

THE SANDSPIT HARBOUR MEDIATION PROCESS

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A Harbour is Promised

In 1987 the South Moresby National Park Reserve was created on the Islands off the northern coast of British Columbia, known as the Queen Charlotte Islands since European settlement and also known as Haida Gwaii to the Haida people who have lived on these islands for time immemorial.² The federal/provincial agreement which created the Park recognized the Island not only to its ecological values, but also as a place where many made their living in the forestry industry. Accordingly, in addition to creating the Park, provision was made for a comprehensive package of benefits and compensation including monies for economic diversification, and forestry compensation. One specific commitment made was the promise to construct a small craft harbour in the vicinity of the community of Sandspit, whose local economy had been directly dependent on logging.

Several years of intense conflict had preceded the reaching of an agreement. Major environmental and logging interests had been in collision, overarched by issues associated with the jurisdictional and territorial assertions of the Haida people. Islanders had been pitted against Islanders. The protagonism had attracted national and international media coverage. The aftermath of this conflict persisted long after the announcements were made.

As an undertaking of the Government of Canada, the Sandspit Harbour was subject to the Canadian Environmental Assessment and Review Process (EARP). In 1991, an environmental evaluation of the site on Shingle Bay immediately adjacent to the community which was preferred by its residents (the “preferred site”) identified potentially significant effects for over-

¹ The focus in this paper is on mediation as a process for dealing with complex multi-party environmental and resource based disputes. The author served as mediator in this situation. In recognition of the special nature of his role, the facts and descriptions relied upon in the paper are all in the public record through documents and reports. The author uses his special insights regarding the nature and breadth of the issues, and the parties involved, to demonstrate mediation as a process which assisted in bringing about a resolution.

² The Islands have recently been described in these terms:

South Moresby's ecological value in its wilderness state is indisputable. The park, called Gwaii Haanas by the Haida, is expected to become a benchmark, allowing scientists to compare its untrammelled wildlife to changes in other parts of the world.

The 138 islands of the Queen Charlottes include more than 40 lakes, 50 salmon-spawning streams, some of the world's largest Sitka spruce trees and countless mountainsides of thick forests that drop into deep fjords.

The islands have one of the world's largest concentration of Peale's peregrine falcons and one of the highest densities of bald eagles. More than 100 bird species migrate by and an estimated 750,000 seabirds nest there. The islands are the only confirmed nesting site for horned puffins in Canada and the home for 122,000 pairs of ancient murrelets.

The surrounding waters are also thick with life: gray whales and 10 other whale species, dolphins and sea lions, salmon, halibut, herring, crab and octopuses. Black bears, caribou and deer wander through the forests.

The islands also include archeological evidence - in particular artifacts found in caves - that suggests Haida ancestors lived here more than 10,000 years ago. The park offers some of the few sites in Canada where the ruins of ancient people exist side by side with modern living quarters of their descendants.

“In the beginning there was Moresby”, The Globe & Mail, November 13, 1993.

wintering Brant geese. As a result, the Canadian Wildlife Service, an agency of the Government of Canada, formally opposed the construction of the harbour at the site proposed.

The various parties (both governmental and Island) with an interest in the project, and its assessment, agreed to the use of mediation as a tool to resolve environmental and related issues as opposed to a conventional environmental assessment which, in a dispute of this nature, would typically include a formal hearing process. Mediation commenced in April, 1992 with the appointment of a mediator selected by the parties.

In June, 1993 the Mediation Team concluded its efforts with a Final Report including recommendations to the Ministers responsible for the South Moresby Agreement as to a site and design concept for the harbour, associated environmental/mitigation/compensation and monitoring measures, and steps to optimize local and regional benefits of the harbour.

A Review and Evaluation³ was conducted subsequent to the recommendation which concluded:

The Sandspit Mediation Process can be judged to be successful from several perspectives. First, and most important, the team was able to reach consensus on an environmentally acceptable design for the harbour. Second, based on the interviews conducted, an overwhelming majority of the participants felt that the mediation process was the most appropriate vehicle for resolving this issue. Finally, the process was generally consistent with the ten guiding principles of consensus processes established by the Canadian Round Tables.

Concerns Arise and Issues Surface

The 1991 environmental evaluation of the preferred site identified potentially significant environmental effects, principally with respect to over-wintering Brant geese but also relating to fish habitat. Brant are marine birds relying primarily on intertidal vegetation for a major portion of their over-wintering food supply. They are also representative of a species of marine birds that utilize coastal areas during the spring migration along the British Columbia coastline as they move north into circumpolar regions in Arctic North America and Eurasia where they breed. Typically, they over-winter in the more southerly reaches of the Pacific along the Mexican coastline.

The environmental evaluation noted declines from 50 to 60 percent to less than 10 percent in the number of Brant that over-winter north of the Baja California. It also identified Shingle Bay (and specifically the “Spit area”, quite literally, the “front yard” of the community of Sandspit) as the last known over-wintering location of the birds in Canada. As important feeding areas for migrating Brant and the range of nesting populations that stage and feed in these areas, the possibility of these species being of “international importance” within the Migratory Bird Act was raised. The principal concern was in respect to certain eel grass beds on which the birds depended, and the concern that these beds would be impacted by a harbour development. In light of these findings, the Canadian Wildlife Agency determined that it would not accept the development of a harbour at the site preferred by the community.

As a result of the position taken by the Canadian Wildlife Service, feelings ran high in Sandspit. In the community the promise to build the harbour was seen as compensation to which the community and its residents were entitled for the impact that the loss of logging had had on the

³ “Sandspit Small Craft Harbour Mediation Process, A Review and Evaluation”, John Mathers, Federal Environmental Assessment Review Office, July 1994.

local economy, and to provide a foundation for rebuilding tourism and related activities. The contractual commitment of the Government of Canada was one thing; even more grating to community leaders was the fact that the commitment followed a promise made directly to community leaders by the Minister responsible, face-to-face on the shores at Sandspit. There was disbelief, willing to distrust and hostility, at the turn of events which now appeared to be putting this binding obligation of Canada as secondary to the concerns of one of its agencies. No mention had been made in the Agreement about the need for environmental assessments. Were the Brant more important than people? Was this simply an exercise in political gamesmanship? These were some of the questions being asked in Sandspit.

The Parties Surface

The potential use of mediation appears to have had its origin with the Community Liaison Office established on the Islands by the Governments to assist in the development of a range of planning processes and mechanisms contemplated under the Agreement. The individual selected for the role had a background in the field of environmental dispute resolution. Sensitive to the complexity of the problem, and the potential for further fracturing of the Island communities with the re-opening of old wounds that would likely result from a traditional formal hearing process, he raised the possibility of mediation.

Within Government itself, there was a growing frustration with the bureaucratic entanglements and conflicting roles and obligations which had surfaced in the implementation of the Agreement. Departmental officials were obliged to advance departmental interests. At the same time they were subject to the enveloping obligations contained in the Canada/British Columbia South Moresby Agreement. The Minister of Environment had signed the Agreement on behalf of the Government of Canada, and as such, it was upon that Ministry that responsibility for its implementation rested on behalf of Canada. The Canadian Wildlife Service reported to the Minister of Environment. So did Parks Canada which was responsible for overseeing the development of the national park reserve. Insofar as the physical construction of the harbour was concerned, no specific assignment of responsibility had been made in the Agreement. Subsequent to its signing, this obligation had been assigned to the department whose expertise and experience in the Government most closely matched, namely the Small Crafts Harbour Branch reporting to the Minister of Fisheries. Since fish habitat concerns had also surfaced, the application of a national policy relating to fish habitat needed to be considered -- a further "hat" the Minister of Fisheries had to wear.

On top of this were the financial obligations related to the Agreement. The Minister of Western Economic Diversification had been assigned the role as "banker" of the Agreement with responsibility for administering the overall funding. Since the construction of a Federal Capital Works Project was involved, the mandate of Public Works Canada required that all such work be coordinated through it, including the coordination of any outside consulting or contracting entities retained in connection with the delivery of the project. Provincially, the jurisdiction of the Ministry of Environment was invoked as the intertidal area was implicated. The Ministry of Economic Development and Tourism was involved as the Minister named with the responsibility for REDI. In this confusing context of conflicting and overlapping roles and obligations, there was an openness within Government to consider the potential for mediation.

On the Islands there was also a willingness to participate in a process of mediation. The Residents Planning Advisory Committee (RPAC), a broadly based Islands planning authority contemplated by the Agreement and put in place between and among the communities to assist in effecting the goals and objects of the South Moresby Agreement, was an advocate of the

approach. The potential need to involve other interests on the Island was recognized from the outset.

The concept of mediation had also been included in a major new piece of federal legislation - the *Canadian Environmental Assessment Bill* - well advanced in the legislative process, both as an alternative and an adjunct to a hearing process. The enactment of the Bill into law was anticipated imminently. This had given visibility to the concept of mediation, and added to its legitimacy. The existing regulatory procedures were considered sufficiently flexible to permit such an initiative in advance of the Act, particularly at this initial assessment stage. It was agreed that serious consideration be given to the prospects for mediation under the auspices of the Federal Environmental Assessment Review Office (FEARO) as a model building and “path breaking” exercise.

Against this background meetings were held in late 1991 and early 1992 by the prospective participants for the purpose of attempting to agree upon Terms of Reference under which the process would go forward, and the scope of the initiative. The agreement reached provided for the appointment of a Mediator. It was also agreed that the process would go forward under the administrative auspices of the Federal Environmental Assessment Review Office (FEARO).⁴ Interviews of prospective mediators were conducted by FEARO representatives and the Community Liaison Office on behalf of the larger group.

The representatives from each of the following agencies, and Island interests were identified in the Terms of Reference and Ground Rules as follows:

The Parties to the mediation process shall include:

- a) *The “Principal Participants” - the key stakeholders who are participating directly in the mediation efforts including, initially:*
 - i) *Fisheries and Oceans Canada*
Habitat Management
Small Craft Harbours;
 - ii) *Environment Canada*
Conservation and Protection Service, Canada Wildlife Service;
 - iii) *B.C. Environment, Lands and Parks;*
 - iv) *“Islands Representation”**
**(Although Residents Planning Advisory Committee (RPAC) has provided initial representation from the Island, the Parties acknowledge that other stakeholders from these communities may wish to participate.)*
 - v) *Planning and Coordination Committee (PACC) Co-Chairs.*

⁴ FEARO, the federal agency responsible for environmental assessment in Canada, provided administrative support and assistance to the process. It also gave leadership to a subsequent evaluation of the process on the basis that “an evaluation of the Sandspit Process will provide guidance to FEARO and others on issues to consider when embarking on mediation.” ... and “will assist FEARO in preparing guidelines and procedures for mediation under the CEAA.” - *Sandspit Small Craft Harbour Mediation Process, A Review and Evaluation*, John Mathers, Federal Environmental Assessment Review Office, July 1994.

- b) *The “Interested Parties” - other stakeholders who hold some responsibility for the results of the mediation and must be regularly informed of progress including, initially:*
- i) *Western Economic Diversification Canada;*
 - ii) *B.C. Economic Development, Small Business and Trade;*
 - iii) *ISTC - Tourism Canada;*
 - iv) *Environment Canada*
Canadian Parks Service;
 - v) *Tourism B.C.*

Throughout the process, the distinction between so-called principal parties, and the interested parties, was of no practical effect. The parties all sat at the table as equals, participating fully.

The Process Begins

The first meeting in the mediation process was held on April 24, 1992. Immediately prior, the Mediator met privately with each of the representatives of the parties to be briefed by them on the background and the issues from their perspective, and to identify any significant concerns that they might have in relation to the process. The Mediator also shared with the participants an outline of some of the points that he thought the parties may want to consider at the outset as a basis to move the process forward including: the parties; purpose of the negotiations; timetable and duration; structure of the negotiations; use of Mediator or third party; scheduling and agendas; relationship to external interests; confidentiality; agreements; compliance and changes; prioritization and concurrent processes; other proceedings; etcetera.

After a preliminary exchange of views, the initial meeting turned to the negotiation of Ground Rules for the process. To further assist in the discussion, the Mediator provided a set of questions to assist the parties in surfacing the issues that needed to be addressed and to give focus to the meeting. These were as follows:

1. *The Parties*
Who has expressed a desire to be at the table? Are there other parties who may have an interest in, or may affect, the outcome or whose concurrence may be necessary to the effectiveness or enforceability of any agreement reached? Should they also be at the table? If not directly as a party at the table, are there other interests who should be involved in the process in some other way? Who, if anyone, should be kept "informed" of the progress of negotiations? If so, who is to do the "informing"? What about the public-at-large?
2. *Purpose*
What purpose do the parties seek to accomplish? In other words what are the issues in dispute? Can other matters be subsequently added by mutual agreement of the parties?
3. *Timetable and Duration*
Is there an estimate as to the potential length of time the process will take? Should this be expressed in the Ground Rules? Should there be a cut-off date after which any party may withdraw? Or, may any party withdraw at any time? Should initial time expectations be capable of revision by mutual agreement, and should the parties commit

to a specific re-assessment of the target period at least ____ days prior to it being reached?

4. Structure of the Process
 May additional parties be added at any time upon the concurrence of the existing parties? May the parties be represented through counsel, spokesman, technical experts, or any or all of them? May persons not explicitly designated to actively participate do so at the request of that party and with the concurrence of the other parties? May "Working Groups" be formed by concurrence of the parties to address specific tasks or issues? Should the composition, scope and operation of those working groups be established by the parties? Can working groups include persons not part of the specific persons at the table? Is it possible to agree upon information, or a mutually acceptable process by which it is to be developed?
5. Scheduling and Agendas
 Should an explicit schedule of joint meetings for a specific period be established? Or should meetings be held when requested by either party? Or should joint meetings be called at the sole discretion of the mediator? Are agendas to be prepared in advance of each session? Or should such topics as the parties want to raise be discussed at any meeting? Is a formal record to be kept of the meetings? Or should the parties or the mediator simply take such notes as they may consider advisable for their exclusive use to assist in recalling the history of their discussions?
6. Relationship to External Interests
 Are sessions to be open, or closed to the media? Or to the public? Is communication with the media permitted, and if so, on what basis? A prepared press release jointly authorized by the parties? Or at each individual's party's discretion? Or solely by the mediator?
7. Confidentiality
 Are all discussions (including specific offers, positions, statements) in respect of, and all documents created for or in the course of, the process to be privileged and confidential? And further, is it agreed that such discussions or documents cannot be used for pending or future litigation, or any other potential proceedings? Should the parties be required to provide all relevant information? If for a particular reason a party is unwilling to produce a specific document must it nonetheless provide the substance of the information required in some form? What, if any, role should the mediator play in respect of the communication of information?
8. Role of the Mediator
 Why, and when would the parties consider involving a mediator? Should the mediator's perform his functions for a fixed term or at the pleasure of the parties? What assurances should the parties give to a mediator in terms of the confidentiality of his role, and his non-compellability in any subsequent proceedings? Is there to be any restriction whatsoever on the mediator's right to meet separately or jointly with the parties at such times as he may consider appropriate, or as the parties, or any one of them, may request? What is the retainer relationship between the mediator and the parties, and on what basis, and frequency are his accounts to be rendered and paid? Should the mediator be empowered, if he considers at any time that it would be of assistance to him or the parties in resolving any issues or recording any agreements reached, to retain, instruct and make available to himself and the parties such expert or legal drafting assistance as he deems advisable?
9. Agreements
 Is it in the interests of facilitating the broadest possible consideration of options and alternatives that all the suggestions and possibilities will be tentative until full agreement is reached? Is concurrence on any single item subject to reaching agreement on a total

acceptable package addressing all matters relating to the topics under discussion? Should the parties agree in advance that in the absence of agreement in all issues, any agreement reached should explicitly describe remaining areas of disagreement and the reasons for that disagreement? Should possible means of reconciling such differences also be identified? What, if any, use can be made of such an agreement, including the recitation of areas of disagreement, and any proceedings which may subsequently arise outside of the mediation process?

Are there certain issues that should be isolated and dealt with in priority to others? Will agreement on such issues, if any, or the lack thereof, be independent from, or subject to, agreement on all other issues?

Who should be responsible for controlling the drafting of the text of any agreement of the parties? The parties? Or the mediator as he may be assisted, subject to drafting, review, and approval by the solicitors of the parties?

10. *Compliance and Changes to the Ground Rules*

How shall compliance with these Ground Rules be maintained? Shall each party be responsible for the adherence of its own representatives to these Ground Rules? What steps, if any, should be taken to ensure adherence?

11. *Priorization*

Should the parties undertake, each to the other to proceed with their efforts on the basis of mutual representations as to the priority assigned to the matter?

12. *Other Proceedings*

Provided the process is continuing, what should be the status of court or other proceedings, whether initiated or in contemplation?

A Working Group was created and charged with giving expression to these discussions in an initial draft set of Ground Rules that would provide a foundation for further discussion. These Draft Rules were prepared, and after careful review and discussion at the subsequent meeting were adopted as the Ground Rules for the process.⁵

These initial discussions also considered the connection between the mediation process and the requirements of an EARP process. While the focus of the EARP process was environmental impacts, broadly construed, the view was expressed that it could be considered to contemplate related socio-economic issues and significant public concerns, the failure to address any of which could create the potential for Ministerial uneasiness in responding to any final report/recommendation that might be forthcoming. The ultimate determination as to whether the mediation process, and any Report/Recommendation that might flow from it, pre-empted the need for an additional environmental assessment process including public hearings would be a decision of the Minister of the Environment. The aim at the Table, it was agreed, would be to attempt to find common ground on a recommendation that could be put forward on a mutually acceptable basis by all of the participants that would provide a basis for its adoption by the Minister without the need for any additional processes or activities.

Pulling the Chairs Around the Table

Who should be at the Table? That was a key question with which the parties had to struggle both in framing the initial Terms of Reference and at the outset of the mediation process. From the Islands, the initial representatives at the Table had been appointed through the Residents Planning Advisory Committee (RPAC) two of whom were from Sandspit and the third was the Community Liaison Officer. The Haida First Nation should be there if they wished to be - that was

⁵ See Schedule 1 attached.

acknowledged both in initial discussions, and at the outset of the mediation process. Lines of communication to explore the interest of the Haida in participating, or to be otherwise involved, were opened by the Mediator as the request of the Mediation Team. The governmental interests at the Table had been identified. Who, if anyone, else needed to be at the Table?

Initiatives to determine whether other potential interests would emerge and to whom a seat at the Table should be offered began with a visit by the Mediator to the Islands - with public notification as to his visit. In the community meeting which followed a range of people expressed concerns and asked about the nature of the process as it might unfold. In conjunction with this initiative, a wide range of exploratory discussions took place on the Islands, both spontaneously and purposefully, to get a sense as to what interests should be there, and the reaction of other possible interests to any such possible involvement of a particular group. The presence of a specific environmental interest was acknowledged as a necessary player at the decision making table, and discussions as to what group/organization on the Island might perform such a function, and who might represent it, were initiated. Emerging from that iterative dialogue was a recognition that this was a single purpose activity and the organizational focus that would best match the circumstance was a coalition of environmentally concerned individuals/interests under an umbrella organization. The Sandspit Mediation Environmental Group ("SMEG") was born, with an Islander prominently identified with bird concerns to take a seat at the table on its behalf.

The Haida identified their interest as being sufficiently met if kept generally informed, as opposed to directly involved, in the process, provided that the mandate of the process clearly stayed focused on a resolution of environmental and related concerns. For the Haida, the assurance that the mediation process would not deal with the allocation of dollars to any specific undertaking within the overall package of benefits was a key concern -- negotiation would be required in respect to that in a separate and distinct set of activities.

Later other groups came forward with concerns. Socio-economic issues subsequently surfaced, and with them, the interests of a neighbouring community concerned as to the implications of a new harbour in the region on its existing harbour. A representative for this interest was identified, and an invitation was extended, and accepted, to join the Table.

The Sites Revisited

In addition to the Primary Site, the Mediation Team ultimately expanded its scope of review to seven additional alternative sites. All but one of these, a site immediately adjacent to this Primary Site at the location of an existing Wharf, had been identified and considered in the earlier planning process.

Early in the process, an independent engineering consultant was engaged for the purpose of reviewing the alternative sites which had already been under consideration and the various pros and cons from an engineering and cost perspective. Extensive discussion took place including a visit to the various locations.

Each of the prospective sites was considered with regard to the following:

1. *Engineering factors*
 - a) *Capital cost;*
 - b) *Infrastructure effects and requirements;*
 - c) *Available area.*

2. *Environmental Impacts*
 - a) *Fish and habitat;*
 - b) *Brant geese;*
 - c) *Dredging impacts.*
3. *Socio-Economic Effects*
 - a) *Business potential and conveniences to boaters;*
 - b) *Disturbances to neighbours;*
 - c) *Effects on present recreational facilities.*
4. *Concerns and preferences of the residents of Sandspit.*⁶

By August, four of the seven sites were identified as warranting further consideration. By November, a site close to the Wharf and another at Haans Creek at the western end of Shingle Bay, about three kilometers from the core of Sandspit, were identified as potentially acceptable. Additional engineering considerations also were dealt with in the interim.

At that point, the need to directly engage the community in the process was recognized. Detailed story boards were prepared, and the full Mediation Team participated in an Open House in the community. Concerns relating to fish habitat surfaced at the Haans Creek site, and at the Wharf Site adjoining residents were upset with the implication the harbour development would have for them.

With the benefit of this further input, the Mediation Team made its choice as to a recommendation - selecting the Haans Creek site some three to four kilometer distance from the community at the far end of Shingle Bay.

Now focused on the selected site, further investigation proceeded to more definitively determine the impacts, and the mitigation and monitoring measures that would be required to deal with them. At the point at which a Draft Report was developed, a further and final round of public open houses, throughout the Islands was held, to both inform as to the process, the proposed site, the impact and associated measures and to become informed as to any concerns.

Building Consensus

It was with a goal of reaching consensus that the parties agreed to enter into the mediation process. In a consensus process there are no votes. No party can be overpowered by opposing numbers against its will. The agency with the authority to make decisions does not give up that authority by entering into negotiations; no decision (agreement) can be reached which it finds unacceptable. On the other hand, if a decision or agreement is reached that is mutually acceptable, it will go forward with the explicit acceptance and support of those interests and parties who might otherwise be in opposition.

Simply stated, “mediation” is negotiations with the assistance of an independent person often referred to as a “third party”. Critical to mediation is the relationship between the mediator and the parties at interest. That relationship has at least four dimensions:

⁶ Final Report, Sandspit Small Craft Harbour Mediation Process, The Mediation Team, June, 1993 page 6.

- Independence from the parties and the immediate issues in dispute;
- Mutual acceptability to the parties;
- A focus on the process, not the substance, of the negotiations; and
- Assisting in finding a settlement mutually acceptable to the parties. The content of the settlement is the responsibility of the parties and must be mutually acceptable to them.

A word on the role of the Mediator - but first the context should be set. Mediation is a creature of negotiation: Negotiations can occur without mediation but mediation cannot occur without negotiations. In mediated negotiations the participants are committed to seeking a mutually acceptable resolution of their differences which they will formally commit themselves to implement and support. It is shared decision making on a defined set of issues for a specified period of time. Alongside the commitment to joint decision making is the understanding that, should they fail to reach agreement within the specified and agreed upon time frame, each is free to pursue its interests as it sees fit, whether through unilateral decision making, the political process, the courts or some other means. In negotiations “agreement” is defined as the joint acceptance of all parties.

In environmental and resource based conflicts the mediator is likely to perform a range of process management functions of the following nature:

- Acting as a convenor in assisting the parties to define the terms and conditions under which the negotiations will proceed;
- Acting as a broker, representing the interests, concerns, and ideas of one party to another, outside of joint sessions in caucuses; and
- Acting as a discussion or meeting manager in joint sessions.

The mediator will manage a meeting for the purpose of reaching agreement. This may include focusing the conversations, restating and rephrasing, suggesting procedural and substantive directions and managing areas of agreement and disagreement. The mediator may also encourage the use of caucuses to ensure that all parties have a chance to consider and discuss separately new initiatives and proposals.

In the Sandspit mediation the Mediator, in varying degrees at different times, performed this range of functions in assisting the parties to move the process forward to resolution.

Establishing Working Groups

Starting with the establishment of the Ground Rules Drafting Working Group, the Mediation Team recognized that moving the process forward would be most practically served with the establishment of specifically tasked Working Groups who would carry out their activities between major meetings, and give leadership to aspects of the discussion to which they tasked at the major meetings. These included, in the sequence under which they were established the following: Ground Rules drafting; Issues Identification / Information Assembly; Brant; Fisheries and Compensation; Socio-Economic; Communications; Drafting of the Mediation Report.

The Working Groups dissipated when the task was completed. Each of the Working Groups included representatives of the interests with the most direct concerns in relation to the tasked topic. Often they were constituted with an initial suggestion as to representation given by the

Mediator with immediate follow-up discussion as to whether someone needed to be added, or removed. Typically, the Working Groups completed their work through conference call meetings and the preparation and exchange of faxed material. The flow of the mediation process can best be captured by focusing the discussion around the activities and outcomes of the Working Groups.

The mediation process was underway for 14 months, with 14 meetings of the full Mediation Team (major meetings) and approximately 45 additional “Working Group” meetings (all but one of which were by telephone conference call). Additionally, specific tasks were undertaken by the participants, individually or jointly. Throughout the process the mediator was in continuous contact with the representatives of the parties, primarily through telephone communications, but often in face-to-face meetings.

Identifying the Issues and the Information Base

The Issues Identification Working Group began to work immediately after the first meeting. Since a number of alternate sites had been under consideration, different issues and concerns were associated with each, such as:

- The Brant geese -- Would the Brant leave their winter home on Shingle Bay in the presence of the construction activities, and ultimately an operating harbour?
- Fisheries habitat -- Could eel grass habitat be successfully replicated elsewhere? What were the implications of the Fish Habitat Policy of the Federal Fisheries Department?
- Socio-economic considerations -- How important was the proximity of the harbour to the community? What were the implications for other harbours and communities on the Islands was also of major concern to other interests?

In connection with the Brant, a study was underway by a biologist which would complement several previous studies that had been done. This would provide significant information into this process. While the study had been ongoing for some considerable period of time it was not yet completed, although the work was well underway. From a fisheries perspective much less was known, and more needed to be known. Inadequate information was available in respect to eel grass habitat.. Fish stocks, both number and types, was not well identified at that point in the Shingle Bay area.

The Brant

The core issue for the Mediation Team was the potential implications of the construction of a harbour on the Brant geese which over-winter in the Sandspit area. There were very strong feelings surrounding the issue. Resentment towards the Government was high. There was frustration with the suggestion that the Brant would leave as a result of the harbour as the geese had coexisted with human activity on the Skidegate Inlet for as long as most people in the community could remember. Furthermore, the airport adjacent to the community was often the site of vigorous geese activity; that situation had become sufficiently serious in the past year that efforts had to be undertaken by the airport authority to scare the geese off with shotguns so as to avoid any potential hazard to the airplane traffic in the region. As far as the community was concerned the notion that a harbour was incompatible with the continuing presence of the geese was difficult for them to reconcile with the commitment made to them and the implications of not

having the harbour as a springboard for revitalizing the local economy. For many in Sandspit it appeared that geese were being given priority over people.

What was clear, for reasons that were unclear, was the fact that the Brant appeared to favour the Shingle Bay area, and, certainly in the eyes of the Canadian Wildlife Service, the area in the vicinity of the preferred site where the eel grass beds were most concentrated. However, the geese were not always in the Bay. For extended periods they would disappear only to return subsequently. Local people could only speculate that other sources of habitat were also conducive to the geese. This further reinforced the view that in the presence of the harbour, there were alternative habitat sites within the Islands to which the birds would have recourse.

From the Canadian Wildlife's perspective, Skidegate Inlet was the last known overwintering location of Brant in Canada. That only 600 birds utilized the site compounded its concern. What was involved was a matter of national, and international wildlife significance. That characterization was not without detractors. Was it simply an agency opinion, or did it have some fundamental legal underpinning? Was it only a subjective view or an objective determination? How did this reconcile with the fact that Brant were being legally hunted in Boundary Bay on the Fraser River estuary in the vicinity of Vancouver?

The workings of the Brant Working Group initially focused on finding out further information. Much was known, but much was unknown. A further biological study was near finalization and the results were known. There was concurrence as to the need for further information and expert opinion on the eel grass beds which comprised the prime habitat for the Brant, and that appropriate expertise should be consulted. Potential sources of information and candidates with whom such consultations could take place were identified.

What was learned? Most significantly, it became clear that the eel grass beds in the Shingle Bay area were unique on the Islands in that they grew higher up in the intertidal area in this region than elsewhere. As a consequence, at the higher tide levels, the birds could feed in this area when food was unavailable in other sources. Why were the eel grass beds growing closer to the shoreline in the intertidal zone in this area than elsewhere? On the undulating intertidal plain, the eel grass grows in the shallows and requires a constant water overlay to thrive. The water Table along the Spit caused fresh water to percolate out from the shoreline onto the intertidal zone with the result that there was water coverage over the eel grass at higher elevations than elsewhere. Accordingly, it appeared that the eel grass was able to survive at those elevations when it is unable to do so in other locations that were identified on the Island. The fact that the eel grass was growing in atypical and stressful conditions, i.e. low salination water, and greater exposure over prolonged periods, higher protein concentrations at the tips of the leaves result. Furthermore, salt glands of the young birds do not mature until approximately a year and a half and as a result drinking lower salination fresh water co-mingled with salt water had a certain attractiveness to them.

With this deeper understanding there was a greater appreciation as to why the Shingle Bay area might be attractive to the birds over and above other areas but the fundamental questions still remained. Would the construction and presence of a harbour cause the birds to leave? There was no answer to this question. No matter how much the Mediation Team might come to understand, knowing what was in the mind of the birds would always be a matter of speculation. That would only be known by observation, after the fact, as a certainty. In the face of this uncertainty, how might one move forward to break the impasse?

The focus started to shift from the answer to the question. "Conclusiveness", it was acknowledged would not be possible, and in that way it is no different than many contexts in

which professional judgments have to be made - whether in the field of medicine or law, engineering or biology. What became clear was that the answer was in the question. Would the birds leave Shingle Bay? To that there was no answer. But there was consensus on the question that had to be addressed: What would a reasonably prudent biologist conclude as to the likelihood of the Brant leaving Shingle Bay in response to the construction and operation of a harbour in the circumstances now known? Without acknowledging that the birds would leave Shingle Bay - there was common ground that a prudent resource manager should ask that question and might reasonably conclude in the circumstances that the level of risk associated with the preferred site was unacceptable.

Fisheries and "Habitat Compensation"

Fisheries issues, although trailing the Brant question in profile and visibility, surfaced early in the process. The existence of eel grass beds, and the possible loss of them in the course of harbour construction, represented a potential loss of fish habitat. That this was a strong likelihood was well known, particularly as a prime spawning area for herring, but the nature and extent of the fish stocks in the area was not well known. Accordingly, given the pressure to achieve resolution of the issues on as efficient a time schedule as possible, there was a need to initiate immediately the development of this information. A fish seining survey, to develop some understanding of the potentially effected fishery resource in the region, was undertaken.

A related fisheries issue was that of "habitat compensation". A national fisheries policy on Fish Habitat set out a detailed code that guided the requirements in relation to habitat loss and compensation. This Policy was reviewed and discussed. Further, examples of circumstances where eel grass habitat had been replaced was described, and some sense of what costs might be involved was explored. Issues also surfaced as to the viability of developing "compensation" habitat in northern waters given limited experience in northern waters on which to draw. Were there options to compensate other than replacement beds of eel grass?

This issue loomed larger in the final stages of the process as attention started to focus on the Haans Creek site. Concerns over fisheries issues emerged with increasing focus and intensity as it became increasingly likely that this site was a strong contender.

Socio-Economic Working Group

From Sandspit's perspective, the further away from the community that the harbour was located, the less likely that the economic benefits intended by the Agreement to flow to the community would, in fact, do so. The Primary Site was directly adjacent to the community "centre" and all other proposed locations were at increasingly distant points.

In addition, socio-economic concerns of other communities surfaced. In the neighbouring community of Queen Charlotte City, the question asked was this: Would the development of a small craft harbour at Sandspit draw boaters from other harbour facilities on the Islands, and impact negatively by shifting economic activity from one community to another? These concerns were intensified by the state of disrepair of the Queen Charlotte City Harbour.

Within two months of the initiation of the process there was a growing recognition of the need to further expand the Table to bring in representatives of other communities whose socio-economic interests could be touched as a result of the development of this harbour. Invitations were extended, and shortly thereafter, a representative from the Queen Charlotte City joined the Table.

Were these concerns measurable? Was it possible to undertake a cost/benefit analysis of alternative locations on economic benefits to the community? How reliable would it be? What about the existing market studies? Should they be revisited? Was a fresh look necessary?

As opposed to commissioning a study to answer the questions, outside professional advice was sought as to whether these questions were answerable, and if so, how any resulting analysis could be used. This advice suggested that a more practical approach would be to shift the focus from how the harbour would differentially impact the community proximate to location, to how might the harbour fit into a package of development initiatives to enhance economic and social conditions on the Islands.

A Socio-Economic Working Group was struck and charged with the task of reviewing all of the outstanding concerns falling under the heading “socio-economic”. This group was able to reach consensus on a “single text” which was reviewed by the whole Mediation Team. Ultimately, based on the outcome of this effort consensus was reached on a series of recommendations “to optimize local and regional benefits of the Sandspit Harbour”.⁷

Public Information Working Group

The need to develop a communication strategy - both to inform the public as to process and to provide an opportunity for the process to become informed by the public - was recognized early in the process. A Public Information Working Group was established. The first decision taken was agreement on an approach involving identifying questions and drafting answers for publication in a continuing series of articles in the local paper. This process had the collateral effect of building consensus around the key questions, and a response to them expressed in non-technical terms.

The interface with the public was an important consideration throughout. In the Letter of Transmittal to the Minister, these activities were summarized as follows:

- Notification in the local paper as to the commencement of the process, the interests represented, and by whom, and the Mediator, together with telephone numbers and an invitation to make contact with any member of the Mediation Team, or the Mediator, for further information.
- Public meetings were held in Sandspit on May 15, 1992; August 26, 1992; October 14, 1992.
- Meetings and Workshops by the Group on the Island.
- Full page "Question-and-Answer" format articles were prepared and published in the local newspaper, the Observer relating to *Mediation Process; Brant Geese; Fish and Fish Habitat; Disposal of Dredgate; Fisheries Issues at the Haans Creek Site.*
- An Open House at which Haans Creek and the Wharf Site were compared was held in Sandspit on February 16, 1993. A firm specializing in public involvement, had been engaged to assist in the design and management of the process, and reporting on the outcome. InterFacts' Report on the Sandspit Open Houses is included as an Appendix to the Report.
- Consensus on a Final Draft Report was achieved in April. Before finalizing the enclosed Report the Mediation Team put the Final Draft Report before the public for review and comment in Open Houses held on the Islands in Masset/Old Massett, Skidegate/Queen Charlotte, and Sandspit. Members of the Mediation Team attended throughout the Open Houses. InterFacts Consulting Ltd. was again engaged and their Report on the Islands Open Houses is included as an Appendix

⁷ These recommendations are described in more detail in the *Working Paper on Socio-Economic Issues Related to the Proposed Sandspit Small Craft Harbour*, Appendix 4 of the Final Report, Sandspit Small Craft Harbour Mediation Process, The Mediation Team, June, 1993.

to the Report. In finalizing this Report, the Mediation Team has had regard to the concerns of the Islands people made known at the Open Houses.

- These activities all of which occurred in the context of the Mediation Process, had been preceded by other public consultation activities, including a Public Meeting as part of the Initial Environmental Evaluation (I.E.E.).⁸

Putting The Guiding Principles Into Practise

- Principle #1: Purpose Driven*
- Principle #2: Inclusive Not Exclusive*
- Principle #3: Voluntary Participation*
- Principle #4: Self-Design*
- Principle #5: Flexibility*
- Principle #6: Equal Opportunity*
- Principle #7: Respect for Diverse Interests*
- Principle #8: Accountability*
- Principle #9: Time Limits*
- Principle #10: Implementation*

At the same time as the Sandspit mediation process was moving forward, efforts were underway by the Round Tables of Canada and the Canadian Council of the Ministers of Environment under the leadership of the National Round Table to develop a set of *Guiding Principles For The Use Of Consensus Processes*. This broadly based initiative had as its objective developing a national reference point on the fundamental characteristics of a consensus process, particularly in the context of sustainable development. These Principles would also provide a means through which the use of these processes could be given greater visibility and legitimacy both in the public and within Government. Finally, it would provide a common baseline in the evaluation of initiatives utilizing this process design. These Principles provide a convenient reference point for an evaluation of the Sandspit Mediation⁹.

⁸ Ibid, Letter of Transmittal dated June 16, 1993

⁹ "Sandspit Small Craft Harbour Mediation Process, A Review and Evaluation", John Mathers, Federal Environmental Assessment Review Office, July 1994, observes:

The results of the interviews represent a subjective evaluation of the process by participants. They are of value in that they identify a number of issues that need to be considered in future mediation processes. However, there are a number of limitations to the results. First, they represent a self-evaluation of the process and do not consider views of those outside the process. Second, this evaluation considered only one case and therefore was influenced by specific factors related to this issue. Since some of these factors are unique to Sandspit, including the fact that this was the first formal involvement of FEARO in mediation, extrapolation of the results to other mediation exercises must be done with caution. Finally, the views of participants were likely influenced by their position with respect to proposed harbour. Due to the small sample size, no attempt has been made to analyze the responses by either the respondent's position on this issue or by their role in the community or government.

This exercise raises the broader question of how one should evaluate a mediation process. Should the evaluation focus on the process or the outcome, for example, is reaching a consensus a valid measure of success? Are objective evaluation criteria required or is a subjective evaluation adequate? Can the evaluation be conducted at the end of the process or should it also occur during the process? Should the evaluation consider views of those outside the process as well as participants in the process?

... One important observation from this review is that the Agency needs to develop an evaluation process for mediation including a set of standards or criteria against which the process can be judged.

In the “Sandspit Small Craft Harbour Mediation Process, A Review and Evaluation”¹⁰ the following observation is also made in this context:

One starting point in this regard is the recent publication by the Canadian Round Tables entitled “Building Consensus for a Sustainable Future - Guiding Principles”. The document presents ten guiding principles of consensus processes which were developed by the National, Provincial and Territorial Round Tables in Canada and by the Canadian Council of Ministers of Environment. The principles are listed in Table 1. The document notes that while no single approach will work for all situations there are certain principles that are fundamental to consensus. These guiding principles represent a set of criteria that could be considered when evaluation consensus processes. They have been used to structure the discussion of the Sandspit process in Section 4 of this report.

Principle #1 -- Purpose Driven

There was common ground amongst the parties that a consensus process with the assistance of a Mediator offered the best opportunity to resolve issues. Given this front-end commitment to the process, there was little questioning as to whether the parties felt they were in the right forum. Certainly, from time to time, particularly in light of the length of time that the process was taking, there were musings as to whether or not it might have been a lot simpler to simply appear in a hearing room and thrash it out and let somebody else decide it. The importance of having ownership in the process and control over its outcome through direct involvement at the Table invariably came forward in response.

The Review and Evaluation summarized the situation in these terms:

In the interviews conducted, all but one participant concluded that the mediation process was the most appropriate technique for this issue. The process, in fact, resulted in the team developing two alternative designs that were acceptable from an environmental perspective. It is unlikely that a panel review would have achieved the same result. The panel review would have likely focused on the one site preferred by the residents but unacceptable to the resource management agencies. A panel would have been faced with the choice of either recommending that government accept or reject this proposal and would not have had the ability to seriously examine alternatives.

One of the strengths of the mediation process was that a solution was developed by the directly affected parties rather than being imposed by a third party. In this regard, mediation differs from panel reviews or other forms of consultation processes. In the panel situation, the panel hears from many groups then makes a recommendation that government either accepts or rejects. While the results of mediation are also a recommendation to government, the parties themselves have made the trade-offs and reached a decision rather than leaving it to the panel or government.

The panel process tends to produce winners and losers whereas mediation results in parties with significant interests agreeing to the outcome. In this case, a panel hearing would likely have divided the community further, since by its very nature it would have forced participants to take strong positions with the hope of persuading the panel that their view was “right”. On the other hand, the mediation process brought parties together and resulted in dialogue between those on opposite sides of the issue. This may be a benefit that will extend beyond the mediation process.

¹⁰ “Sandspit Small Craft Harbour Mediation Process, A Review and Evaluation”, John Mathers, Federal Environmental Assessment Review Office, July 1994 -- referred subsequently in text as the “Review and Evaluation”.

Principle #2 -- Inclusive Not Exclusive
Principle #3 -- Voluntary Participation

The importance of involving all interests with a stake in the outcome or who could successfully undermine any outcome that might be achieved was uppermost in the minds of the participants from the beginning of the mediation, and in discussions leading up to it. The fact that certain interests on the Islands were not represented from the very outset, however, created difficulties. "Back-filling" the Table presented challenges in much the same way as invitations to a party sent later to some than others. What interests needed to be represented at the Table? How would they be organized? Who would speak on behalf of them? What implication the involvement of additional interests might have in relation to other interests who might also take the position that they too should have been included was a matter of very considerable delicacy. Further, how could the parties around the Table reconcile that including others with opposite views to them was in their interest? Should the Mediator decide who and who should not be involved? That had certain attractiveness. However, were the Mediator to start taking responsibility for decisions of this nature then the ownership in the outcome, both in its potential successes and failures, would start shifting from the participants to the third party.

The organization of similar groups/organizations into a coalition should also be noted. The environmental groups on the Islands felt that none of their mandates was consistent with the very specific orientation of this exercise. The formation of a Steering Group reflecting environmental interests and organizations on the Islands enabled the selection of a representative at the table. On the "governmental side", the interests within Government were considered to be sufficiently disparate with distinct agendas that separate seats at the Table were necessary. The mediation process provided a context in which to integrate these competing perspectives into a mutually acceptable outcome in a way that had not previously proven possible.

The Review and Evaluation offers this observation:

At the outset of the process, the parties acknowledged that other stakeholders from the Islands' communities may wish to participate. During the initial meetings of the team the desirability of broadening Islands' representation was identified since the RPAC members were perceived by some to be proponents of the harbour. Subsequently, the Sandspit Mediation Environmental Group (SMEG), a coalition of environmental interests on the Islands was established, with representation at the table. Shortly thereafter a request from the Queen Charlotte City/Skidegate Landing Advisory Planning Committee (QCCSLAPC) to participate in the process was accepted. The mediation team issued an invitation to other similar bodies on the Islands but this did not result in additional parties. The Council of the Haida Nation (CHN) was invited to participate and was kept informed on the progress of the process. Representatives of Old Massett and the CHN attended one meeting of the mediation team.

The decision to add members to the team consumed a considerable amount of time and energy. Further, since these additional parties did not join the team until third (SMEG) and fifth (QCCSLAPC) meetings, some time was lost in reviewing issues considered prior to their joining the process. Despite adding members to the team, some interviewees commented that not all significant interests were represented. In this regard the interests of Transport Canada and the Agnes Creek enhancement program were specifically mentioned.

It was not until later in the process that the interests of Transport Canada, their staff and families in Sandspit were identified. The interests of Transport Canada were related to the effects of one potential harbour site on their property. Since this site was identified during the mediation process, it would have been difficult to recognize their interests initially. Once Transport Canada's interests were identified they participated in several meetings of the mediation team and when the site that affected their property was

dropped they chose not to actively participate in the process further. This issue points out the need to be flexible in membership of the team.

The second interest that some felt may not have been represented were those involved in the Agnes Creek enhancement program. This group considers that the harbour site selected would adversely affect fish produced in Agnes Creek. It is their view that this position was not adequately represented at the mediation table by Fisheries and Oceans or by RPAC representatives. Although this interest was not on the team, they were given an opportunity to present their views at an open house held by the mediation team. In this way all members of the team were fully aware of their views. Further, the team was briefed by Fisheries and Oceans on correspondence from the Agnes Creek representatives and issues raised were considered by the team. It would have been difficult to have foreseen the interest of the Agnes Creek enhancement program at the start of the process since their interest was not expressed until the team started to seriously consider the Haans Creek site.

Principle #4 -- Self-Design

The Sandspit Mediation Team designed the mediation process through the face-to-face discussion and negotiation of a set of Ground Rules at the outset of the process. The selection of a Mediator which had been agreed upon in initial discussions was through a process that the parties had determined through their own efforts. The selection process was carried out through interview representatives and they in turn made recommendations to the main Table who endorsed it. The Ground Rules that were agreed upon clearly defined the issues and addressed the roles and responsibilities of the various parties and the basis under which the process would go forward.

The Review and Evaluation observed:

With regards to how the Sandspit process was conducted, several participants suggested that meetings of the team should have been more frequent at the start of the process in order to define information requirements, less frequent while information was being gathered, then more frequent or longer at the end of the process when the agreement was being developed. This arrangement would more closely parallel the panel model where information requirements are identified in scoping sessions at the start of the process and, once the information is gathered, hearings and report writing are conducted. This approach may not be appropriate for mediation since it would have reduced the amount of time that people had to discuss and understand the issues. In mediation a key component is communication among the parties rather than a strict factual analysis of the issues.

Based on the results of the interviews it appears that some participants would have preferred a greater degree of structure. The question is how this need would be met while still maintaining the principle of flexibility. One option would be the use of a small working group to set an agenda for the process. This could be done once the process is established and would give participants a greater sense of process direction. Notwithstanding, the process must be flexible enough to deal with issues as they arise during the course of the mediation.

Principle #5 -- Flexibility

Flexibility was important in many respects in relation to the process. In terms of the involvement of the parties there was flexibility and openness as to the need to involve interests when their interest in the outcome emerged. One particular illustration as to how the mediation process adapted is this - When the interests of the Transport Canada employees was identified, the Mediator and several team members met with the Regional Director. A special meeting was held in the community to which Transport Canada employees were invited to discuss the problem. Transport Canada personnel were also invited to attend, and did attend at several meetings.

Principle #6 -- Equal Opportunity

Resourcing to ensure effective participation was achieved in a variety of ways. First of all information for the most part was developed on the basis of a common understanding reached around the Table as to who should provide it and was accordingly a cost to the process as a whole as distinct from any single party. All parties had equal access to it. To the extent that there was any existing information going into the process all of that was made available.

The Review and Evaluation observed:

In general, the participants concluded that this requirement was met. The use of external technical experts was felt to be very effective by participants as was the use of working groups to develop background information on specific topics.

A unique issue in the Sandspit process was the lack of a clearly identified proponent who could provide information required by the team. When the team identified information needs it was not always clear who would obtain the information and how it would be paid for. In most other cases there would be a clearly identified proponent and following the "proponent pays principle" the responsibility of providing the information would fall to it.

During Sandspit mediation process the team engaged specialists to advise participants on particular issues. For example, specialists on eel grass, coastal sedimentation and Brant geese were engaged to provide information and opinion. While the process also used government specialists, there is value in engaging outside expertise as they are seen as having no connection to the project and therefore viewed as neutral. The use of these specialists is analogous to their use in panel reviews. In the Sandspit case the specialists were paid by the initiating department, however, under the CEAA these costs could be borne either by the proponent or the Agency. A policy on the use and funding of technical specialists by mediation teams needs to be developed by the Agency.

Another issue is the need for secretariat support for the mediation process. In panel reviews, the secretariat supplied by FEARO often does a significant amount of background research for the panel. In the Sandspit case, FEARO did not have the resources or the mandate to provide a significant amount of technical support. Guidelines on the support role that Agency staff will provide during mediation would be helpful. The guidelines should ensure that any duties performed by the Agency do not jeopardize its neutral role in the process.

Further, early discussions focused on the appropriation of compensation to those who were involved in this activity other than as part of their normal job. A per diem honorarium was negotiated at the Table to the satisfaction of the participants. This included, not only an allowance for attendance at meetings, but also an allowance in respect of time involved in preparing for meetings and participating in related activities.

The Review and Evaluation observed:

In the Sandspit process, non-government participants were compensated for their out of pocket expenses associated with travel and accommodation and were provided with an honorarium for their time.

All participants felt that it was appropriate to offer compensation for the time spent by non-government participants. Most felt that it was essential to create a sense of balance between government and non-government participants. In the case of Sandspit, the payment of honorariums was essential to participation of some parties. The system of compensating participants on a per meeting basis rather than for actual time spent was effective in managing and controlling costs.

In considering compensation for mediation, the members of the mediation team should be thought of more as panel members than as participants in a panel review. In mediation, it is the team that prepares the recommendation and therefore their role is much more than that of being consulted. In fact, recommendations from a mediation team have as much or more weight than a panel since they represent a consensus of all parties.

In addition to financial compensation, resources for all participants to participate effectively can include technical support to non-government participants. In this case, Norman Dale provided the Islands' participants, in general, and RPAC in particular with both process and technical advice. Several participants commented on the value of having this support available to the community. Such support gives the community the ability to participate on an equal basis with government and industry who have access to various forms of research, technical and logistical support. In cases where the community is remote, this person can assist the mediator in providing advice on local issues and by networking and transferring information within the community. Participant funding programs could be used to provide such support to well organized interest groups. Some interests, however, may not recognize the need for such support and it may be necessary when structuring the process to include the resources and mechanism to provide this.

All parties had the opportunity to participate effectively in the process. Having included some training and skills development early in the process might have been helpful. The Review and Evaluation observed:

In the Sandspit process there was some initial confusion about the process among both government and non-government participants. Prior to development of the ground rules, some had the impression that participants would vote on the proposed solution with the resulting concern that there should be enough people to represent a particular view. Another misconception was that the mediator represented a "one-person panel" with the ability to either recommend or impose a solution.

Several participants commented that training on mediation and consensus processes would have been helpful and may have improved the pace of the process. This training could take the form of a one or two day workshop on what mediation entails and on developing the skills necessary to participate effectively in the process. A training session would also provide an informal opportunity for the parties to start to get to know each other. With panel reviews orientation/training is provided to panel members at the start of the review. In a similar vein, it would be appropriate to provide training to participants on the mediation process and alternative dispute resolution techniques. This training could be provided by the mediator, the Agency, or both.

Principle #7 -- Respect for Diverse Interests

The parties, while they had a wide diversity of opinions came to have fundamental appreciation for competing perspectives and values around the Table. One of the important outcomes of the process was not simply in relation to the particular issues under discussion but also in relation to opening and establishing broader lines of communication and rapport between the participants all of whom were key players within the community. For example, the relationship between the Canadian Wildlife Service and the community improved dramatically. Significant changes interpersonally amongst participants took place.

The Review and Evaluation observed:

This principles states that "acceptance of the diverse values, interests, and knowledge of the parties involved in the consensus process is essential". This principle was not specifically addressed in the interview questions; however, it is clear that respect for the interests of others developed during the Sandspit process. For example, relationships between the Canadian Wildlife Service and the community improved considerably during

the process as each party came to understand each others views and positions. In fact, much of the process revolved around developing an understanding and acceptance of the views of other parties in the process.

Principle #8 -- Accountability

This issue was not without problems both on the Island, and within government. One of the issues that presented at the table in relation to the Government was the diffuse and overlapping nature of the obligations for Canada in the Agreement, and departmental obligations in respect to specific legislative and policy mandates. Within the cross-current of interests and concerns on the governmental side was a range of tensions, overlaps and conflicts. The most significant question was which department was to be the official proponent. High level discussions were involved in attempting to resolve this. This created a significant level of difficulty for the process until it was ultimately resolved early in 1992 and within particular ministries, there was conflicting roles. For example, within the Department of Fisheries there was an obligation upon the Minister both in respect of Small Crafts and Harbours and Fisheries Habitat.

The point is this. Governments are organized programatically not hierarchically. It works in vertical not horizontal lines. Government means many things. It wears many hats. It sits in many places. It has a whole diversity of interests contained within it. In a real sense, the problem enlarges to include the problem of the way government itself is organized and its capacity to respond. Resolving the issues within government becomes a major challenge for disputes of this nature.

Within the communities a similar ambiguity in roles existed. While the Residents Planning Advisory Committee (RPAC) represented all non-Haida communities on the Islands it had chosen to be represented at the mediation solely by its Sandspit members. These individuals were already strongly identified publicly as being advocates in relation to the harbour and all of this made it all the more important that other Island interests found a seat at the Table. Those interests ultimately involved the adjacent communities whose harbour interests might be impacted and an environmental interest.

The Review and Evaluation has provided these further comments on the challenges that were faced in maintaining relations with represented constituencies and the general public:

Constituencies

The complexity of this task varied with individual situations. It is difficult for anyone outside the particular constituency (or agency) to judge how effective this activity was. In the Sandspit process there was no formal mechanism for reporting back to the group the results of such briefings. In particular, where the constituency represents a segment of the public such reporting back would be useful.

Several people noted the pressure that the mediation process puts on the individual at the table. In the case of government, it is imperative that the representative develops the appropriate reporting mechanisms within their agency to ensure they receive support for the positions that they take. Moreover, it is important for agencies to recognize the need to support their representative when entering into a mediation process. In addition to vetting of positions this support must also be in the form of time and budget to allow effective participation by the representative.

Public

The need for a public information process associated with mediation is necessitated by the nature of the process. Although the public was not specifically excluded, all meetings of the Sandspit mediation team were, in fact, held in private. Without a public

information program, this may lead to a public perception that the mediation process is a way to make a “back room deal” and somehow preclude public input.

The Sandspit process used a series of newspaper articles, public meetings hosted by Islands’ representatives and public open houses to inform and be informed by the public. Overall, this program was judged by participants to be effective. Suggestions for improvement included: issuing news releases following each meeting, assigning one person as a media spokesperson, developing a communications strategy at the start of the process and inviting the public to attend some or portions of the meetings. Clearly a public information program is an essential part of the mediation process especially when the process stretches over a considerable time.

Principle #9 -- Time Limits

Timelines were structured into the process from the outset. The incentive for creating strong timelines came from the parties. The harbour construction schedule had already fallen more than two years behind the South Moresby Agreement when the mediation began. This was an embarrassment to the federal government, an irritation to the provincial government, and a severe grievance within Sandspit.

By making explicit the fact that the process and its progress was reviewable after three months, and in three month intervals thereafter, the parties created the context where the parties or any of them could legitimately raise the whole issue as to how the process was moving forward and have it dealt with in an open candid way as opposed being uncertain as to whether it was legitimate to even raise it. Each meeting did not complete without a time defined task and activities and fixing the date for the next and subsequent meetings. There was an attempt to schedule over three month intervals including both the major meetings and the Working Group meetings. This created a context where the time management of the process had discipline and effectiveness far beyond what would be possible if one were attempting to coordinate the arrangements for such activities when the parties were not around the Table.

There was imposed through external activities as well further timelines in the process. Strong incentives to conclude the process were already starting to surface by reason of the inevitable bureaucratic agenda and timetable surrounding the election that was anticipated in the fall and the possibility of wholly new faces to deal with and reacquaint with the complex issues was a strong impetus.

Other time pressures were also taken into account including the fact that collateral activities were taking place with some of the other institutional structures that were being built and the need for there to be a certain recognition and sympathy between activities at the Table and some of those external activities was recognized and built into the timetable. As well issues concerning the determination of proponent and funding of the process that followed upon the heels of that were also raised.

By the time mediation began the harbour construction schedule had fallen more than two years behind the promised deadlines of the South Moresby Agreement. This was an embarrassment to the federal government, an irritation to the provincial government and a severe grievance within Sandspit.

There was throughout the process from beginning to end in a variety of different contexts strict adherence to timelines.

The Review and Evaluation observed:

The Round Tables' ninth principle states that "realistic deadlines are necessary throughout the process." Although not stated by the Round Tables, the issue of budget is closely related to the time that the process takes.

At the start of the Sandspit process, a check point was established at three months to review progress achieved and, if agreement had not already been reached, to determine whether the mediation process should continue. At this three month period the parties agreed to extend the process for an additional three months. At six months the progress was again reviewed and additional tasks required to complete the mediation process were agreed to. In total, the process took about 14 months to complete.

There were a number of factors that contributed to the length of time (and therefore the cost) of the Sandspit process. One factor is that this was the first formal attempt at mediation under the federal environmental assessment process. As experience with the mediation process is gained the process will become more efficient. As noted earlier, the lack of a proponent for the harbour confounded the process at a number of turns. Moreover, funding for studies and for the process itself was delayed at one point while responsibility for the project was transferred from one department to another. In addition, the relative geographic isolation of the Islands made it difficult to schedule meetings any more frequently than once per month and added significantly to travel costs.

It is difficult to see how the Sandspit process could have been completed in much less than one year. Some time might have been saved in the first few months if pre-negotiations to prepare for mediation had been conducted prior to the commencement of the process. This would have saved the time lost in adding and orienting new participants but time would still have been required to get the team familiar with the issues and to build confidence in the process. At the end of the process, a public information program prior to submission of the final report added about two months to the process.

A related issue is that process costs are difficult to estimate and manage. As noted above the process was initially scheduled for three months but ultimately took 14 months. In addition, the mediator is seen to be working for the parties involved and takes direction from them. If the parties decide that they want the mediator to undertake a particular activity (for example, participate in a public meeting that one of the parties may have organized) it would be difficult for the manager of the process not to fund this activity. If funding was not provided this may be seen as interference with the process. In the future it would be desirable to have the parties agree to a budget for the process then they could determine whether a particular activity fits within their budget. Notwithstanding, mediation is less structured than a panel review and it will be difficult to estimate costs accurately.

Principle #10 -- Implementation

While the scope of mediation did not permit dealing with implementation directly, the mediation exercise was pragmatically driven to anticipate and resolve all issues that could stand in the way of its implementation other than the question of the money to be attributed to the project. This was beyond the mandate of the process.

Conclusion

The typical response in Canada to significant or controversial projects requiring environmental assessments has been a public hearing before an appointed Panel. Mediation within Canada's new Environmental Assessment Act is now an explicit alternative to a Panel. The Sandspit case, and its subsequent Evaluation using the *Guiding Principles*, represents a further building block in institutionalizing negotiation based processes as an appropriate public policy response to the complex tangles of issues and interests often associated with environmental assessment. The

provisions in the Act and the Sandspit experience have helped to give visibility and legitimacy (many believed that the mediation potential has always been implicit within the regulatory framework) to the mediation option in Canada - both within and outside government "circles". A platform has also been created on which to explore the potential applicability of mediation as a tool, not simply as an alternative to a Panel, but in the initial - "screening" - phase of the proposed initiative, and as a possible complement to the Panel to deal with procedural matters or with specific subsets of issues.

The Sandspit Mediation is another piece in a growing body of experience that is enabling us to explore the relationship between how we approach the resolution of complex environmental problems, and the outcome reached - the interaction between "how" and "what". Conventional wisdom has been to define the problem in the image of the process, not to build the process in the image of the problem. This emerging body of experience, with its focus on process first and outcome second, is providing the base on which to revisit conventional wisdom, and to explore the extent to which form is substance.

“SCHEDULE 1”
SANDSPIT SMALL CRAFT HARBOUR MEDIATION PROCESS
TERMS OF REFERENCE AND "GROUND RULES"

The proposed Sandspit Small Craft Harbour (the "Project") is subject to the Federal Environmental Assessment Review Process ("EARP"). As part of the EARP initial assessment of the Project the participants have agreed to use a mediation process to seek resolution of environmental issues surrounding the Project. The mediation process shall deal with such issues as the risk to Brant geese, impacts on fish habitat, and the socio-economic benefits to be derived from the project.

1. Objective

To define a commonly acceptable way to provide the community of Sandspit B.C. with a small craft harbour facilities pursuant to the provisions of Part II of the Canada/B.C. South Moresby Agreement and consistent with the principles of sustainable development and the Federal Environmental Assessment Review Process.

The parties agree that there are no limitations to the options that may be considered during mediation. Options that may be considered include but are not limited to mitigation and/or compensation for fish and bird habitat, possible relocation of the harbour to alternative sites, and consideration of optional harbour designs.

2. Parties

The Parties to the mediation process shall include:

- (a) The "Principal Participants" - the key stakeholders who are participating directly in the mediation efforts including, initially:
 - (i) Fisheries and Oceans Canada
Habitat Management
Small Craft Harbours;
 - (ii) Environment Canada
Conservation and Protection Service, Canada Wildlife Service;
 - (iii) B.C. Environment, Lands and Parks;
 - (iv) "Islands' Representation"*;
 - (v) Planning and Coordination Committee (PACC) Co-Chairs.
- (b) The "Interested Parties" - other stakeholders who hold some responsibility for the results of the mediation and must be regularly informed of progress including, initially:
 - (i) Western Economic Diversification Canada;
 - (ii) B.C. Economic Development, Small Business and Trade;
 - (iii) ISTC - Tourism Canada;
 - (iv) Environment Canada
Canadian Parks Service;
 - (v) Tourism B.C..

* Although Residents Planning Advisory Committee (RPAC) has provided initial representation from the Island, the Parties acknowledge that other stakeholders from these communities may wish to participate.

The participation of any additional Parties will require the review and approval of the Principal Participants. In making this review the Principal Participants shall consult with the Mediator.

The Principal Participants will name Representatives who will make every effort to attend all meetings during the mediation process. An Alternate may attend if the Representative is unavoidably absent. In that case it shall be the Representative's responsibility to ensure that the Alternate is fully briefed on the status of the process and previous discussions.

3. Decision Making

The Parties agree to operate by consensus which shall mean the agreement of all the Principal Participants.

The Principal Participants are committed to developing a resolution that is acceptable to all Parties. It is recognized that individual elements of any such a resolution might not be acceptable if there were not agreement on a total package. Therefore, any "agreements" on any individual items are tentative until such time as a total package resolving all matters in issue has been agreed upon unless the Principal Participants explicitly agree otherwise on any particular item.

4. Working Groups

Working groups will be established to address procedural and substantive issues and tasks.

Their establishment, membership and mandate shall be by consensus. Upon the completion of their mandated task, they shall be disbanded. The Working Groups will be expected to report back to the Principal Participants on the basis of a consensus that the report will be helpful to the process even though agreement may not be achieved on all of the substantive matters within any such report.

Members of the Working Groups may include persons other than Representatives of the Parties.

The following Working Groups were established at the initial meeting:

- (a) Ground Rules Working Committee;
- (b) Issues Identification Working Committee;
- (c) "Information Inventory" Working Committee.

5. Mandates

All of the individuals who are participating in the mediation process recognize that they are participating in a Representative capacity and accept the responsibility to keep the Party(ies) whom they represent and to whom they report informed of the progress of the discussions and to seek advice and authority as may be appropriate.

The Parties are proceeding on the basis that what is said or done by the Representative of the Principal Participants during the mediation process is reasonably believed by the Representative to reflect, or is likely to reflect, the concerns, interests and wishes of the Party whose interests they represent, and where there is uncertainty as to whether that is the case, to make that known.

6. Preparation of Agreement and Mediation Report

The Parties agree that it will be desirable for the Mediator to prepare the text of any Agreement that they may conclude, subject to their guidance and input. Upon being satisfied that the text reflects the consensus reached, the Representatives shall indicate jointly their respective concurrence by signing a document to that effect to be prepared by the Mediator.

Should the Principal Participants reach a consensus that resolves most, but not all, of the issues they may agree upon a Statement describing the areas of disagreement and any lack of information or data that prevents such agreement and where possible a process for achieving agreement on such issues.

The Mediator shall prepare a Report at the conclusion of his assignment which shall be the Agreement if full agreement is achieved, or the Statement, if partial agreement is achieved, and, if no agreement is achieved the Report shall be subject to the approval of the Parties.

The Mediator shall deliver copies of the Report to interested Ministers, including, in particular; the Federal Ministers of Environment; Fisheries; and Western Economic Diversification; and the Provincial Ministers of Environment; and Economic Development, Small Business and Trade.

7. Timetable and Duration

Consistent with the very high priority attached to the resolution of these issues, the intent of the Parties is that agreement be reached within three months of the appointment of a Mediator. To this end, at the first formal meeting in the mediation process on April 24, 1992, an initial schedule of meetings has been established to provide a timeline and framework in which to move forward. It is recognized by the Parties that:

- (a) The Mediator will be engaged in meetings and discussions with all Parties.
- (b) Other meetings and discussions will occur between all or some of the Parties outside of this explicit schedule of meetings.
- (c) Further meetings of the Parties may be fixed.
- (d) The progress achieved in the mediation process will be reviewed on July 21st and 22nd, and if agreement has not already been reached, an assessment will be made to determine whether there is consensus on the mediation process continuing subsequent to that meeting.

8. Mediator

The Mediator who has been appointed, Glenn Sigurdson, has been mutually agreed to by the Parties. The Federal Environmental Assessment Review Office (FEARO) will act as the administrator of the mediation process, facilitate the process and act as an observer at mediation meetings.

The Mediator will assist the Parties to negotiate an acceptable agreement on how the project might proceed.

9. Expert Assistance

Any Party, at its expense, may use such expert assistance as it may consider appropriate and any direct involvement of such expertise in any mediation meeting shall be after prior notification of the other Principal Parties and the Mediator. If expert assistance in a particular field, or in respect to a particular subject matter, is seen as a matter of mutual interest to the Principal Participants, and potentially helpful to the mediation process, and consensus can be reached as to the expert whose advice is to be relied upon or with whom consultations would be helpful, then such expertise shall become a Cost of the Process.

10. Relations with the Media

The parties wish their efforts to proceed forward on a basis that will permit the fullest possible exploration of all approaches and possibilities to the resolution of the issues and within that spirit the parties commit to carrying out their efforts to seek such resolution in the context of the mediation process.

The participants agree to focus on the process and to avoid characterizing the positions or participation of other parties to the mediation process in any of their communications with the media.

The Parties agree to discuss at the conclusion of each meeting the characterization of the discussion and outcome of the meeting for guidance in any communication they may have in that respect with the media, and further, to keep each other and the Mediator generally informed as to involvement and contact with the media.

The Mediator shall, in this respect, play such role as the Parties may from time to time regard as appropriate and may instruct.

11. Use of Information and Discussions

The Parties understand that the broadest possible exploration of information and alternatives is necessary in order to ensure that the best solutions are found.

Meetings of the Principal Participants and the Working Groups, and any other meetings within the contemplation of the mediation process, will not be recorded nor will formal minutes of the proceedings be kept.

The outcome of each meeting will be prepared by, or under the direction of the Mediator, highlighting the areas of discussion, Working Group assignments and tasks to be undertaken.

All Parties agree that they will supply whatever information and data that it reasonably considers will be helpful in resolving the issues and to make it available on a timely basis, and, specifically to provide any information which is referred to or relied on in the mediation process.

It is common ground between the Parties that their efforts are proceeding forward in good faith, and in that spirit, it is understood that any specific offers or statements made during the proceedings are not to be used by any other participant to attempt to bind any other party or person in any other forum including pending or future administrative procedures or litigation.

The Parties recognize the special nature of the Mediator's role and undertake not to seek or compel the testimony of the Mediator or the FEARO staff in respect of anything said or done by them in the course of the mediation process or the production of their personal notes or work papers in connection with any administrative or legal process, except as may be jointly agreed by the Parties and the Mediator.

12. Cost of the Process

The following costs, subject to approval by the Planning and Coordination Committee, and Costs of the Process will be covered by funds allocated for the planning process under the Regional Economic Development Initiative:

- All costs of the mediator, support staff and any agreed upon expertise.
- All costs associated with provision of meeting facilities and such consultations as may be appropriate.
- Any other approved costs necessary to mediate the dispute.

The following costs will not be covered by the Regional Economic Development Initiative:

- Staff time for federal or provincial officials.
- Any travel, research or incidental expenses of government officials, except those consistent with the principles established in the mediation process and approved in advance by the P&CC.