THE NEGOTIATOR'S GUIDE TO MEDIATION

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WHAT IS MEDIATION? AN OVERVIEW

Mediation is a dispute resolution process in which two or more parties participate in a dialogue that is assisted by a neutral party who has no power to determine the outcome of any of the issues in dispute. Mediators use a variety of strategies and techniques to help parties to resolve their issues. The process of mediation, as understood in North America, usually has the following characteristics:

- **Impartial third party:** A third party with no interest in the outcome chairs discussions between the parties aimed at enabling them to reach understanding and agreements.

- **Non-coercive**: The mediator uses a number of techniques aimed at improving the parties' communication and joint problem-solving, but has no authority to direct that the parties accept any particular outcome.

- **Voluntary**: Unless they agree otherwise, any negotiating party or the mediator may withdraw from the mediation process at any time.

- **Confidential and without prejudice:** Discussions are usually, by agreement, confidential** and (if legal issues are in dispute) without prejudice to any positions that the parties may wish to advance in court proceedings.

- **Informal:** Mediated discussions are relatively informal and flexible.

- **Mediation Agreement:** The terms of the mediator's involvement are set out in an agreement among the negotiating parties and the mediator

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**Note that if one of the negotiating parties is a government, the parties' ability to keep settlement discussions, and related documents, confidential may be limited by federal or (if a province is involved in the discussions) provincial privacy and access to information laws. The effect of such statutes should be discussed with legal counsel at the outset of any settlement negotiation or mediation process.

- **Subject matter:** discussion in mediation is not restricted to any legal issues in dispute; parties in mediation may explore any conflicts or issues that they consent to discuss.

- **Outcome:** The result of mediation is either a settlement agreement agreed to by the negotiating parties (on some or all of the issues in dispute) or non-agreement.

- **Enforcement:** Mediation settlements take effect through contract law, occasionally (if the mediation is related to the subject of court proceedings) supplemented by the filing of the settlement with a court.

THE MEDIATOR'S ROLE

In general, a mediator's role is to use his or her position, as a professional who stands outside the history of and emotional background of the relationship, to help the parties to address their conflict constructively, creatively (where possible), and in a manner that reduces the risk of damage to the parties' relationships. The mediator's precise mandate and obligations are usually set out in an agreement between the parties and the mediator. As will be seen in the "Diversity of Mediator Styles" section of this guide, individual mediators may emphasise certain types of interventions in their approach (focusing on addressing the communication challenges faced by parties in dispute, their relationship needs, or their ability to resolve issues of substance).

The purpose of introducing an impartial mediator into a conflict (or a dialogue that may lead to conflict) may include: to improve the effectiveness of the parties' efforts at dialogue, to increase the perceived fairness of the process by ensuring that all parties are listened to, and to create an environment conducive to the constructive exploration of possible outcomes that all parties to the dispute could accept. In every case, the interventions of the mediator will be tailored to the goals identified by the parties, the nature of the dispute and the obstacles that have made it difficult for the parties to resolve the issues on their own.

Common mediator interventions include:

- **Encouraging respect:** by helping the parties to [develop and] agree upon "ground-rules" for their discussions that ensure respectful dialogue, and monitoring the parties' discussions to assist them to honour those ground-rules.

- **Agenda guidance:** by assisting the parties to craft meeting agendas that ensure that settlement discussions move beyond exchanging positions, whether about past events or future settlement possibilities. Mediation agendas may include discussion of the values each side believes are relevant to the dispute, the underlying settlement goals of each party, the information required by either party before an agreement can be reached, and the general principles of fairness that should be satisfied by a settlement.

- **Broadening perspectives:** by refocusing the parties' attention from fixed positions to their wider, underlying interests (including achieving fair outcomes, process goals, and other objectives of the parties), making possible the exploration and invention of new possibilities for agreement.

- **Enhancing communication:** by using active listening skills, neutral reframing of emotionally charged comments, explicitly recognizing the emotional, spiritual or cultural aspects of the issues under discussion, periodically summarizing the parties' interventions to ensure that content is clearly understood -- with a view to reducing the risks of miscommunication that go hand-in-hand with dialogues between parties who believe themselves to be in conflict.

- **Caucusing:** with the parties' agreement, holding private meetings (known as "caucuses") with each side, to allow the parties to reveal to the mediator previously hidden interests, their concerns about the progress of discussions or new settlement possibilities, and to seek the mediator's assistance in presenting issues at the table.

- **Reality-checking:** in private caucuses with each party, exploring confidentially the strengths and weaknesses of the party's negotiation positions in relation to it's settlement goals and each party's alternatives to an agreed settlement.

- **Encouraging creativity:** once the parties have discussed their initial positions and the underlying interests and values they would like a settlement to respect, creating a safe environment within which the parties can invent and explore previously unconsidered options for resolving the issues.

- **Commissioning neutral fact-finding:** if the parties so request, hiring, on their behalf, other third party experts (appraisers, fact-finders, etc) whose independent reports may help the parties to resolve disputes about questions of fact.

- **Monitoring undertakings:** if the parties so request, where the discussions are expected to last over several meetings, keeping a record of tasks agreed to be completed by each party and monitoring the timely completion of those tasks.

- **"One-text" drafting:** if the parties so request and based on the input of each party at the table, preparing and circulating neutral "rolling drafts" of a potential settlement agreement, for review, comment and consideration of the parties.

THE STAGES OF THE MEDIATION PROCESS

Mediation, like negotiation, is a fluid process. The parties' progress through a mediation depends upon their interactions, the elements they believe need to be addressed in their discussions, and the individual style of the mediator. As a result, there are no clear boundaries between the different stages of mediation. Perhaps the most common approach to mediation ensures that there is time for the parties to consider each other's interests and jointly explore options for addressing those interests. The following are the stages through which an interest-based mediation will typically proceed.

I. Establishing the Process

a. The Mediation Agreement

After the parties jointly select a mediator, they and the mediator will agree on the terms of a mediation agreement, which formally sets out the rules of the mediation, and the rights and obligations of each of the participants. This agreement may be customized to meet the particular needs of the parties and the nature of the issues. The mediation agreement usually addresses at least the following:

- **Statement of the issues:** identifies the topics to be discussed in the mediation;
- **Role of the mediator:** describes the general responsibilities of the mediator, and any specific tasks the parties agree in advance the mediator will perform (drafting agendas, recording undertakings, etc);
- **Role of the parties:** describes the general responsibilities of the parties (usually to try to resolve the issues in good faith, and to remain responsible for evaluating possible agreements, etc);
- **Confidentiality**:
    - states whether the discussions in mediation may be shared with outsiders prior to settlement; and
    - states the circumstances, if any, in which discussions between the mediator and one party may be shared by the mediator with the other party.

- **Without prejudice:** the parties usually agree that their discussions will not affect their legal positions in court and will not be disclosed in court proceedings;
- **Scheduling:** describes the planned timing and location of mediation meetings;
- **Right to terminate:** usually any party or the mediator may end their participation in the mediation at any time if they think the process is unproductive; and
- **Payment of mediator:** arrangements for payment for the mediator's services and expenses.

b. Sharing of Background Information (Pre-mediation)

After signing the mediation agreement, the parties typically wish to share certain background information with the mediator about the issues they want to resolve. In many cases, each party will provide the mediator with a written **mediation brief**, which summarizes the main issues, the party's positions on the issues and its underlying settlement goals. Important background documents may also be shared with the mediator at this time.

Pre-mediation steps may also include individual meetings between the mediator and each party, to help the mediator and the parties prepare for the process.

In Crown-Aboriginal mediations, for example, prior to the first meeting the mediator will clarify the role of any elders who may participate in the discussions, whether the discussions will be held on an Aboriginal territory, and whether there are particular customs that the Aboriginal party would like followed at mediation meetings.

II. The Mediator's Opening Statement

After introductions, the mediator makes an opening statement that briefly outlines the "rules" of the mediation. The parties will be reminded of the main understandings set out in the mediation agreement (confidentiality, without prejudice, etc). The mediator will typically suggest certain basic ground-rules of respect to be abided by the parties in their discussions and ask the parties to agree that the mediator should ensure that these ground-rules are followed.

The mediator will usually ask each of the parties to describe their individual authority to agree to or recommend a proposed settlement, including any limitations to their

individual authority. The mediator will review the proposed agenda for the meeting and ask the parties if they wish to suggest any changes.

III. Exploratory Discussions

The mediator chairs initial discussions of the parties aimed at identifying the main issues in dispute, the background to those issues and the parties' positions on how each should be resolved. Typically, the mediator will seek to uncover, as the discussions continue, why each party has taken its positions (i.e. the perspective from which they view the issues, and the interests and principles they wish any settlement to advance). At the same time, the mediator will seek to explore whether those general interests and perspectives are shared, or at least clearly understood, by the other party.

IV. Inventing Options for Settlement

Negotiators trying to resolve a dispute may be tempted to set out clear and fixed positions on the issues because they are concerned that to appear flexible may make them vulnerable to being taken advantage of by the other side. While this is understandable, positional negotiation can prevent the parties from seeing additional options that might equally advance their goals. At worst, positional bargaining can lead to frustration and deadlock. This problem is aggravated where the history of the dispute and the parties' relationship make it difficult for them to trust each other.

An effective mediator will seek to create a safe environment where the parties can feel free to explore new options for settlement without worrying that discussing those options will be held against them later in the process. A mediator will typically ask the parties to take the time necessary to consider the broadest possible range of options for resolving each issue that might meet their settlement goals, on the clear understanding that this part of the discussions involves no commitment of any kind by the parties. Assessment of these new options will be left to a later stage in the mediation.

V. Evaluating the Options and Exploring a Possible Overall Settlement

The parties having fully discussed their positions, interests and possible settlement options, the mediator will now guide a discussion in which the parties assess those settlement options. Generally, the mediator will encourage the parties to consider settlement options in light of their own values and settlement goals, and the likely acceptability of those options to the other party.

As in other phases of the mediation, the parties' discussions may include private **caucuses** to reflect on the progress of the discussions and the acceptability of options being considered for settlement. At various times the mediator may ask to meet privately with each party's negotiators to explore whether there are undisclosed obstacles hindering the negotiators' ability to make progress. At other times, a team of negotiators may wish to meet among themselves privately to assess settlement options or discuss how to proceed. Private caucuses with the mediator will usually be kept confidential by the mediator, but the confidentiality of such caucuses should in all cases be clarified by the parties and the mediator.

VI. Reaching an Agreement in Principle

The mediator and the parties will now seek to reach general agreement on the main points of the settlement. The mediator may assist here by summarizing the points on which the negotiators have reached a consensus. In cases where governments, First Nations or other organizations are involved, the negotiators will typically need to consult with their colleagues or constituencies prior to finalizing an agreement in principle.

Where governments, First Nations or other organizations are involved, the mediator will generally ensure that the parties consider what public statement, if any, they wish to make about the progress of the mediation.

THE DIVERSITY OF MEDIATOR STYLES

Individual personality and technique are important qualities of an effective negotiator; the same holds true for effective mediators. While mediators all use techniques aimed at neutrally assisting the parties to reach a settlement, an individual mediator's focus will reflect their own style and orientation toward dispute resolution. There are at least three main ways that a mediator's style may affect his or her approach to mediation:

a. Evaluative vs. Interest-based

Probably the most common strategy used by professional mediators in Canada (and the one generally described in this guide) is the "interest-based" or "problem-solving" approach. The focus of the interest-based mediator is on encouraging joint problem solving by the parties, eliciting from them what they each need in order to reach their underlying settlement goals. This will be accomplished in large part by enhancing the level of communication between the parties. The aim of the interest-based approach is to reach wise agreements that are likely to endure because they reflect the values and the collaboration of all parties.

An "evaluative mediator", on the other hand, is one who believes that a significant (or even primary) part of his or her role is to assist the parties to assess the validity of their settlement positions. Evaluative mediators are perhaps most commonly hired in disputes over legal issues, where they can bring their recognized expertise in the subject matter to bear on the dispute. Perhaps the most prominent setting for evaluative mediation is at judicial "pre-trial" meetings, where a judge will seek to assist the parties to come to a settlement of their legal dispute that reflects a "reasonable" assessment of their legal rights.

b. Narrow vs. Broad Focus

Some mediators tend to orient the parties' discussion toward a wide-ranging consideration of all of the issues that may be related to a dispute. Such an approach would encourage the parties to consider their conflict from a broad perspective, with a view to uncovering all of the concerns that may have an impact on the conflict. The goal of this approach is to ensure that any settlement addresses all of the factors that might cause the conflict to recur in the future. Encouraging a broad focus in this way is consistent with the interest-based approach, which invites the parties to consider their underlying goals (including any relationship concerns) as well as their stated positions and legal rights. By contrast, if a mediator brings a narrow focus to the dispute, the scope of the issues discussed will be largely defined by the parties' original positions.

While this may ignore other underlying concerns of the parties, it can have the advantage of allowing them to reach an agreement more quickly.

c. Facilitative vs. Pro-active

Emphasizing that the parties in a mediation have the main responsibility for resolving their differences, some mediators tend to focus primarily on their role as facilitators of respectful and constructive communication. Such an approach may be particularly useful where the parties' ongoing relationship is very important to them and they may benefit from deepening their understanding of each other's perspectives on the conflict. Other mediators, by contrast, tend to focus not just on enhancing communications but also on pro-actively assisting the parties to resolve the substance of their dispute.

It should be recognized that the differences in style described above will often be subtle (one writer has described them as underlying "orientations" toward which a mediator may tend) rather than fundamentally different approaches to mediation. As well, most successful mediators are flexible and will be responsive to the nature of the issues in dispute, and to the expressed wishes of the parties as to the type of assistance they would like. Nevertheless, in each case negotiators should consider discussing with the mediator at the outset the mediation approach they prefer for the issues at hand.

MEDIATION AND OTHER DISPUTE RESOLUTION PROCESSES

I. Mediation Compared t Other Common ADR Processes

Because mediation is only one process by which parties can seek to settle their differences, the nature and objectives of mediation can be seen more clearly when mediation is compared to other dispute resolution processes. Mediation is similar to **negotiation, facilitation and arbitration** in that all four are popular alternatives to **adjudication** by the courts. All four processes offer parties the possibility of avoiding the high costs of trials and appeals, and all four give the parties more say about the way in which their differences will be resolved. As alternatives to court, mediation, negotiation, facilitation and arbitration are often called "alternative dispute resolution processes", although in fact the vast majority of disputes (including legal disputes) are resolved through one of these so called "alternative" processes.

There are important differences among mediation, negotiation, facilitation and arbitration, perhaps the most important of which is the extent to which in each process an independent third party plays a role in shaping the outcome of the dispute.

Consider the defining characteristics of each process:

- **Mediation**: a relatively informal, consensual process in which a neutral third party assists the parties to communicate more constructively, to better understand the roots of their disagreements and to create options for resolving those disagreements.

- **Negotiation**: a relatively informal, consensual process in which the parties seek on their own to resolve their differences through dialogue.

- **Facilitation**: a process similar to mediation, in which a neutral third party chairs the parties' discussions, frequently used where there are many parties participating in the dialogue. Unlike mediation, the role of a facilitator (literally, someone whose job is to "simplify" the discussion) is generally understood as limited to ensuring that each party has a fair opportunity to speak, that agendas are adhered to, and that basic rules of conduct are respected.

- **Arbitration**: A relatively formal process (although less so than litigation) in which a neutral person selected by the parties receives evidence and

arguments from each and then issues a private ruling that the parties have agreed will be binding on them.

Notice the important differences between mediation and arbitration. In mediation the parties themselves retain control over whether and how their differences will be resolved. If an agreement is reached it will be invented and drafted by the parties themselves. In arbitration, the neutral third party alone decides how the dispute will be settled. The parties' role is limited to presenting evidence and making submissions and then receiving the arbitrator's decision. In mediation the parties may bring forward any values and concerns that they individually believe should be taken into account in shaping the outcome. Arbitration processes, on the other hand, are generally limited to submissions of fact and law.

Next, because the outcome of a successful mediation is simply an agreement that all consent to, the outcomes possible under mediation can be as flexible and multifaceted as the parties wish. (In Crown-Aboriginal disputes such outcomes can theoretically include, at least where provinces are involved, the return of lands, co-management arrangements, and agreements about future rights, as well as the awarding of financial compensation). In arbitration the outcome is less flexible: an award or ruling is imposed on the parties and is generally restricted to financial compensation or a declaration of legal rights. However, arbitration at least offers a guarantee that there will be a resolution of the issues; mediation (like negotiation) can only result in a settlement if all parties voluntarily accept the terms of that settlement.

The differences between mediation and negotiation are less striking. Both processes leave the parties with ultimate control over whether and how their differences will be resolved. Like mediation, negotiation offers the parties great flexibility in deciding the elements of their settlement. It is only the addition of the third party's assistance that makes the processes fundamentally different.

II. Additional ADR Processes

While negotiation, mediation, facilitation and arbitration are the most popular alternatives to using the courts to resolve disputes, they are not the only processes available. Depending on their specific needs, parties may choose to resolve their dispute (or one particular aspect of their dispute) through:

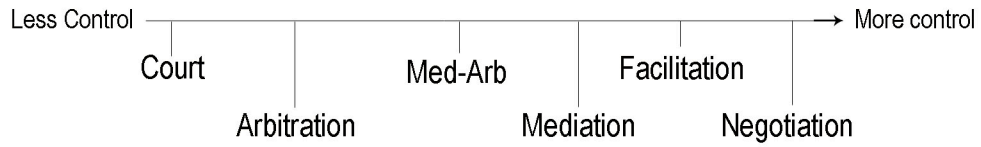
- **Fact-finding**: in which the parties hire a neutral expert according to agreed terms of reference, to investigate and report on certain factual questions in dispute;

- **Neutral evaluation**: in which the parties ask an outside legal expert to provide a non-binding assessment of the parties' legal positions;
- **Med-Arb**: in which the parties agree to spend a fixed amount of time with a mediator and, failing an agreed settlement, to permit the mediator to receive evidence and arguments and issue a binding decision on the issues;
- **Conferencing/circles**: an ancient process of dialogue among not only the "parties" to the dispute but also including anyone who has been affected by it, facilitated by an elder or other wise neutral, and designed to elicit an understanding of the harm caused by certain actions and the possible steps that might be taken to repair that harm; or
- **A "hybrid" process**: in which the parties agree to combine two or more of the basic processes described above to give them added flexibility, or certainty that their differences will be resolved.

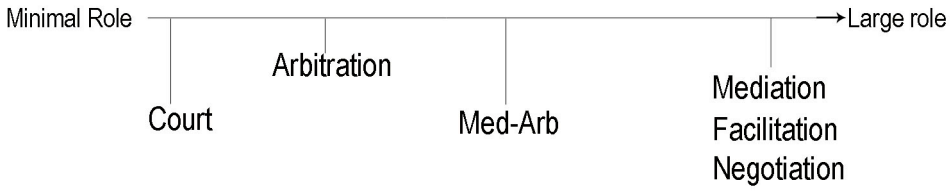
III. Summary

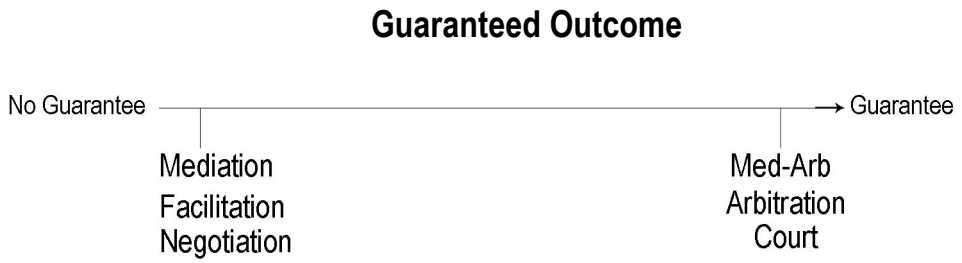
Considering the number of processes available for resolving disputes, it can be helpful to compare them according to three important criteria: degree of party control over the process and outcome, the extent to which they allow values other than law or fixed rules to determine the outcome, and their ability to guarantee a resolution of the issues. The following three diagrams show how the most common processes can be compared in this way.

Degree of Party Control over Process and Outcome



Role of Values other than Law





IV. Choosing the Most Effective Process

Each dispute resolution process has advantages that make it particularly well suited for certain situations. Choosing the most effective process in each case requires a thoughtful assessment of the context in which the issues have arisen. Parties who find themselves in a dispute, or in a situation where disputes are likely to arise, need to assess each of the following:

- the nature and sources of the dispute, and
- the parties' goals for the process and outcome.

a. The Nature and Sources of the Dispute

It can be tempting for parties involved in a conflict to view the cause of the conflict, or the failure to resolve it, as arising from the unreasonableness of the other party. Similarly, lawyers may be tempted by their training to consider only the legal dimensions of the parties' disagreement. Having a full understanding of the sources and nature of a dispute is an essential step toward selecting a process that can resolve it effectively. The chart on the next page highlights the variety of causes that can lead to, or complicate, a dispute.

The Sources of Disputes

Values	Information
• different values based on culture, ideology, experience • different conclusions about what principles should apply to resolve issues • different conclusions about the effect of applying shared principles to the issues	• conflicting interpretations of the facts • unequal access to or lack of information • different perspectives on what facts are important
Relationships	**Interests**
• past conflicts • communication problems • lack of trust • perceptions of power imbalance	• seen as conflicting • differences in process goals • differences in outcome goals

If communication and trust problems have played a major role in causing or prolonging a conflict, and if both parties value the creation of a healthier ongoing relationship between them, a highly adversarial process like litigation will not be a preferred option for resolution. If, on the other hand, a dispute has arisen primarily because of a disagreement over facts, negotiation and mediation will usually be less suited to resolving the dispute than a process like adjudication or fact-finding. Finally, if a dispute has arisen, or is likely to arise, largely because of the parties' conflicting values in relation to an issue, a process which emphasizes communication of those values and a broadening of each party's horizons will tend to be more effective in resolving the conflict than a process which relies on adversarial procedures.

b. Process and Outcome Goals

A dispute resolution process should also serve each party's overall objectives, both in terms of the outcome of any disputes and the process by which the disputes should be settled. For a party that seeks an outcome that requires future cooperation between them, the limited remedies available through the court process will generally not be

suitable. On the other hand, for a party seeking a public and binding precedent that will affect others in a similar situation, the private processes of negotiation, mediation and arbitration will be ineffective. Finally, in addition to their goals in relation to the outcome of the dispute, the parties' choice of dispute resolution process should also reflect their preferences as to *how* that outcome should be reached. Depending on their circumstances, they may prefer a process that avoids undue costs or damage to relationships. They may also believe that an outcome resulting from the cooperation of all parties is more likely to endure than an imposed result.

c. Mediation as the Default Process?

Because of its flexibility, its ability to take into account the parties' own values and concerns, and the introduction of a skilled neutral party into the process, mediation is viewed by many experts on dispute resolution as the default process for addressing significant disputes. Indeed, because of the particular potential of mediation to resolve disputes relatively quickly and at a lower cost to the parties, the courts in several Canadian jurisdictions (including Ontario, Saskatchewan, British Columbia and Alberta) have recently introduced mandatory mediation programs in civil claims.

THE POTENTIAL BENEFITS OF MEDIATION

a. General Advantages

We have already discussed (under "The Mediator's Role") the various techniques by which a mediator can assist in the resolution of difficult issues. In general, the potential benefits of mediation can be summarized as follows:

- Encouraging each party to broaden its perspective on the issues at hand and the ways in which they could be resolved;
- Encouraging each party to take into account the legitimate concerns of the other side, since any voluntary settlement agreement must satisfy the underlying interests of all parties;
- Enhancing the quality of communication between the negotiators, to ensure that despite their differences the parties' discussions remain constructive and respectful;
- Assisting the parties to invent imaginative and practical options for resolving their differences, particularly where the discussions are threatened by a deadlock between conflicting positions;
- Creating an environment where sufficient trust can be built between the parties to allow them to work collaboratively;
- Where the parties have an ongoing relationship that they wish to preserve or improve, helping them to avoid unduly adversarial approaches which may damage that relationship; and
- Increasing the efficiency with which the parties can reach an agreement and thereby potentially reducing the costs and time required to reach settlement.

b. Overcoming Common Hurdles in Negotiation

Another way of thinking about the benefits of mediation is to consider the most common obstacles to reaching an agreement through negotiation. Among those obstacles, negotiation experts have highlighted the following:

- **Strategic barriers to settlement:** that is, problems created by positional or adversarial negotiation tactics that can diminish the quality of the parties'

communication, impair trust and goodwill between the negotiators and reduce the likelihood that the parties will reach a wise, enduring outcome;

- **Cognitive barriers to settlement:** that is, obstacles created by the fact that parties in a dispute frequently have completely different understandings of the dispute, its context, sources, and the values that should be applied in settling it.

- **"Reactive devaluation":** that is, problems that arise because negotiators who see themselves as on opposite sides of an issue tend to discount the other's arguments *simply because* they were presented by "the other side"; this commonly leads to mutual suspicion of proposals made by the other party.

Mediation offers the potential to effectively address each of these obstacles to negotiated settlement. The mediator can help the parties overcome **strategic barriers** (problems created by positional and adversarial approaches) through the setting of common objectives, encouraging a focus on each party's underlying interests, defusing the escalation of emotions at the table, and creating a safe environment for the parties to consider creative options for settlement. A mediator can also help to reduce the effect of **cognitive barriers** (problems of communication and perception) by expressly checking the parties' assumptions, reframing and reflecting the parties' concerns in a neutral way, and using private caucuses to explore unstated concerns that may be hindering the parties' progress. Finally, the interventions of a mediator are not prone to **reactive devaluation**, because they originate from a person with no interest in the outcome of the discussions.

c. Limitations of Mediation

Any consideration of mediation as a possible process for resolving a dispute must take into account the parties' needs and the limitations inherent in the process itself. Although mediation, like negotiation, can produce flexible and collaborative outcomes, success in mediation depends upon the ability and desire of the parties to come to an agreement on the issues. In other words, the use of mediation (or negotiation) cannot assure the parties that they will reach a timely resolution of the issues. Secondly, although it is arguable that mediation can reduce the possible effects of perceived power differences between the parties, as compared to unassisted negotiation, concerns about power cannot be completely eliminated by the use of mediation.

Finally, as noted above, neither mediation nor negotiation will be satisfactory to a party that wishes to obtain a public ruling concerning its rights.

CASE STUDY: MEDIATION IN THE CONTEXT OF ABORIGINAL-CROWN ISSUES

To illustrate the application of the principles set out above, consider the choice of resolution process in addressing Aboriginal-Crown issues. Disputes in this area may arise in the context of land rights, treaty rights, or negotiations to develop new forms of governance. The diverse nature of these issues, their contexts and the differences in the goals of the various parties involved make it difficult to generalize about the possible role of mediation in each case. Nevertheless, it may be helpful to take note of some of the factors particular to Crown-Aboriginal negotiations that make mediation deserving of the parties' consideration.

The general range of dispute resolution options has been described under "Mediation and Other Dispute Resolution Processes." When considering the potential value of mediation compared to negotiation in the Crown-Aboriginal context, it makes sense to consider the nature of the (potential) dispute, the goals of the parties and the likely obstacles to achieving a resolution through negotiation.

a. The Nature of the Dispute

As noted in the Introduction, the issues addressed in Crown-Aboriginal negotiations are often particularly complex – in their origins, their political and constitutional implications, in the number of persons that may be affected by any outcome, and in the issues of relationship and identity they involve. In addition, the negotiations are inevitably complicated by the structure of governments and the need for all parties' representatives to be guided by their negotiation mandates. Finally, the resolution of Crown-Aboriginal issues is often hampered by at least some element of historical distrust, if not between the negotiators, then between the parties they represent. All of these factors that complicate the resolution of Crown-Aboriginal issues suggest that the assistance of a neutral person to guide the process may be helpful.

b. Goals of the Parties

Except in cases where one of the parties wishes to have the courts publicly rule on a legal dispute between them, the use of mediation will be consistent with three primary goals commonly shared by the parties. First, mediation opens the possibility of more flexible, forward-looking outcomes than are available through the courts. Second, given the length of time that many Crown-Aboriginal disputes have been outstanding, the involvement of a mediator can assist the parties to reach a more timely resolution

of the issues than unassisted negotiation. Third, to the extent that reconciliation is a goal of both parties, the assistance of an experienced mediator in promoting a constructive dialogue will tend to minimize the risk that adversarial interactions at the table will damage the parties' relationship.

c. Obstacles to Negotiated Settlement

Finally, all of the three common barriers to achieving negotiated settlements can play a significant role in hindering progress in Crown-Aboriginal negotiations. Problems arising from adversarial approaches to negotiation, fundamental differences in perspective as to the context in which the issues have arisen, and discounting by negotiators of the views expressed by their "adversaries" – all have played a part in causing delays and impasses in certain Crown-Aboriginal negotiations in the past. For the reasons described in the previous section, mediation can help overcome each of these barriers to resolution.

Although there are limitations to mediation as a tool for improving negotiations, all of the above factors suggest that negotiators should at least consider the potential of mediation as they assess their options for resolving Crown-Aboriginal issues. It is worth noting that the mediation process has been used with success in such negotiations in the past, to address issues ranging from the creation of reserve land bases, the development of Aboriginal police services, to the settlement of land rights disputes.

FURTHER READING

For a helpful overview of the differences between alternative dispute resolution processes, see:

> D. Paul Emond, "Alternative Dispute Resolution: A Conceptual Overview" in *Commercial Dispute Resolution: Alternatives to Litigation* (Aurora: Canada Law Book, 1989), pages 1-25.

For readable and practical descriptions of mediation and other alternative dispute resolution processes, see:

> Genevieve Chornenki & Christine E. Hart, *Bypass Court: A Dispute Resolution Handbook*, 4th ed. (Toronto: Butterworths, 2011),
>
> Robert M. Nelson, *Nelson on ADR* (Toronto: Thomson Canada, 2003),
>
> Cinnie Noble, L. Leslie Dizgun & D. Paul Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery, 1998), and
>
> Michael Silver, *Mediation and Negotiation: Representing Your Clients* (Toronto: Butterworths, 2001).

For lengthier descriptions of mediation and other dispute resolution processes, written by well-respected American authors, see:

> Stephen Goldberg, Frank Sander & Nancy Rogers, *Dispute Resolution: Negotiation, Mediation, and Other Processes*, 3rd ed. (Aspen: Aspen Publishers, 2002), and
>
> Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd ed. (San Francisco: Jossey-Bass, 2003).

Finally, for an analysis of the impact of mediator styles, see:

> Leonard L. Riskin, "Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed" (1996) 1:7 Harvard Negotiation Law Review 8.