution proceedings;
- (g) The likelihood of success in obtaining or finding a breach of *Foresters Act*, Bylaws, or Code of Ethics.

The A Panel was also given the responsibility to oversee the performance of the discipline process on behalf of Council. The Director of Discipline chairs the A Panel.

- B Panel:

The old Standing Hearings Committee was continued as the B Panel. It continued to function as a pool of registered members from which three members are chosen to act as the "judges" during an inquiry (hearing). The B Panel is chaired by a member with considerable experience in discipline issues.

The ABCPF's discipline review process has operated within the framework of these three committees since 1996.

This framework was also intended to ensure independence of the committees to address all complaints without the direct involvement of the ABCPF's Council. A limited number of Council members are involved on the A Panel. In addition, Council is provided general case updates during the bi-monthly Council meetings (with member-specific information omitted). Individual councilors were also apprised of membership concerns through their on-going liaison and meetings.

Beginning approximately two years ago, Council recognized some members continued to have concerns about some aspects of the discipline process. These tended to revolve around complexity, timelines and whether cases were being dealt with in the most effective manner. In early 2001, Council elected to move forward with a formal process to review the overall operation of the discipline process. The outcome was establishment of the Discipline Review Task Force, chaired by Council's Director of Discipline.

## **2. Review Process and Discussion**

In developing the Discipline Review Task Force, Council reviewed background papers and proposed Terms of Reference including a budget for conducting the review. At the conclusion of the Council review, the Discipline Review Task Force was directed to undertake the following activities:

- Conduct a review of the efficacy of the overall ABCPF discipline process
- Consider whether more formal alternate discipline review processes should be considered for incorporation in the process
- Consider options for improved Council oversight of the process.

Council requested the process be fast-tracked to ensure timely recommendations for consideration in upcoming *Foresters Act* and bylaw discussions with members. Membership in the DRTF, as appointed by Council, included:

Henry Benskin, former ABCPF President and former Director of Discipline  
Dan Graham, B Panel chair  
Paul Knowles, SIC member  
Tom Lewis, SIC chair  
Jerome Marburg, ABCPF Registrar  
Bruce McLean, former ABCPF President and former Director of Discipline  
Gord Rattray, current Council member and Director of Discipline  
Van Scoffield, ABCPF Executive Director  
Barb Shirley, current Council (lay) member and A Panel member  
Joan Thomas, A Panel Member

The first meeting of the DRTF was held in June 2001. The meeting resulted in agreement to retain the services of a consultant to provide recommendations for DRTF consideration. John Sanderson, Q.C. was retained by the DRTF in July to assess what, if any, additional formal ADR mechanisms should be included in the discipline process and procedures. The DRTF held five meetings (including two meetings with John Sanderson) concluding the process in mid-November. A series of recommendations (summarized in the subsequent

section) were developed. Key issues addressed during the five meetings are summarized as follows:

➤ ***Is the current process cumbersome?***

DRTF members concluded the ABCPF's internal discipline process should be no more cumbersome and adversarial than is absolutely necessary. While the Sanderson report finds no substantive concerns with the current process, the DRTF unanimously agree that the committee structure can be streamlined. This streamlining can be done recognizing fully the obligations for the ABCPF to acknowledge and respect potential legal landmines and ensure due process rights of all who approach the complaints resolution system. They also confirmed the equally compelling obligation to maintain a system that is approachable, user friendly and maximizes the chance for all parties to be satisfied they had a fair hearing of their issues.

Utilizing the flexibility in the system to formalize ADR allows for the fact that the best process model for individual cases is seldom the same. However, if one does get involved in a significant dispute, the process must be effective, efficient and provide fair treatment of the subject member.

➤ ***Does the stigma of entering 'the discipline process' deter potential complainants?***

The effectiveness of the discipline process not only depends on how appropriately and efficiently complaints are dealt with, but also whether the system itself is conducive to complaints being brought forward in the first place. Some members and non-members may be deterred by the prospect of entering a 'discipline process' for less serious issues such as might arise from professional conflict over minor policy issues. They may feel that the prospect of time-consuming, legal process at high personal cost to themselves or to the subject members does not merit registering a formal complaint.

The ABCPF could reduce the risk of legitimate practice complaints not being brought forward by re-labelling the 'front end' of the discipline process as well as by greater use of ADR approaches. All formal complaints could be initially dealt with by establishing a new committee specifically tasked with managing complaints and invoking ADR processes.

➤ ***Perceptions versus reality?***

The DRTF came to the realization that many of the ADR techniques and processes discussed in the Sanderson Report are available and are used in the current system. They also recognized that only a very small fraction of discipline concerns raised at the front end (approaches to the Registrar) make it through to the referral to the SIC stage. Regardless, members are convinced that a system that more formally sets out ADR options is required.

This will not only make the system more approachable as discussed in the section above, but also allow parties to the complaint to more easily recognize that options other than addressing the complaint by adversarial/legalistic means exist.

➤ ***Is the A Panel warranted?***

The merits of the A Panel were carefully considered. Apart from reviewing investigation committee reports, deciding whether or not ADR proposals are to be accepted, it was felt that the A Panel has played an important role of providing the 'sober second thought' on behalf of the Association. The A Panel has the responsibility of deciding whether or not a matter should be referred to an inquiry panel (hearing) based on the criteria outlined in their terms of reference reproduced earlier in this report. This said, the DRTF is of the opinion that the A Panel can be disbanded in favour of splitting its existing functions between the CRC and what is now the B Panel (to be renamed the Discipline Committee). Under this scenario the proposed Complaints Resolution Committee (CRC) would take on the former A Panel's roles of: (1) receiving investigations committee reports and deciding what, if any, steps are required next; and (2) acting as the general oversight committee for the discipline process. In aid of this, the CRC terms of reference will call for at least one strategic planning session per year to discuss how well the system is working and what, if any, process improvements need to be made. The Executive Director, Registrar, SIC Chair (and vice chair), and the Discipline Committee (formerly B Panel) chair would all be invited to attend and participate fully in these strategic planning sessions.

The newly renamed Discipline Committee would retain all of its original functions to which the ability to form a committee of one (requires change to the *Foresters Act*) to act as an arbitrator in ADR processes or to receive and decide on ADR settlement proposals will be added.

➤ ***The role of the Registrar?***

The role of the Registrar is one of 'gate-keeper'. The Registrar receives queries as well as formal written complaints. In this capacity, the Registrar can, and currently does, informally resolve many issues, as well as ensure that any formal complaints are complete and within the Association's mandate to resolve.

The Registrar has a challenging role at the 'front end' of the process. It was felt that the Registrar's initial screening role should be continued, and that the perception that the Registrar somehow controls the process can be addressed by having the ADR decision process formalized in the early stages of the complaint review by the Complaint Resolution Committee.

The existing role of the Registrar in networking and acting as a resource across the entire complaints review/discipline process, including assistance to the SIC, IC, A Panel and B Panel has been considered invaluable and should continue under any new system.

➤ ***The role of Council?***

Council has governance responsibility for the Association, and must therefore be concerned with the effectiveness and efficiency of all policies (including those governing discipline) and finances.

In recent years, Council as a whole has been required to maintain independence from how individual cases are handled through the discipline process, except for only the most general progress updates from the Director of Discipline who maintains an oversight role on behalf of Council. The *Foresters Act* supports this type of structure in the way in which it mandates discipline committees and the way processes are structured.

The day-to-day oversight role is presently carried out by the A Panel. One of the challenges recognized by the DRTF is that the A Panel only gets involved in the relatively few cases that progress to the stage of report going to the A Panel. It was felt that by having the Director of Discipline involved right up front, he/she would be better positioned to carry out the oversight role (i.e. at the initial complaints review and investigation stage).

➤ ***The role of the Director of Discipline?***

The Director of Discipline carries the major responsibility, on behalf of Council, to ensure the discipline process meets the needs of the Association. In reviewing the current role, there was recognition the role of the Director of Discipline should be changed.

The Director should be expected to observe the meetings of the other committees in the process and become familiar with their members. There is also a need for stronger collaboration with the respective committees in assessing performance of the process. The Director should be expected to receive and collate the reports from the committees utilizing Key Performance Indicators (i.e. length of time, outcome, member satisfaction) and to report these back to Council.

The Director of Discipline should be involved at the front end of the system and should become a member of a complaints resolution committee. It was recognized, and strongly recommended that the sensitive and important nature of this portfolio dictates that the Director of Discipline be an experienced member of Council, preferably at the Vice-President level or a member of the executive.

➤ ***Complaint Management?***

In managing complaints, DRTF members concluded that complaints could be categorized into one of three (3) streams:

- ABCPF & public interests not involved - settlement between the complainant(s) and subject member(s) themselves. The ABCPF could act as a facilitator or enabler of a solution.
- ABCPF & public interest is sufficiently important to warrant ABCPF being party to ADR processes and an active participant in any dispute resolution mechanisms.
- Serious issues warranting referral to the SIC for consideration. The SIC retains its independent jurisdiction to manage investigations and the resources required for such investigations. In so doing, the SIC will recommend IC members to Council for designation on a case-by-case basis and will act as a resource to ICs when they prepare their reports. IC reports, once finalized and acceptable to the SIC, are forwarded to the CRC for decision as to whether or not to issue a notice of inquiry.

It was felt that there must be separation between the membership of the CRC and SIC to ensure no issues of apprehension of bias arise.

➤ ***Could ADR process cost more?***

By formalizing ADR options to the complaints review/discipline process, it might be perceived that complexity could add to costs. The consensus was that the ABCPF has recent experience with a number of time consuming and expensive cases that might have been resolved at a much earlier stage had a more explicit ADR structure been in place at the outset. Staff and SIC members on the DRTF emphasized this in reflecting on past cases in which offers to resolve complaints through ADR have been offered to subject members but have been refused in favour of the "formal" investigation/hearing emphasized in the current bylaw wording. DRTF members agreed that a wider menu of ADR options explicitly stated in the bylaws not only offers more pathways, but also allows the participants more control over that process. It is believed, based on experience of experts, that complaints resolved through ADR processes other than investigation/hearing are often done more quickly and cost-effectively.

### **3. Recommendations to Council**

The findings of the DRTF were built substantially upon the recommendations contained in the Sanderson Report. John Sanderson's recommendations to the DRFT were developed based upon a detailed review of the current *Foresters Act*, bylaws and procedures; interviews with ABCPF staff and certain task force members; and personal experience with administrative law and with other professional regulatory bodies.

From the discussion highlighted in the previous section, the DRTF recommends that:

1. A more explicitly stated alternative track of ADR options be made available to the Association and its members to deal with complaints and disputes. To provide the necessary legal foundation, amendments to the *Foresters Act* and to the bylaws will be required.
2. The ADR processes created within the bylaws incorporate the necessary rules and protocols for each of these processes. The 3-stream approach discussed above can be the basis for this.
3. If a particular case warrants, it may be helpful and cost-effective to arrange the services of an experienced outside resource person, who is able to provide advice at the request of committee members on how a particular file or matter might best be handled from an ADR point of view.
4. A Complaints Resolution Committee (CRC) should be formed with participation of the Director of Discipline, former SIC and A Panel chairs or similar experienced members of these bodies (to a maximum of four members) and a lay member. Quorum provisions would apply.

The CRC would manage the complaints as they proceed through the complaint review/discipline process, by reviewing each matter at each stage in the process to identify the most appropriate means, from the standpoint of the Association, to achieve an effective resolution. The CRC would receive the reports of Investigation Committees and would decide whether or not a notice of inquiry should be issued. The Registrar will provide staff support and guidance to the CRC.

5. The present A Panel responsibilities be split between the CRC and the renamed Discipline Committee (formerly the B Panel) as outlined earlier in this report.
6. The current Standing Investigations Committee and related Investigations Committee structures should be maintained intact. As noted previously, the proposed restructuring would have the CRC forwarding specific complaints to the SIC for their management.

Resulting Investigations Committees would deliver their findings to the Complaints Resolutions Committee rather than the A Panel following final review by the SIC.

7. The current B Panel structure be maintained and enhanced as outlined earlier in this report. To be renamed the Discipline Committee, the former B Panel members would continue to manage the current hearing processes.
8. The present system of reporting to the membership regarding the disposition of complaints be reviewed. The present system The Law Society uses to provide educational information about significant discipline matters is a useful model (i.e. issue alerts and practice notes).
9. A review involving the chairs of the CRC, SIC and DC, convened and chaired by the Director of Discipline, be held at least annually. The purpose of the review would be to assess the performance of the discipline process and provide a report to Council. Key performance indicators should be developed to assess overall performance.
10. The Director of Discipline be an experienced member of Council, preferably the Vice President or failing that, a member of the executive.

#### **4. Proposed Implementation Strategy**

Implementation of the recommendations contained in this report and the Sanderson Report require some modification to the *Foresters Act* and the bylaws. The actual amount of modification need not be very much as the changes envisioned need only be “enabling” provisions with much of the operational detail contained in policies and procedures. Along with changes in the *Foresters Act* to allow for more ADR options and processes, changes are also contemplated to address deficiencies in the investigation and hearings sections already in place.

The biggest issue is one of timing. The changes to the *Foresters Act* will depend on whether or not the Association gets its request for legislation accepted and, if so, when changes will be placed on the legislative agenda. In the meantime, we recommend that the Registrar be instructed to begin working on the drafting process—the *Foresters Act*, bylaw provisions, Terms of Reference for various committees, policies and procedures in general—drawing on advice from the DRTF, outside legal counsel and such others as may be helpful.

Once the new structures are described, we will need to communicate our intentions to the membership and begin the education process with them. We should also be ready to make minor adjustments based on feedback from members. The DRTF suggests this be done as part of the professional development workshops scheduled for late summer and fall of 2002.

Input from other professions and groups can also be sought throughout the summer of 2002. Once the *Foresters Act* changes have been accepted and have been given Royal Assent, the new bylaw(s) can then be put to the members with full implementation as soon as approval is obtained from the members and the new bylaw(s) are accepted by government (late 2002 or early 2003 being the more realistic assumptions for timing).

The DRTF recommends that an assumption be made that the new structure will be accepted and the *Foresters Act* changes will go forward such that CRC committee members be identified and training for all Complaint Resolution Committee members to be conducted throughout 2002.

The Association is encouraged to continue with its existing ADR efforts and, given that ADR proceeds by way of consent of the parties, to field test some of the proposals with incoming discipline complaints.

# **APPENDICES**

## **A. Sanderson Report**

**Report to  
Association of BC Professional Foresters  
Discipline Review Task Force**

**Prepared by  
John Sanderson, QC**

**October, 2001**

**Report To Association of BC Professional Foresters  
Discipline Process Review**

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## **Introduction**

I have been retained to assist the ABCPF Discipline Review Task Force, who are currently engaged in reviewing the current discipline process, as well as the role of the various committees and association staff, to ensure that the discipline process supports the strategic growth and direction of the profession. The primary focus of my terms of reference is as follows:

- (1) Review the current ABCPF Discipline Process for soundness and to ensure the discipline process supports the strategic growth and direction of the profession.
- (2) Review the role of the various committees mandated by the *Foresters Act* and the Director, Discipline and association staff within the ABCPF Discipline Process.
- (3) Consider the financial and resource implications of any proposed changes.

## **Methodology**

When I first entered upon this task, I met with the Registrar and received a number of documents and other materials, which have been reviewed and considered. In particular, I received copies of the bylaws, the terms of reference of the various committees or panels engaged in the current process, copies of the recent recommendations of the Task Force dealing with the discipline process, some examples of decisions that had gone through the hearing process and other general materials and articles of interest and value. I also received a thorough briefing from the Registrar on the history and background of the current processes.

The first part of my analysis was to review the materials that I was given. The second phase was to interview, largely but not entirely by telephone, a majority of the members on the three panels, as well as certain members of the administrative staff, for the purpose of having a frank and candid conversation with them as to their views and concerns with respect to the current discipline process. I wish to acknowledge the co-operation I received and the openness and frankness of the panel members who shared their ideas and feelings with me. I should also say that some of these conversations were somewhat lengthy and I recognize there was some inconvenience to them in spending time with me during a busy work day. In any event, without exception, their comments were enormously helpful.

## **Themes from the Conversations**

When I talked with the panel members with regard to their views and concerns, I asked them to be candid with me in return for anonymity. More specifically, I assured them that nothing that was said to me would be attributed to any individuals. Perhaps this was useful to them but, whether that is so or not, the conversations that I had were free-ranging and certainly candid.

The overwhelming impression I received from the persons I interviewed was that the current process, while not perfect, was functioning at a level that was generally acceptable and did not

require drastic restructuring. Simply put, it works reasonably well but it can be made better. What are the shortcomings? That is where I focused my enquiries.

In my experience, it is not surprising that certain concerns were repeated in these conversations, which have given me an important perspective. I have been somewhat selective but the most significant of these concerns, in my view, are as follows:

1. The current process seems to be too long and too drawn out.
2. Petty problems sometimes go to a full hearing and through the same process as do matters of serious consequence to members of the association. As one person said, there is no differentiation between matters of serious consequence and a squabble between a couple of members over a minor question of interpretation of some policy.
3. The current process is cumbersome. Do we really need three committees?
4. The current process appears to be legalistic and antagonistic.
5. There is a need through the current process to do a better job of attempting to educate members.
6. The current processes can be narrow and rigid, in the sense that ADR is not used as often as it should be or as early as possible, before the parties get locked into set positions and attitudes.

### **Current ADR Options**

The usual translation of the acronym ADR is alternative dispute resolution. I prefer the phrase **appropriate dispute resolution**. Dispute resolution can be considered as an outcome; it can also be considered as a concept or an approach. For our purposes, what is important is that there are a number of techniques, organized and established systems, all fitting comfortably under the umbrella of dispute resolution. If one thinks of dispute resolution as a computer, one can say there is a menu bar from which the user can choose the particular technique that best suits the individual circumstances.

I appreciate the fact that this report is not intended to be a treatise on dispute resolution techniques. However, it may be useful to the task force to briefly describe the techniques that seem to best suit the regulatory regime established by a statute, such as the *Foresters Act*.

The first technique I would like to discuss is that of **consensual negotiations**. In the context of a regulatory regime, the basic idea is that any time after the receipt of a complaint, a member or members and a representative of the association may together negotiate a consensual resolution of the complaint. The goal of a consensual complaint resolution process is to reach an agreement between the member and the association that addresses the complaint about the member's

conduct in a way that meets the association's responsibility to act in the public interest and yet adequately treats the interests of the member and the association.

The parties to the negotiations would be the member or members and the association. Participation in negotiating a consensual complaint resolution is voluntary. However, the member must be provided with sufficient information about this process option to make an informed decision on whether to participate. The member would be an active participant in the process and may be assisted by legal counsel. Either party, the member or the association, can withdraw at any point from the negotiation.

Communications between the parties during negotiations are private and confidential, just as are the exchanges of information during mediation. Similarly, admissions made by a member during the negotiations may not be given in evidence at a hearing, should the negotiations be unsuccessful. The process usually proceeds through a number of steps. The first is the sharing of information and deciding whether there is sufficient information to proceed to the next step. If not, decisions can be made as to what additional information is required and how to get it. The next steps are to define the problem and to develop options for resolution. At this point, the task is to identify all of the possible means that are available for resolving the problem. The options are then narrowed, by ensuring that the proposed resolution in fact addresses and fits the problem and is adequate to remedy the situation, is feasible, in the public interest and addresses the interests of both parties. Efforts are also made to analyze the risks, enhance the gains and minimize the costs.

When the best option for resolution has been determined and chosen by the parties, an agreement is drafted, which, among other things, would set out the terms and undertakings of both parties, including the monitoring provisions. When the agreement is finalized and has been signed, it is then submitted to a committee of the association for approval. Approval is only given if the agreement provides for an arrangement that satisfies the requirement that it is in the interests of the statutory body and the purpose for which it was formed and also in the interests of the members of the association.

The second technique is that of **mediation**. Mediation involves a process whereby disputing parties are assisted by an outside neutral person, usually selected by the parties themselves, to find their own solutions to their own problems. The mediator facilitates the dialogue between the contending parties, exploring interests, brainstorming options and evaluating possible solutions. In my view, the best description I have heard of what a mediator does is "someone who helps the parties to have difficult conversations." The mediator can be a catalyst and a bridge builder, in that ideas and concerns that people do not wish or are unable to express directly can be exchanged safely and without loss of face through the medium of a mediator. The mediator can also be a resource to the parties and a source of fresh, new ideas that may open doors for the parties. The mediator is not an adjudicator and has no power to force anyone to do anything. However, an effective mediator, particularly one who is able to create an atmosphere of trust and credibility with the parties, may often be able to turn an adversarial battle into a serious problem solving exercise.

**Fact finding** is based on the premise that many, perhaps most, disputes are caused by differing views of what went on and who caused what events. Without a common version of the facts, the dispute will continue to fester. Fact finding is a process designed to remove this obstacle to resolution. It can be used on its own or in conjunction with another process, such as mediation.

The process itself is usually non binding; that is the resulting factual analysis remains that of the person who prepared the report but it determines the facts for the purpose of negotiating or arranging a resolution. At the very least, it will clarify the parties' views as to what went on and that alone may result in settlement of the dispute. Even if it does not, it can play a role which, attached to other ADR processes, complements techniques such as consensual negotiations or mediation.

Fact finding, in essence, is an investigation, conducted by a neutral third person or panel. A determination is made as to what are the facts of the issues and the extent of the reasonableness of the parties' positions in relation to those facts. As I have said, the written report that follows is usually non-binding, although the parties may choose to make it binding if they so desire. It may simply record the facts as found or may include recommendations for settlement. It generally establishes a starting point for further negotiations or expedites an additional ADR process to be conducted later.

The fact finder must have the capacity to generate respect, exhibit credibility and maintain a sensitive objectivity. It requires a person with investigative skills and an ability to sift through the facts in dispute. In some cases, the fact finder should be a technical expert in the subject matter of the dispute. Thus, in the case of the association, a fact finder who is a forester would be particularly useful if the issue is a problem arising from a practice dispute.

**Arbitration** is a adjudicative process, one that imposes a solution on disputing parties who have selected a respected neutral person to hear their account of what happened, who is at fault and what should happen now. An arbitrator sits in judgment on the parties, assesses the evidence, considers the consequences, weighs the rights of the parties, decides the issue in dispute, somewhat in a judgelike fashion, and then produces a result and reasons for it in a document called an award.

Perhaps the simplest way to understand the matter is to think of an arbitrator as a privately appointed judge who decides an issue over which the parties are in dispute. The parties must agree in advance to be bound by the decision, whatever it is. The arbitrator is obliged to provide a fair hearing to the parties, in the sense that they must be given a full opportunity to present the facts and their respective arguments but, at the end of the day, the arbitrator's decision is final. The rules of the arbitration can be arranged by the parties directly or by reference to a statute, such as *The Commercial Arbitration Act*.

With respect to regulatory bodies, the concept of arbitration as a viable option depends on the wording of the particular statute that gave life to the association. For example, some statutes

provide that only the counsel of the association or a committee designated by it may impose discipline. In the case of this association, section 29 of the Act uses the phrase "a person designated by council" to describe the decision maker where issues of improper conduct are involved. On the face of it, it is certainly arguable that the person appointed could be an outside arbitrator.

The choice of an arbitrator is critical to the effective functioning of the process. The arbitrator must have both the capacity and the experience to be a fair and impartial adjudicator. Additionally, the arbitrator must be someone who engenders respect and is perceived as a person of significant credibility.

To this point, each of the techniques I have described has their own definition and is self contained. Many people who are unfamiliar with the scope and flexibility of the ADR process as a generic whole believe each one of these must be seen as separate and independent entities. In fact, two or more of these techniques may be used in some rational and progressive order to achieve a final resolution of a particular dispute.

The concept of a **troubleshooter** best illustrates this concept. In the health care industry in this province, the hospital industry and the trade unions that represent health care employees have devised a system whereby a complaint is presented to a thirty party neutral person, who initially attempts to secure the relevant facts. If the troubleshooter believes he or she has sufficient information to intelligently understand the matter, then the next stage of the process begins. If not, the troubleshooter may go out and investigate the matter by interviewing anyone who has knowledge or information the troubleshooter needs. The troubleshooter then puts on a hat as a mediator and performs that role, as I have previously described. If a resolution acceptable to the parties can be achieved, that ends the matter. However, if that is not attainable, the troubleshooter then issues a report, very much as a fact finder, that includes a proposed resolution of the matter and brief reasons why that is considered by the troubleshooter to be an appropriate solution.

When the parties receive the report of the troubleshooter, they are required to sit down and discuss it within a specific period of time. They are not bound by what the troubleshooter has recommended and they are free to make whatever changes they wish to the proposed solution in order to reach an agreement. For that purpose, they are effectively using the technique of consensual negotiations. If that does not work, the system used in the health care industry allows either or both parties to insist on formal arbitration of the dispute.

I appreciate that a formal process such as this is probably not necessary here. However, the important point I wish to make is that the association can create its own justice system and establish one or more different kinds of processes for different kinds of disputes or, alternatively, it may arrange things so that the technique best suited to the particular dispute can be utilized on its own or in conjunction with one or more other techniques in dealing with that matter.

## **Creating ADR Processes**

As I have already noted, ADR processes are entered into voluntarily; in a word, they are consensual processes. Just as parties engaged in formal, court based litigation may decide to meet, together with a mediator, to attempt to settle their dispute, parties involved in a regulatory complaint system may elect to try a different technique to achieve an acceptable result. What is important is that a fair and proper process - in the administrative law sense - be constructed in accordance with the statute and bylaws of the association. Here, such a process already exists. To create an alternative track, there is a system of ADR options that are available to the association and its members to deal with complaints and disputes that arise and requires nothing more than a general amendment to the statute (in this case, s. 31), and to the bylaws, to provide the necessary legal foundation. These new ADR options are elective and do not apply unless both the complainant and the association agree; eg. if they do not agree or either of them decide not to continue, then the current or regular complaint process would apply.

### **Proposals for Change**

Let me begin by acknowledging the old adage - If it ain't broke, don't fix it. The current discipline process, in my view, can be improved but there is no need for it to be discarded and completely rebuilt. I am impressed with the dedication, interest and commitment that so many people in the association have demonstrated. The real challenge is to encourage a continuation of those efforts but, at the same time, construct mechanisms to make the process work more effectively for the members themselves and for the organization.

One of the most important components of an effective discipline process is to effectively screen and categorize complaints when they are first received. There are at least two important reasons why this is so. In the first place, a careful analysis of the complaint may reveal obvious flaws or deficiencies that will cause serious difficulties later down the dispute resolution road, unless they are remedied. At the same time, an objective assessment of the significance of the complaint to the persons involved, as well as the interests of the association, will lead to an identification of what resources ought to be supplied and what techniques, if any, should be considered and applied.

For this purpose, but also to co-ordinate the use of ADR throughout the entire discipline process, I would propose that an ADR Committee be formed, which would consist of the Registrar and two or three members of the SIC. I believe it would be useful to have a lay member as a member of the ADR Committee.

The role and mandate of this Committee is to manage the complaints as they proceed through the discipline process, by reviewing each matter at each stage in the process to identify the most appropriate means, from the standpoint of the association, to achieve an effective resolution. Clearly, certain complaints will require investigation and, if warranted, a hearing. In other cases, it will be evident that some form of ADR should be proposed to the parties at the outset. There is a third group, complaints that take on a different dimension as the process proceeds, where ADR

may be proposed at whatever stage has been reached. These are all issues to be monitored and determined by the ADR Committee.

The office of the Registrar, as I see it, is effectively the entry point for the process. His role is to co-ordinate and oversee the initial workings of the process as the essential contact or link between the various participants. When a complaint is first received, it should not be considered as a valid complaint unless and until it is put into writing. If this occurs, the initial screening is then done by the Registrar to determine if the subject matter of the complaint falls within the scope of authority, role or interest of the association. Further, whatever is received must be reviewed to identify whether the complaint has been made by a member or is about a member of the association. Similarly, the Registrar would review the information to ensure that there has been sufficient information given to identify the matter or the issue that is the subject matter of the complaint.

If the Registrar is preliminarily satisfied that these questions can be answered affirmatively, he would acknowledge to the complainant that the complaint has been received and that it will be processed in accordance with the association's discipline procedures. It would then be up to the ADR Committee, as previously described, to review and categorize the complaint.

I suggest there are at least three categories of complaints to be identified and evaluated by the ADR Committee. The first is to differentiate between a complaint involving the conduct of a member, or more accurately misconduct, and a dispute concerning a practice problem such as a question relating to the interpretation or application of a policy or practice requirement. The second is whether the complaint is of such a nature and significance that the interests of the public and that of the association itself are necessarily engaged. The third category is those complaints where ADR at an early stage is potentially going to benefit the parties and the association and may achieve an immediate and successful outcome.

Clearly, these are matters of judgment and the line is often blurred between a complaint that objectively is a serious matter in contrast to a minor dispute between two members that is unlikely to involve anyone other than the direct participants. Nevertheless, it is important that this analysis be made, so that the complaint that clearly must go to a full investigation is identified and put into a separate stream. As I have said, the central inquiry by the steering committee is to determine, at least in an initial sense, whether some form of dispute resolution should be proposed or whether the complaint is so significant, such as an allegation of a serious breach of ethics, that a full investigation and perhaps hearing is the appropriate course of action.

The ADR Committee will want to consider other categories for disputes and what criteria should be applied. This should be welcomed and encouraged and that the committee itself should have the opportunity to develop the categorization scheme that works best for them. Looking at the history of the discipline process over the past several years is one guide as to the nature of the complaints that can be expected in the future.

Apart from the relative seriousness of the complaint, the nature and substance of the matters in dispute go a long way to answer the question as to whether ADR is likely to be welcomed at an early stage and what form of ADR would be useful. If there are common interests among the parties, ADR is probably a good idea. The same is true if the complaint is not highly charged with emotion. If the problem revolves around the interpretation of a forestry practice or issue, again ADR - probably consensual negotiations - is warranted. On the other hand, if the Registrar reports to the committee that the parties to the complaint are bitter and fractious and that is borne out by the material on file, then ADR - at least at this early stage - is unlikely to help. While it is possible to develop complex lists of criteria to guide this analysis, my experience is that objectivity, balance, calm detachment and common sense are the essential tools for the committee. It should always be recognized that the complaint process is fluid and ADR can be inserted as events or changing attitudes reshape the dynamics and priorities of the parties.

I recommend that an elective, consensual negotiation process be created and that the necessary rules and protocols be drafted. The basic principles for this particular ADR model have already been described. The value of such a process is considerable, if only because it provides an effective means at the early stages of a complaint for a negotiated resolution to be achieved. The process allows for a complaint of one member against another to be discussed, negotiated and resolved through a process they direct and control. It would be cost effective because the numbers of persons involved in the negotiations would be few, outside resources are seldom involved and the number, pace and timing of meetings could be controlled, in the sense that if matters drag on, either party could withdraw from the process. Finally, the interests of the association are maintained because if and when an agreement is reached, it must be approved by the association. For the reasons set out below, I propose the A Panel would perform this function.

If the consensual negotiation process was not considered appropriate to the circumstances or was suggested and rejected, another important ADR option is mediation. I do not think that the Registrar should attempt to act as a mediator, in any formal sense. I recognize that in the initial contacts with the complainant or complainants the Registrar can and should ask questions and make suggestions that may cause the complaint to go away. That is a desirable result and one that the Registrar should be encouraged to achieve. One of my colleagues calls this "unappointed and unofficial problem solving". However, mediation, as a formal identifiable intervention, can be conducted by one of the SIC panel members or, indeed, members of other panels who have an interest in mediation and obtain basic skills training. Alternatively, where the dispute involves a serious issue of concern to the interests of the association, an outside person can be appointed. While this would result in some additional cost, my experience is that it would not normally involve more than one or two days' fees by the mediator.

If the consensual negotiations route is agreed to by the parties or some other ADR initiative is proposed and accepted, the ADR Committee should let that process unfold. If it is unsuccessful, or no ADR intervention is considered appropriate at this point, the ADR Committee would report on the matter to the full SIC.

The role and responsibilities of the SIC members are time consuming and often onerous. Depending on the particular nature of the complaint, it can be more efficient, in terms of time and cost, to contract with an experienced person who would conduct a fact finding exercise and make a report to the SIC as to the findings. Similarly, the members of the SIC, at any time during their investigation, may decide that mediation efforts should be conducted. In either case, it is important for the members to have some basic knowledge of these ADR techniques and to seek advice from either the Registrar or an outside person, who would review the facts and circumstances and provide an opinion.

I have given some thought to the present role of the A Panel. It seems to me the present composition may be unnecessarily large for the number of complaints that seem to be occurring. Perhaps five members is a more realistic number, with an additional lay person also on the panel.

The primary task of the A Panel is to decide whether an inquiry is to be held. Much of that is based on what the SIC has reported but the A Panel can and must come to its own independent judgment. It may decide that an ADR intervention is appropriate. The choice of the technique to be employed can and should be influenced by what ADR activity took place at the earlier stages. It can complement or flow out of what was tried before, such as mediation used as a follow-up to a fact finder's report. Similarly, arbitration could be proposed, rather than a conventional hearing.

I would also recommend adding a second responsibility to the A Panel's duties. If consensual negotiations take place and an agreement is achieved by the parties, that agreement must be formally approved by the association. The A Panel seems to be the right vehicle for this role. The Registrar should be available to advise the Panel as a resource person and as the co-ordinator of the processing of the complaint but without a vote on the outcome.

There are two further matters on which I should comment. The first is that the present system of reporting to the membership regarding the disposition of complaints should be reviewed. The present system that The Law Society uses to provide educational information to the profession about significant discipline matters, often, but not always, without naming the individuals, is a useful model. The key to this approach is to let the profession know and understand what kind of conduct is acceptable within the profession itself and what are the likely results if reasonable tolerances are ignored or exceeded.

The final matter concerns the value of arranging for the occasional services of an outside resource person, who is able to provide advice at the request of panel members or outside administrative officers as to how a particular file or matter might best be handled from the point of view of ADR. Many private organizations have this kind of arrangement. It can be helpful and cost effective provided the outside resource person has the experience and background to recognize when particular ADR initiatives are timely or appropriate, what should be the terms of reference, who should conduct the initiative, where, when and how.

Finally, I have been asked to discuss the cost implications of the changes I have recommended. As a general proposition, one of the chief benefits of ADR is that it is likely to be cheaper, in

terms of saving money and time, than proceeding to a conclusion by way of a full inquiry. I suggest there are other savings as well. ADR provides a way for the association to make its own choices as to what resources it wants to employ, either internal or external. If a hearing takes place, counsel is required throughout. There is no appeal from an ADR process. ADR processes are quick to arrange and usually are of short duration. The ADR process can be constructed to provide for efficient decision making, since the procedural rules are created by the participants. Finally, ADR allows for creative and innovative remedies and conditions to be arranged since the result must be attained by agreement, absent arbitration. In short, while ADR is not always a magic solution, it does provide the association with the capacity to fashion creative remedies to complaints, cheaply, quickly and with considerable flexibility.

## **B. Committee Terms of Reference – Bullet Form**

### **Complaint Resolution Committee**

- Membership – to be determined
- Receives complaints from Registrar
- Analyses to determine what route matter should take using three general categories:
  - Matters not involving professional / public interest. Matter to go to ADR with view of withdrawal of complaint being ideal objective. Association takes facilitating role;
  - Matters involving professional / public interest but where ADR is preferred route. Association may take an active role as one of the parties in the process;
  - Serious issues, the only recourse for which is the investigation/hearing route.
- Receives IC reports and decides whether a Notice of Inquiry should be issued
- Refers ADR proposals to the DC for decision.

### **Standing Investigations Committee**

- Membership – unchanged except for reduction in lay representative from 2 to 1.
- Receives complaint referrals from CRC
- Establishes IC with one or more SIC members
- Manages investigations and quality control in IC reports

### **Discipline Committee**

Former B Panel now renamed.

- Membership – unchanged
- Act change will allow DC to form a panel of one member to:
  - Act as arbitrator in ADR arbitrations
  - Hear and decide on ADR settlement proposals.
- Will continue its function of providing a pool of members to sit on Inquiry Panels.

## **C. Proposed Process Graphic**

