

## MINISTRY OF CHILDREN AND YOUTH SERVICES

### POLICY DIRECTIVE: CW 005-06

This policy directive requires societies when using alternative dispute resolution to:

1. use one of the three types of alternative dispute resolution, as described in this directive, as prescribed methods under the *Child and Family Services Act* (CFSA), or a fourth option where it meets the criteria outlined in this directive and is approved by the Executive Director of the children's aid society;
2. use alternative dispute resolution facilitators who have the specific qualifications and experience described in this directive;
3. apply specific criteria in determining if facilitators are impartial;
4. use a written agreement, where possible, which is signed by all participants and contains the confidentiality provisions as set out in regulation; and
5. provide notice to the Office of the Children's Lawyer, where alternative dispute resolution is proposed.

### EFFECTIVE DATE:

This policy directive will become effective on **November 30, 2006**.

### INTRODUCTION:

Alternative dispute resolution (ADR) is a strategy to streamline court processes and encourage alternatives to court. It focuses on a more strengths-based, inclusive and collaborative approach to resolving child protection disputes, and encourages the involvement and support of the family, extended family, and the community, in planning and decision-making for children.

The *Child and Family Services Act*, as amended by Bill 210 identifies the following occasions where a prescribed method of ADR must be considered and/or may be used pursuant to the following provisions of the CFSA:

- If a child is or may be in need of protection, a children's aid society must consider whether a prescribed method of ADR could assist in resolving any issue related to the child or a plan for the child's care (section 20.2(1)).
- The court, at any time during a proceeding, and with the consent of the parties, may adjourn the proceeding to permit the parties to utilize a prescribed method of ADR to attempt to resolve the issues in dispute (section 51.1).
- On applications to vary or terminate an openness order before or after an adoption, the court may, with the consent of the parties, adjourn the proceeding to permit the parties to utilize a prescribed method of ADR to attempt to resolve any disputes related to the proceeding (sections 145.2(7) and 153.1(10)).

## 1) PRESCRIBED METHODS OF ALTERNATIVE DISPUTE RESOLUTION

The ADR regulation sets out the principles that must guide all prescribed methods of ADR under the *Child and Family Services Act*. O. Reg 496/06 provides in part as follows:

1. A method of alternative dispute resolution that satisfies the following criteria is a prescribed method of alternative dispute resolution:

1. The alternative dispute resolution must be undertaken with the consent of all participants.
2. The alternative dispute resolution must be one that can be terminated at any time by any of the participants to it.
3. The alternative dispute resolution must be conducted by an impartial facilitator who has no decision-making power.
4. The alternative dispute resolution must satisfy section 2 with respect to confidentiality of and access to records and information.
5. The alternative dispute resolution must not be an arbitration.

This policy directive further defines a limited number of prescribed methods which may be used by children's aid societies in view of the fact that the use of ADR in child protection matters is a relatively new practice, and is a new policy direction for Ontario. Therefore, preference is given to methods that are well established and that have been evaluated, in order to protect the best interests of children.

### REQUIREMENTS:

Children's aid societies are required to use one of the following methods as prescribed methods of ADR:

#### A. Child Protection Mediation

A process where child protection workers and the family (including the child where appropriate) and any other person putting forward or proposing to participate in a plan for the child, work together with the aid of a trained and impartial child protection mediator who has no decision making power. The mediator assists the participants in reaching an agreement on the issues in dispute, in generating options for resolving their dispute and in developing a mutually acceptable plan that addresses the protection concerns identified.

## **B. Family Group Conferencing**

A process that brings together the family (including the child where appropriate), the child's extended family and community, child protection workers, and service providers to develop a plan that addresses the protection concerns identified. A trained and impartial coordinator, with no decision making power, assists the participants throughout the process. An integral component of family group conferencing is providing the extended family group with an opportunity to meet privately, independently of professionals, to develop this plan.

## **C. Aboriginal Approaches**

Traditional methods of dispute resolution, including circle processes, which have been established by First Nations communities or Aboriginal organizations. Impartial facilitators who have no decision-making power and who are skilled in First Nation traditional methods, assist the participants in developing a plan that is supported by the participants and/or the First Nation community and addresses the protection concerns identified.

**OR**

**D.** Where the above methods are not available or where another method is deemed more suitable, a children's aid society may wish to use another method of ADR. A Society may use another method of ADR, but that method of ADR must:

- a) be described in a detailed written proposal;
- b) satisfy the criteria of a prescribed method of ADR, as outlined in the regulation;
- c) be facilitated by person who meets the criteria outlined in the qualifications and experience section of this directive;
- d) be assessed and approved by the Executive Director of the children's aid society involved.

## **REPORTING REQUIREMENTS:**

Children's aid societies must record in the appropriate file (i.e. child's file, child protection file, adoptive family file) that ADR was considered, what decision was reached and the supporting reasons. Where an ADR takes place the outcome of the process must also be recorded in the appropriate file.

Children's aid societies are required to track the use of the prescribed methods and key outcomes on a quarterly basis through the MYRBP reporting mechanism.

## **2) QUALIFICATIONS AND EXPERIENCE OF PERSONS FACILITATING ALTERNATIVE DISPUTE RESOLUTION**

It is widely recognized that child protection disputes are complex and difficult to resolve due to the high level of conflict and significant power imbalances that may exist among the participants. Therefore, persons facilitating a prescribed method of ADR must possess a high level of competency as well as a specific skill set.

### **REQUIREMENTS:**

Children's aid societies, when engaging in one of the prescribed methods of ADR, are required to use facilitators who:

- comply with the provision in the regulation dealing with confidentiality of and access to records and information;
- provide the results of criminal record checks, completed within the last three years prior to facilitating a prescribed method of ADR; and
- have the following specific qualifications and experience:

#### **A. Child Protection Mediation**

- Children's aid societies are required to use child protection mediators who are on the provincial roster managed by the Ontario Association for Family Mediation.
- A child protection mediator on the provincial roster has satisfactorily completed the Child Protection Mediation Training and has the following prerequisites:
  - a professional degree or diploma in the social services or children's services;
  - at least 60 hours of training in family mediation, both basic and advanced, to include a minimum of 20 hours of skill training;
  - at least 10 family law cases mediated to the point of agreement;

*OR*

  - Accreditation by the Ontario Association for Family Mediation (OAFM) or Certification by Family Mediation Canada.
- A child protection mediator on the provincial roster, has the following:
  - professional liability insurance;
  - a satisfactory criminal record check completed within the last three years; and
  - three satisfactory professional references.

Children's aid societies are not required to verify these qualifications or requirements.

## **B. Family Group Conferencing**

- Children's aid societies are required to use family group conferencing coordinators who are on the provincial roster managed by the George Hull Centre for Children and Families.
- A family group conferencing coordinator on the provincial roster has the following:
  - a post-secondary degree or diploma in the social services or children's services, or equivalent; and
  - experience in the social services or children's services;

*AND*

  - training, both basic and advanced, and mentorship in the principles and practices of family group conferencing provided by the George Hull Centre for Children and Families as the provincial training resource.

The majority of family group conferencing coordinators are employees of a community agency (children's mental health centre, children's aid society, or other). Therefore, the expectation is that the employing agency is responsible for liability insurance, checking the coordinators professional references, and for ensuring a criminal record check is completed every three years.

Where a family group conferencing coordinator is not an employee of a community agency which is responsible for liability insurance and has completed reference and criminal record checks, the George Hull Centre for Children and Families will be responsible for providing liability insurance, checking the coordinator's professional references and for ensuring a criminal record check is completed before placing them on the roster, and every three years thereafter.

## **C. Aboriginal Approaches**

- Children's aid societies are required to use facilitators who have the following:
  - recognition by the First Nations community with whom the child is affiliated or by an Aboriginal organization, as qualified to engage in Aboriginal approaches to alternative dispute resolution;
  - knowledge of the *Child and Family Services Act*; and
  - a satisfactory criminal record check completed within the last three years.

#### **D. Other Methods**

- Executive Directors may only approve other methods of ADR, where the facilitators have the following:
  - a post-secondary degree or diploma in the social services or children's services or equivalent;
  - experience in the social services or children's services;
  - knowledge of the *Child and Family Services Act*;
  - a satisfactory criminal record check completed within the last three years; and
  - three satisfactory professional references.

### **3) FACILITATOR IMPARTIALITY**

The ADR regulation requires that ADR be conducted by an impartial facilitator who has no decision-making power. This policy directive defines the term impartial.

#### **REQUIREMENTS:**

Where possible, ADR resources must be sponsored by and located within an organization other than a children's aid society.

Where the ADR facilitator is located within or sponsored by a children's aid society:

- The ADR facilitator must have a dedicated and distinct role, separate from the child protection role and the child welfare team.
- The ADR facilitator must not have access to client files or the society information database.
- The ADR facilitator must not have access to case recordings or court reports.
- The ADR facilitator must not report to a child protection supervisor, and must report to senior management, in order to avoid any perceived or real conflict related to specific child protection cases.
- The ADR facilitator should maintain an office, where applicable, and conduct ADR outside the children's aid society office.

#### 4) THE USE OF PRIVACY/CONFIDENTIALITY AGREEMENTS

All participants to a prescribed method of ADR are bound by the precise confidentiality provisions contained in the regulation. It is important that these provisions are clearly explained to all participants by the ADR facilitator prior to entering into a prescribed ADR process so the participants can make an informed decision about their participation. This portion of the regulation provides as follows:

##### **Confidentiality of and access to records and information**

2. (1) The following rules respecting the confidentiality of and access to records and information apply to prescribed methods of alternative dispute resolution:

1. Neither the participants nor the facilitator conducting the alternative dispute resolution nor any other person providing alternative dispute resolution services are compellable to give testimony or to produce documents in a civil proceeding with respect to matters relating to or prepared or exchanged during the alternative dispute resolution.
2. Representations, statements or admissions made in the course of the alternative dispute resolution and documents prepared or exchanged during the alternative dispute resolution cannot be used in evidence or produced in a civil proceeding, subject to the following exceptions,
  - i. the statements, admissions or documents give rise to the duty to report that a child may be in need of protection under section 72 of the Act,
  - ii. where there are reasonable grounds to believe that the disclosure is necessary to address a real or perceived threat to any person's life or physical safety,
  - iii. an individual consents to the disclosure of his or her own personal information, or
  - iv. the terms of an agreement, memorandum of understanding or plan arising from the alternative dispute resolution may be disclosed to a court and all counsel for the participants in the alternative dispute resolution, including counsel for the child where applicable.

3. The alternative dispute resolution facilitator may use or disclose non-identifying information relating to the alternative dispute resolution for research or educational purposes, but the facilitator must provide written notice of this to all participants in the alternative dispute resolution before the alternative dispute resolution begins.

(2) Nothing in subsection (1) abrogates the rights of the participants in an alternative dispute resolution to discuss the content of the alternative dispute resolution with their counsel.

(3) Nothing in subsection (1) limits the powers of a program supervisor under section 6 of the Act.

(4) In this section,

“non-identifying information” means information whose disclosure, alone or in combination with other information, does not reveal the identity of the person to whom it relates.

#### **REQUIREMENTS:**

Children’s aid societies are required, where possible, to enter into prescribed methods of ADR where the provisions of the regulation respecting confidentiality are contained within an agreement that is signed by the participants prior to the commencement of ADR.

There may be some cases where the use of a written confidentiality agreement could act as a disincentive to certain persons to engaging in a prescribed method of ADR. In these cases, the minimum expectation is that children’s aid societies only engage in a prescribed method of ADR where the elements of the confidentiality regulation are clearly communicated to participants by the ADR facilitator at the outset of the process.

#### **REPORTING REQUIREMENTS:**

Where a written agreement is not signed by the participants prior to the commencement of ADR, the children’s aid society must document the supporting reasons in the appropriate file.

## 5) NOTIFICATION OF THE OFFICE OF THE CHILDREN’S LAWYER WHERE ADR IS PROPOSED

*The Child and Family Services Act*, as amended by Bill 210 states that the Children’s Lawyer may provide legal representation for a child where a prescribed method of ADR is proposed.

20.2 (3) If a society or a person, including a child, who is receiving child welfare services proposes that a prescribed method of alternative dispute resolution be undertaken to assist in the resolving an issue relating to a child or a plan for the child’s care, the Children’s Lawyer may provide legal representation to the child if in the opinion of the Children’s Lawyer such legal representation is appropriate.

### REQUIREMENTS:

Children’s aid societies must notify the Office of the Children’s Lawyer (OCL), as follows:

<b>Section of <i>Child and Family Services Act (CFSA)</i></b>	<b>Notice to OCL</b>
20.2(1) and 20.2 (3) Consideration by children’s aid societies of resolution of issues by prescribed method of ADR	For children under 12, where there is mutual agreement among the participants to pursue ADR.  For children 12 and over and minor parents, where ADR is being proposed but a consent has not been entered into by the children’s aid society and the children’s aid society has not discussed the ADR proposal with the child or minor parent.
51.1 Part III CFSA (Protection applications before the court)	Where the court adjourns for ADR and counsel for the child has not already been appointed by the court in the proceeding.
145.2 (7) Varying or terminating openness orders before adoption	Where the court adjourns for ADR and the child is not already represented by counsel.
153.1 (10) Varying or terminating openness orders after adoption	Where the court adjourns for ADR and where the society is a party to the application.

Children's aid societies must provide notice to the OCL using the form appended to this directive.

Following notice to the OCL, the following will occur:

1. The OCL will review the notice information.
2. The OCL agent lawyer may contact the identified representative at the Children's Aid Society for an interview (either in person or by telephone).
3. The OCL agent lawyer may request a file review from the children's aid society.

At any of the three stages outlined above, the OCL may make the determination as to whether or not they will be providing legal representation to the child, and they will advise the children's aid society of that decision.

### **REPORTING REQUIREMENTS:**

Children's aid societies will report notice to the OCL through the MYRBP reporting mechanism.