

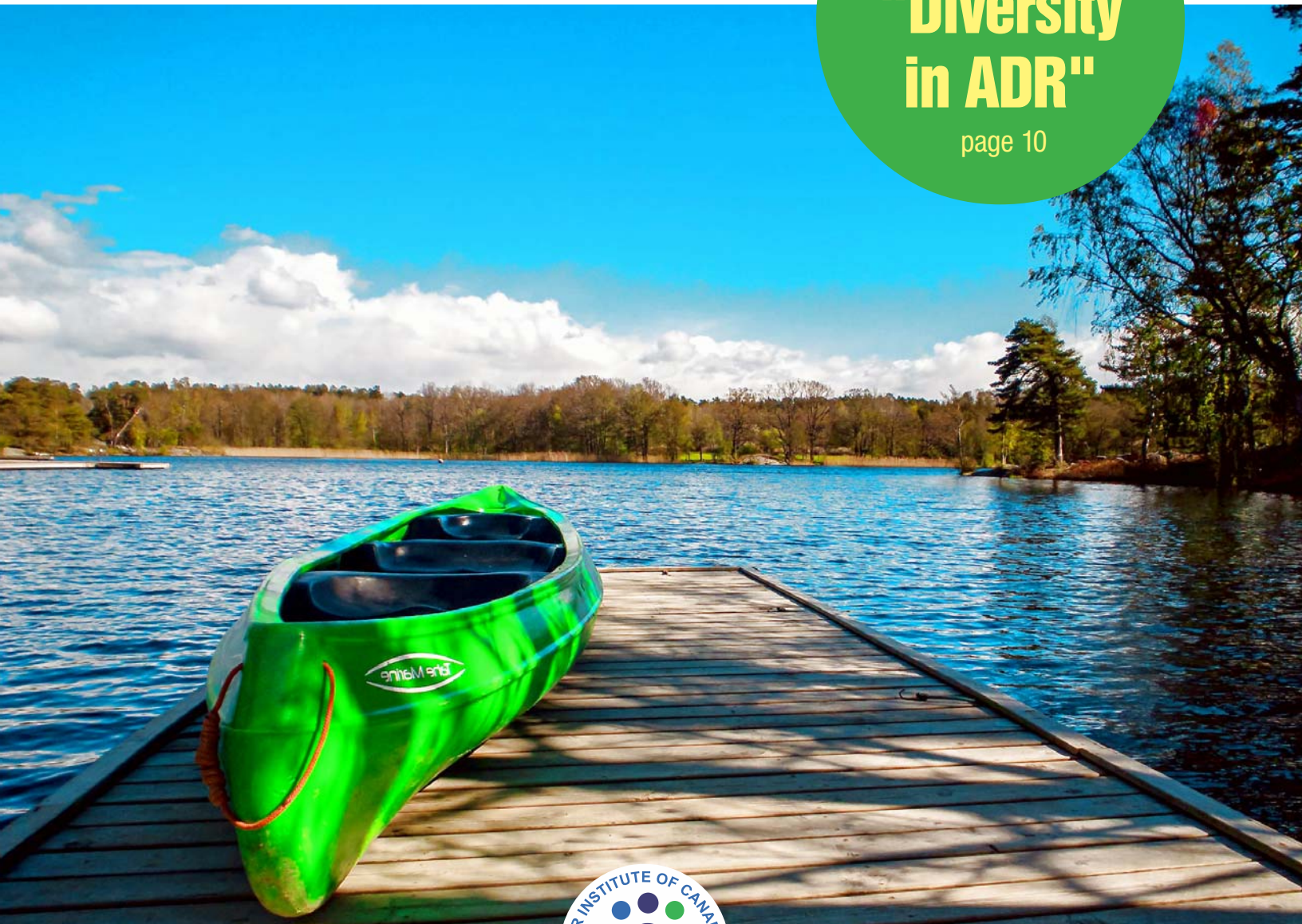
Canadian Arbitration and Mediation Journal

A publication of the ADR Institute of Canada, Inc.

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"Diversity in ADR"

page 10



LEADING DISPUTE RESOLUTION IN CANADA
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Message from the Editor

Welcome to the fall 2020 issue of the *Canadian Arbitration and Mediation Journal*. Once again, we are pleased to cover diverse aspects of dispute resolution in Canada and elsewhere.

This issue's contributors invite readers to delve into—even doubt or question—some of the accepted wisdom and norms that underpin ADR. In her interview, [Dominique Bourcheix](#) suggests that mediation is a luxury available only because of Canada's established judicial system. [Jennifer Webster](#) urges facilitators and mediators to work themselves out of a job by transferring skills to their clients. [Joel Richler](#) reminds ar-

bitrators to resist the temptation to decide disputes on grounds not pleaded or argued. [Ruth Corbin](#) explores and explains a meta-study about whether emotions can really be read from a person's face. [Georg Stratemeyer](#) describes what he learned by reviewing the literature on domestic violence, and [Paul Godin](#) offers a précis of a study comparing four methods of resolving family law disputes. [Voy Stelmaszynski](#) advises tribunal adjudicators and mediators not to take their resources and independence for granted. [Kathryn Munn](#) endorses a book that offers a new approach to mediator ethics, and [Kartikeya Prakash](#) points out the deficiencies of investment arbitration tribunals.

We hope readers will enjoy and benefit from these submissions, and we urge everyone to share this issue with colleagues, clients, and friends. Past issues of the Journal can also be found on CanLII at <https://www.canlii.org/en/commentary/journals/43/>.

Thank you to all who made this



**GENEVIEVE A. CHORNENKI,
LL.M. (ADR), C.MED, C.ARB**

Genevieve has served as mediator, arbitrator, ADR consultant and trainer since 1989. She is a director of the Condominium Authority of Ontario and co-author of *Bypass Court: A Dispute Resolution Handbook*. She was inaugural chair of the Ontario Bar Association's ADR Section and received its first ADR Award of Excellence.

issue possible: our contributors, the helpful staff at the ADRIIC office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome. 🏠

Genevieve A. Chornenki
Editor-in-Chief



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President's Message

I hope you, your families and friends are healthy and managing what has been a very different year so far. ADRIC is doing fairly well, considering the difficulties associated with the pandemic. While staff is working remotely, they are still working diligently to respond to member needs and to advance the many projects and processes our office manages.

In the Spring, staff surveyed members about their needs and concerns during COVID-19. The results led them to organize and provide numerous free supportive webinars to help members' business and personal health. These were recorded, posted to ADRIC.ca and are available to view on demand. Many other new resources are posted to the Member Portal.

We have a new, responsive website that is easy to use and is sure to impress. It includes a new ODR blog led by the ADRIC ODR Task Force.

We have managed to issue two editions of the Journal as well as three issues of *ADR Perspectives* so far, keeping members and clients entertained and informed.

As you may know, ADRIC does case management services for arbitrations and we have set up a new fundholding service to assist the parties and the arbitrators manage required payouts for cases and we are improving our case services model.

We have launched the new Med-Arb Rules, Designation and a Med-Arb Course which is already proving to be in demand.

We worked with CanArbWeek on the inaugural event held September 21-25, 2020. CanArbWeek boasted 10 organizations working together to develop a variety of arbitration videoconferences. Many were available at no charge and recordings are now available on demand. To learn more, visit our [CanArbWeek event page](#).

Because of the COVID-19 social restrictions and concern for our supporters ADRIC has changed its approach to hosting our national conference. We have developed fourteen webinars in lieu of the in-person conference, plus a series of eight fascinating and challenging



**ANDREW D. BUTT, M.S.T.,
B.ED., B.SC., C.MED, C.ARB**

Andy has 20 years of experience in executive management positions with large corporations, 15 years of extensive experience in mediating workplace disputes, completing workplace assessments, conflict coaching and training with managers and leaders in conflict management situations.

videoconferences focussed on Diversity and Inclusion in the practice of ADR. The series will be interactive to encourage participants to share perspectives and reflections. The facilitators reflect the diversity being encouraged. We view this as a way to impact members' practice and improve consumers' experiences with our ADR services. Be sure to mark the dates in your calendar, share the registration links and participate – it is open to all!

We are working on many other projects to benefit members, to improve satisfaction levels of consumers of ADR services and we look forward to sharing them with you soonest! 🏠

The Canadian Arbitration and Mediation Journal is now on CanLII!

We are delighted that [CanLII](#) (the Canadian Legal Information Institute) has added the Canadian Arbitration and Mediation Journal to [CanLII's commentary section](#). You will find current and all back issues.

Please share this great news with your colleagues in the law community!



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Listen In

A conversation with Dominique Bourcheix, C.Med and Editor-in-Chief Genevieve Chornenki, C.Arb, C.Med

Dominique, thank you for making time in your busy calendar to share your ADR experiences with me and Journal readers. You're somewhat unique as a Canadian practitioner in that you've performed ADR mandates in both French and English Canada. What services do you offer and where have you worked?

Mostly I serve as a mediator, but I've also conducted arbitrations, investigations, and facilitation of big commercial tables such as the dairy and pork industries in Quebec. Over the years, I estimate that I've done about 2,000 mediations in all sorts of areas—contracts, construction, insurance, shareholder's disputes, successions, terminations, and the energy industry. I did about hundreds of family mediations for a few years also which helped me develop many interpersonal skills.

I've worked in both French and English Canada. I've had mandates in Quebec, Ontario, Saskatchewan, and have done teaching in BC and Atlantic Canada as well as in France.

Have you observed any differences in how ADR is conducted in French and English Canada?

The mediation process is the same in English Canada and French Canada, but francophone mediations (even if done, say, in Ontario) tend to be more formal. For instance, everyone is addressed by the formal pronoun "vous," and first names are not used. It's titles and surnames all the way—madame, monsieur, maître, docteur.

In Quebec, there also seems

to be a gap between academics and practitioners. In their past writings and conferences, some academics maintained that the legal aspects of a dispute should not be discussed in mediation and that notion seems to have evolved into an unfortunate dogma. Practitioners don't adhere to it. The solution in mediation can be different from the legal solution, whereas the courts have to impose the legal solution. But that does not mean you cannot talk about what could be the legal solution or discuss the pros and cons of each parties' legal convictions. I look at it like this: an engineer-mediator would help the parties discuss the engineering aspects of a dispute and an accountant-mediator the accounting aspects. So why shouldn't a lawyer-mediator help people talk about the legal aspects? Talking about problems through the lens of a particular discipline is not the same thing as giving advice.

What about ADR training? Is that something you do?

Most definitely. I've designed and taught many ADR courses. For five years, I was responsible for the course on Civil, Commercial and Labour Mediation (which accredits mediators with the Quebec bar and other bodies) as well as the Interest-Based Negotiation course and I've given advanced seminars for mediators at a variety of national and provincial administrative tribunals.

What's really exciting for me is that since the onset of COVID-19, I have developed and refined a course on how to adapt the mediation process



DOMINIQUE F. BOURCHEIX, B.A., LL.B., AD.E., C.MED,

was admitted to the Québec Bar in 1982. Initially a commercial litigator, in 1999 she dedicated her practice exclusively to commercial mediation, facilitation and its teaching. She is the recipient of the Québec Bar's 2019 distinction of *Avocatus Emeritus*, for her contributions to the advancement of mediation for over 25 years. www.mediationsophilex.ca

to online technologies like Zoom. Remote ways of intervening in disputes are going to be a permanent feature of ADR in Canada from now on, and I'm convinced that if used creatively, they increase the engagement and satisfaction of participants. That's been my experience.

What first attracted you to ADR? When? How did you get into the field?

As a lawyer in 1992, I settled a big construction file with ten parties, and when I told a colleague how I did it, he said that I'd actually conducted a mediation and I should take his mediation course to learn more.

My client, an engineer, was preoccupied with a particular design norm. He was furious at the impact a \$20 million law suit was having on his reputation, his engineering firm being a leader in the field, so he resisted meeting the environmental standards and claimed they were met. Working

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only on instinct and intuition, I made him focus on how he could help his client and be creative about a technical solution that was obvious if he stopped concentrating on the norm. I suggested that if he were to help his client, and even surpass the environmental norm, he would be helping himself. My advice was not well received. The engineer called the man who referred the file to me, called me crazy, and complained that I wasn't defending him. But my referral source told him to do what I said.

A week later the engineer came back with a technical design for a solution that cost \$1 million instead of \$20 million. I convoked a meeting of all parties, submitted the engineer's solution; they were flabbergasted and their Chicago experts were very silent. I proposed the ten parties split the \$1 million each for 10%, independent of the responsibility. Two weeks later, the file was settled, the engineer got the repair contract, and we avoided a shutdown of the plant and a 6-week trial that would have been a theoretical debate about the definition of the environmental norm. The plant in question became an icon that totally surpassed the norm.

Without my being conscious of it, what I did in that file was integrate interests. That, plus being creative, is what I absolutely love to do. So, I took my colleague's course and became hooked on the concept of interest-based mediation.

Obviously, you're an enthusiastic proponent of mediation, but you've also publicly described it as a "luxury." In what way is mediation a luxury?

Mediation is a luxury because we could not enjoy the process or its benefits without the safety net of our judicial system, the ultimate form of justice in a democratic society. Without that safety net, mediation would be a forum for the law of the jungle. I know that to a certain extent the law of the jungle is always prevalent, that is the ones who have money get access to the justice and so on, but the rule of law is there for all to have and hold. The law provides us with stability and a reliable set of standards that govern and regulate civil society.

But mediation is also a luxury in a different sense. I think it is a higher form of justice. It can accomplish not just legal justice, but the moral justice that comes from empowerment, process, respect, listening and being understood, and participation to the outcome—all the ingredients necessary to bring back the self-esteem that is lost in unresolved conflict. That self-esteem regained is the real sense of justice.

I don't mean to suggest that every dispute can and should be resolved by mediation. Some disputes must be resolved by means of a trial and a judicial decision, and this must be accepted and understood by everyone involved in dispute resolu-

tion, including by judges. There must be no shame in not settling, for it is not a moral failing, and it troubles me to hear that people who come to court prepared for and wanting judicial process are told to go out into the hall to talk. That's a denial of justice in my view.

What about other processes like arbitration or workplace investigations? Where do these fit in?

I think they are great tools. They are a form of adapted and more flexible judicial option if well done. I have done both but feel greater satisfaction from mediation for the reasons above.

Describe the most rewarding, poignant, or memorable experience you have ever had working as an ADR neutral? How did that come about?

This is difficult to answer because there are so many. But if I have to choose, I would say that the most poignant experience I had was as mediator in a file concerning a plane crash. A mother lost her husband and son on a fishing trip that was organized by her brother-in-law who survived. We settled with her and not with him. The difference was that the brother-in-law was consumed with anger. Although the mother lost more than he did and her sadness was so profound (it was palpable, she cried a lot, even at one point had to leave my office and go to the park nearby to look at the rose garden at my suggestion), she had forgiven him and even tried to help him, in vain. The mother spoke about clearing the money issue and the court case so that she could concentrate on her real challenge—her healing—and it was so powerful. She was talking like a bodhisattva. It was an example of amazing inner strength and how anger is useless in a healing process.

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Would you be willing to talk about an error you made as an ADR practitioner? What happened and what did you do about it?

My biggest technical error was, fortunately, without practical consequences, but it was a profound learning experience for me. I once agreed to a party's request to have me reveal a really important piece of confidential information to the opposing lawyer only if I felt I was in a situation of good faith. Never should I have done that. The situation was obviously one of bad faith, so I did not share the information, but what if the situation had been ambiguous? What if I wasn't sure whether the opposing lawyer was acting in good faith or bad faith? I hated taking on the responsibility of deciding that and resolved never to do it again.

My biggest psychological error, and I did it a few times, involved dealing with individuals who may be experiencing mental illness. If I see that my interventions seem to have a positive effect on, for instance, a very paranoid person, I fall into a trap. I become convinced that I can change them for the purposes of the mediation. I think I am a miracle worker. When they fall back into their negativity, paranoia, or neurosis, my response is to try harder. I invest myself too

much to get them out of it. Once I became so invested in making things work that the person I was trying to help lost confidence in me and I looked ridiculous towards all the other parties.

Are there personal attributes that you think an ADR practitioner should bring to the table?

Definitely...Emotional intelligence, to really love people, to have a capacity for compassion, to have acute presence (totally in the moment and mindfulness), and a true impartiality. But also, intellectual attributes: capacity to diagnose a situation and needs and synthesize the subject matter, intuition, creativity, intellectual rigor for feedback.

Do you think being an ADR practitioner is a vocation?

I would describe it more as having found my calling and passion. I feel it more as a passion than a vocation. I love people, and mediation nourishes me from that aspect where I really connect with people and develop a relation of trust with them. When they feel they are in a situation of trust they are secure, they become more creative, and it transforms them for the better in the circumstances. That is what I love to see and experience time and time again.

What does your crystal ball tell you about the future of ADR?

In Quebec I am very pessimistic; it is going to take another generation before we really make it a new culture. The context of judges taking the field encourages the lawyers to institute action so they can be in the system and get free settlement conferences when they have done their legal work. Our obsession to refuse to make it mandatory in one form or another (because we have this cultural problem with authority) are all factors that do not contribute to the change in culture. Our new code of procedure inviting people to go to ADR before they institute an action is a total disaster (the code changed 5 years ago). I am on a committee that is organizing a conference on the subject for October. Don't get me started.....

What about your future? Any plans for retirement?

What I find difficult now, although I love mediation, is having to deal with anger every day. It takes a toll on me. So I am now semi-retired, working three days a week and possibly, next year working two, and so on. But I will always enjoy doing a mandate and choosing my mandates. I hope I can continue teaching also because I love doing that and transmitting my experience to others. 🏠

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ADRIC committed to develop guidelines for Med-Arb processes in 2015. The new Med-Arb Rules are now available! Our mission is always to promote and maintain the highest ADR practice standards; the new Rules are no exception and blend seamlessly with our existing Mediation Rules and Arbitration Rules. We have also developed the Chartered Med-Arb (C.Med-Arb) designation and a special Med-Arb Course. Practitioners can now demonstrate the appropriate education and experience to achieve the designation so that those selecting a professional can be assured.

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The series is called **Diversity in ADR: Ethics and Inclusion**.

The series and webinar leaders (themselves reflecting diversity) will explore how to be an ally; authentic vs performative allyship; understanding power and privilege and its effect; the value of inclusion in ADR; to listen to those who have been

marginalized and learn from their experience in life and their practices; how to help change systemic biases and discriminatory practices in organizations; and how to recognize and deal with clients' trauma caused by prior discriminatory experiences. The series will wrap up in a virtual Listening Circle to consider how to move ourselves, our practices and organizations forward.

The webinars will begin in October with one session per week, and will be provided free of charge. ADR practitioners, like-minded professionals and others are encouraged to learn more. Visit the ADRIIC 2020 - Diversity Series page of [ADRIIC.ca](https://adric.ca) for more information and to register.

<https://adric.ca/diversity-stream/>

NOTE: ADRIIC hopes to offer similar Webinars in French early in 2021

Reflection on Mediation Practice: Skills Transfer in Mediation

As a mediator, I often aim to work myself out of a job. How so? By focussing as much on the parties' conflict management skills as on the resolution of their immediate dispute. By transferring relevant skills to them, I equip them to address future issues on their own in a way that is both satisfying and efficient. Ideally, they will no longer need my assistance.

Skills transfer, as I call it, can be used in a mediation setting to help parties resolve a current issue as well as to learn tools and approaches to address future conflicts. It is my experience that working on skills transfer through mediation is especially beneficial when the parties are in an ongoing relationship, such as among employees in a work team or between an employer and a union. The parties are more motivated to learn and apply new tools in order to improve their success in resolving issues than parties in single transaction disputes because they recognize that future conflict will arise in their relationship.

There are three areas of workplace mediation where skills transfer is integral to the work of the mediator. These are: the mediation of interpersonal workplace conflict; the mediation of collective bargaining disputes; and the facilitation of interest-based negotiations. In each of these types of mediation, the use of a skills-development approach is consistent with addressing a particular dispute as well as improving the parties' ongoing relationship. The mediator will highlight different skills depending on the needs of the parties and the context of the dispute.

Interpersonal Workplace Conflict

An interpersonal conflict involves issues between two or more workplace colleagues. Mediation intervention usually involves initial separate meetings with each person to discuss the events and concerns. In addition, the meeting with the mediator provides an opportunity for the person to understand what would be involved in a mediation session and to decide whether they want to and are able to participate. If all parties agree, a mediation session would proceed through which the mediator would facilitate a structured face-to-face conversation about the issues and options for addressing them.

The focus on developing conflict management skills starts in the separate meetings. The mediator is modelling

different skills and then providing information about conflict management relevant to the experiences and perspective described by each person.

Which skills are developed in the mediation of interpersonal conflict?

Active listening: The mediator uses the separate meetings to listen to each person's description and perspective of the conflict and its impact on him or her. Through the mediator's active listening, each person has the experience of someone paying close attention with the focused goal of understanding their experience. The mediator can then guide the participants to use active listening in the joint session and also during future workplace conflicts. A key to using active listening is to focus on understanding the perspective and experience of the other person without needing to agree with it.

Understanding the three conversations that are happening when there is conflict: When workplace colleagues are experiencing conflict, they can benefit from developing their understanding of the three conversations described by Douglas Stone, Bruce

JENNIFER WEBSTER, B.A., LL.B.

Jennifer Webster, B.A., LL.B., is a mediator and arbitrator in private practice with a focus on labour, employment and human rights law. She worked as a mediator for Federal Mediation and Conciliation Service prior to starting her practice.



Patton and Sheila Heen in their book, *Difficult Conversations* (Penguin Books, 1999). These three conversations are: the What Happened Conversation; the Feelings Conversation; and the Identity Conversation. When parties get caught up in the assumptions involved in each of these conversations, they lose their ability to effectively communicate about problems. The mediator can ask clarifying questions based on the three conversations to enhance each participant's thinking about the conflict. When the focus is on the What Happened Conversation, participants learn about the truth assumption, the intention invention and the blame frame, all of which contribute to a particular view of the conflict. The authors of *Difficult Conversations* provide strategies for re-examining what happened and for changing one's narrative about the conflict. The mediator can review these strategies and help each participant to rewrite their view of what happened. If participants are interested in more information about the three conversations, there are worksheets and study guides provided through the *Difficult Conversations* website that can be used.

Developing an analysis of conflict and conflict styles: Interpersonal conflict is often related to a difference in people's conflict styles. Is one person a conflict avoider while another is a conflict seeker? When people with these two different conflict styles are workplace colleagues, there will be significant challenges in managing conflict at work. The mediator can help them to understand that there are different conflict styles and that most people have a predominant style, although

all people use different styles in different circumstances. In addition to understanding conflict styles, parties can work with a mediator to analyze the conflict and develop an understanding of the roots of conflict as well as the underlying interests of each party in relation to the problem between them.

Telling your story: When people are in conflict, they often become attached to the narrative they have created about the conflict. In the story, they are telling themselves and others about the conflict, they know and understand the truth of the situation and have cast each person in a particular role, whether it is hero, villain or victim. When they tell the story to the mediator, the mediator can start to reframe the story and ask questions about the narrative and the perspective of the story. There is an opportunity for the mediator to help the person see that their narrative is subjective and that there are other stories told and experienced by other people. Through this conversation, the person can begin to adjust the story and be able to share their perspective with others with better understanding that the story reflects their subjective experience and not necessarily the truth of a situation.

Collaborative problem-solving: When facilitating a joint conversation about interpersonal conflict, the mediator teaches an approach to problem-solving that involves collaboration in identifying and defining the issues, exploring possible solutions, and developing strategies for future disagreements. With support and coaching from the mediator, parties can apply the skills of active listening and reframing to improve their

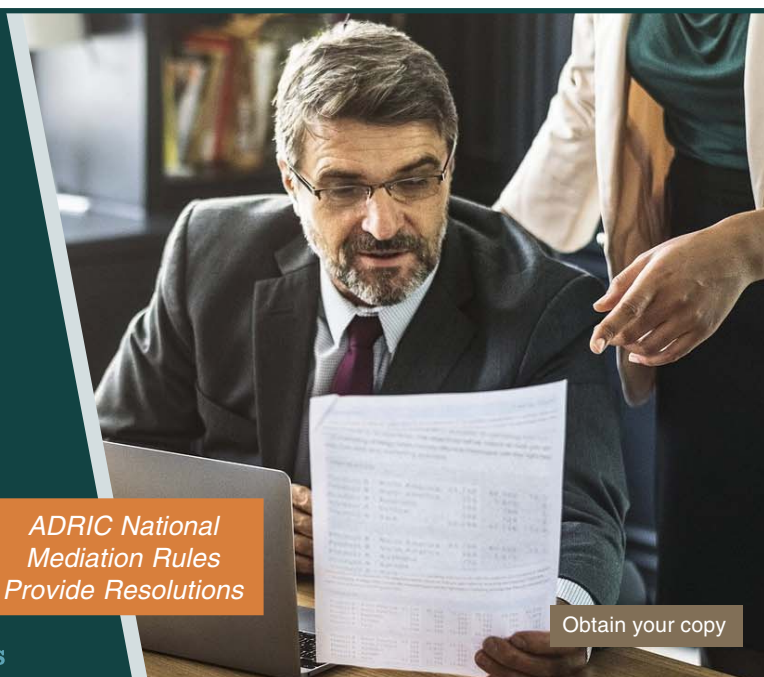
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Collective Bargaining Disputes

The mediation of collective bargaining disputes most commonly occurs under the provisions of a labour relations statute and involves a government-appointed mediator or conciliation officer who assists union and employer representatives when they reach a negotiation impasse. The mediator helps them resolve outstanding issues so they can conclude a collective agreement that addresses terms of employment like wages, hours of work, benefits, or health and safety policies. Mediation is usually a required step under labour relations legislation before there can be a legal strike or lockout. Skills transfer happens in the context of these mediations to develop the parties' abilities to manage issues during the term of the collective agreement and to improve the functioning of their subsequent negotiations.

All of the conflict management skills used in the mediation of interpersonal workplace conflict are involved in collective bargaining disputes. In particular, the mediator's work is focused on improving the communication skills used by the parties and ensuring that participants are engaged in active listening for understanding the perspective of the other party.

In addition, the mediation of collective bargaining disputes may focus on skills transfer in the following areas:

Overcoming trust issues: Employer and union representatives often identify a lack of trust as the most significant barrier to resolving outstanding issues in collective bargaining. The mediator can share strategies for building trust and for writing collective agreement language that does not require trust for enforceability. The nature of the relationship between an employer and a union can often be experienced as adversarial. In order to build trust and reframe the relationship dynamic, parties may need to identify small and gradual steps that

can be implemented in order to improve the relationship. Moving from adversaries to partners can involve work on joint initiatives during the term of the collective agreement, and parties need to commit to addressing any real or perceived breach of trust incidents that arise. The mediator supports parties in identifying ways to manage and develop trust both in the context of negotiations and away from the bargaining table.

Moving from positions to interests: When collective bargaining reaches an impasse, the process has usually reached a stalemate in relation to the different positions that parties have taken on the outstanding issues. In order to move beyond impasse, the mediator helps the parties to look for the interests that are being addressed through a position. Interests can be explored by asking questions such as: What problems is this proposal trying to solve? Why is this proposal important to you, to the workplace and to your constituents? Why do you think this issue is important or troublesome to the other party? How does the other party's proposal affect you and your constituents? As parties work through these questions, the position or proposal at issue is more fully explained and other options can be developed to meet the interests and address the problem. The mediator demonstrates to the parties how using these kinds of questions can move the discussion from positions to interests. When parties develop the skill of exploring interests, they are able to reshape the negotiation to expand the possible solutions to the real problem.

Interest-Based Negotiations

Some unions and employers are choosing to use an interest-based approach to the negotiation of their collective agreement and to address other issues that arise during the term of the collective agreement. Rather than just intervening in the negotiations to help resolve impasses, a mediator can work with representatives of both the employer and the



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union to train them in the interest-based process and to facilitate the application of the process in their negotiations.

Interest-based negotiations is still a collective bargaining process and the conflict management skills applied in the mediation of collective bargaining disputes, as described above, are also engaged in an interest-based process.

An additional skill set is, however, used and developed through the facilitation of interest-based negotiations.

The mediator may or may not be involved in providing specific training to the participants in interest-based negotiations. Such training would teach the steps followed when an interest-based process is used for collective bargaining. These steps are usually divided into a set of preliminary steps, including the development of ground rules and a communications strategy, and a set of steps that are applied to each issue. The interest-based process uses five steps for each issue: 1) define the issue; 2) identify the interests; 3) develop options; 4) evaluate the options; and 5) close the issue through consensus.

Although participants may receive training prior to starting negotiations, it is through their use of the interest-based process that participants develop their skills. The mediator provides coaching through each step by guiding the process and helping participants to learn as they work on each issue. The skills engaged include active listening, understanding the symptoms of a problem, distinguishing interests from positions, using a range of brainstorming techniques for developing options, and managing the challenges of consensus building. Over time, the participants learn the skills used in an interest-based process and adapt the skills to their own collective bargaining.

Skills Transfer in Every Mediation Setting

The mediator's role in skills transfer is particularly evident in mediation settings where the parties are in an ongoing relationship and will likely experience future issues and disputes.

In every mediation process, however, mediators should actively consider how they can support the parties in developing their conflict management skills. As parties improve their skills, they can more easily engage in the resolution of the current conflict, while laying the foundation for better management of issues they encounter.

The recognition of skills transfer as an essential

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component of the mediator's work has implications for the continuing learning of mediators. Professional development should include a focus on each mediator enhancing the competencies needed to effectively coach participants in the use of conflict management skills.

Conclusion

Many mediators may be reluctant to engage in skills transfer because they will perceive that their success will translate into a loss of work. While I appreciate the sentiment, I question how realistic the concern really is.

Speaking for myself, I *want* to do myself out of a job because if that were to occur, it would be an indicator of a job well done and a mandate properly carried out. My focus is on improving the functioning of workplace relationships so there is less need for third-party involvement in general. For instance, if a union and employer are more skilled at conflict management, they are able to negotiate their agreement without a strike or lockout (which benefits them and society at large) and they solve workplace problems without going to arbitration (which saves time and money and usually creates a better solution to the issue). Only the most complicated problems then go to third parties. All of which is to say, I'm comfortable transferring what many think of as professional or special skills to my clients because in the long run, that improves the health of our workplaces.

If that sounds too altruistic, my other comment would be that in my experience I'm not actually doing myself out of a job. When parties see and experience the benefit of a skills-transfer approach to mediation, they tend to retain the mediator again and again to support their skill development and they make favourable referrals to others. And that is truly a win-win outcome. 🏠



Award Writing: Considerations to Ensure Finality and Enforceability

While commercial arbitration is private, contract based and not part of our judicial system,¹ it does form part of our system of justice. As such, arbitral tribunals must decide disputes in accordance with the law, and arbitrators must treat parties fairly and equally.²

In domestic cases, there can often be appeals.³ Domestic and international awards may be set aside where parties have not been treated fairly or where tribunals have exceeded their jurisdiction.⁴

Two recent cases highlight the importance that award writing and arbitral reasoning have in ensuring that awards have the finality and enforceability that parties seek when deciding to arbitrate. In this article, I review those cases and then suggest how arbitrators can apply their principles to their arbitral awards.

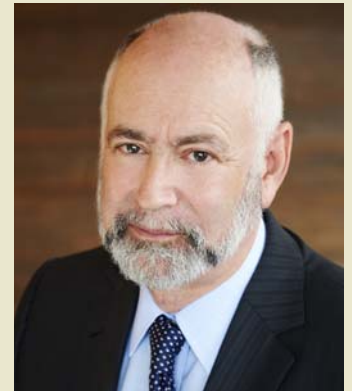
The first case, *Tall Ships Landing Development Inc. v. Corporation of the City of Brockville*,⁵ was a challenge based upon submissions that the arbitrator based his decisions on legal theories not advanced or argued by the respondent⁶ and failed to provide reasons for his finding that claims were statute barred.⁷ The awards were set aside on the following bases.

First, the court accepted that the arbitrator based his decision on grounds that were neither pleaded nor argued during the proceedings. In particular, when considering timing requirements related to the exchange of monetary claims and responses under a construction agreement, the arbitrator implied a term that the claimant's time to respond to a claim rejection was "of the essence." In relation to project costs and interest claims, the arbitrator also implied construction management obligations on the claimant, found breaches of implied good faith obligations, and ruled that the claims were estopped. The arbitrator made these rulings without indicating that he intended to rely on these grounds and without asking the parties to make additional submissions.

The court in *Tall Ships* ruled that the implied obligations were not only errors of law; they were errors that gave rise to fundamental unfairness. In contractual interpretation, "time is of the essence" is the exception rather than the rule and can only be implied if it is warranted by the nature of the property or the circumstances of the case. The implication of the implied terms was not minor; it was the lynchpin of the

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arbitrator's decision. The court found that, given the clear language in their construction agreement, the parties could not have anticipated an argument about implied construction management obligations, and the arbitrator's conclusions were, in any event, suspect. The arbitrator failed to apply the proper test for implied terms, did not point to explicit contractual terms that informed his findings, and allowed perceived equities of the situation to overwhelm clear contractual language.

Second, the court ruled that while arbitrators do not have to deal in their awards with all arguments presented to them, they must address issues that are core or central to the resolution of the case (in this case, discoverability of claims). Reasons must allow a reviewing court to understand why a decision was made and whether the conclusion was within a range of suitable outcomes.⁸ The fairness of arbitration and the ability of a court to determine whether a finding is reasonable are dependent upon an arbitrator showing that she turned her mind to an issue.⁹ "A judge may be required to connect the dots but there must be dots to connect."¹⁰

In the second case, *Canada (Minister of Citizenship and Immigration) v. Vavilov*,¹¹ the Supreme Court of Canada provided guidance to judges and decision makers in respect

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of the review of administrative (and arguably arbitral) decisions on a standard of reasonableness. Before *Vavilov*, what is “reasonable” was succinctly stated in *Teal Cedar Products Ltd. v. British Columbia*.¹² A decision is “reasonable” if it is justified, transparent, intelligible, and figures within the range of possible, acceptable outcomes in respect of the facts and applicable law.¹³

In *Vavilov*, the Court affirmed the foregoing definition of reasonableness and articulated the principles that:

- decisions are not assessed on a standard of perfection;
- parties challenging decisions must show that alleged flaws are sufficiently central or significant so as to render decisions unreasonable;
- written reasons facilitate judicial review and shield against arbitrariness; they explain how and why decisions are made, and help to show affected parties that their arguments have been considered;
- the process of drafting reasons will help decision makers to more carefully examine their own thinking and to better articulate their analysis;
- the focus of judicial review is on decisions actually made, including reasoning and outcomes;
- a reasonable decision is one that is understood by a reviewing court, based upon an internally coherent and rational chain of analysis, and justified in relation to the applicable law and facts;
- it will not suffice that an outcome be reasonable.

Rather,¹⁴

[w]here reasons for a decision are required, the decision must be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it is reached on an improper basis.

[emphasis in original]

- written reasons should be closely, holistically, and contextually read by reviewing courts so that they can obtain a proper understanding of the basis upon which decisions are made;
- hallmarks of reasonableness are justification, transparency, and intelligibility;
- decisions will be unreasonable if they demonstrate a failure of rationality internal to the reasoning process or if they are untenable in light of applicable facts and law;
- reviewing courts must be satisfied that decisions “add up” and that there are lines of analysis that could reasonably lead decision makers to reach their conclusions;

- it will rarely suffice for decision makers to simply summarize statutory or contractual language and arguments made and then state peremptory conclusions;
- applicable law and binding precedents must always be considered, accounted for, and properly apprehended;
- decisions must be justified and reasonable in relation to the evidentiary record; and
- the concept of responsive decisions that meaningfully account for the central issues and concerns raised by parties is inherently bound up with the duty of procedural fairness.

Repeating the foundational principle that arbitral awards must be final and enforceable, what should arbitrators do in writing their awards? I offer the following suggestions:

- be familiar with *Vavilov* and assume that case will apply to review of arbitral awards where the applicable standard of review is reasonableness;
- in early case conferences and in your terms of appointment and procedural orders, ensure that written pleadings are complete;
- prior to the commencement of the hearing, ensure that you are familiar with the legal and factual issues raised in the pleadings and statements of evidence (where filed);
- consider raising issues that are not addressed by the parties and that you consider may be important with counsel prior to the hearing, with the caution that identifying issues may be unfair to the parties in the circumstances of the case;
- where you believe that an important issue, evidentiary matter, or legal authority has been missed, consider inviting the parties to address that gap, again with the caution that you do not improperly interfere with the presentation of claims or defences and thereby improperly tilt the playing field;
- always assume that counsel for the parties are more familiar with their cases than you are and that there may well be reasons that certain issues are not addressed;
- in drafting, assume that your awards may be placed before a court, whether on appeal or on a motion to set aside;
- ensure that your recitation of the evidence includes all material facts (erring on the side of inclusion) and that all of your inferences and findings of fact are clear and based upon the evidence;
- while ensuring that the positions of all parties are sufficiently summarized, take proper care to “write for the loser,” who will be most interested in being satisfied that its claims, evidence, and submissions have been properly and completely understood;
- once your award is prepared in full, review your draft

with the *Vavilov* principles in mind, using that case as a checklist against which to assess your own award; and

- in doing the foregoing, try to place yourself in the position of counsel for the losing party.

Two final comments. First, *Vavilov* was not an arbitration case. Indeed, the word “arbitration” does not appear in the majority or concurring decisions. Yet, there was an intervention by one arbitral institution (the British Columbia International Commercial Arbitration Centre), and it would be surprising if courts were not alive to the potential implications of *Vavilov* on future reviews of arbitral decisions.

Vavilov will undoubtedly embolden counsel to seek court redress from adverse arbitration awards, and arbitrators should know that many more of their awards will be placed before the courts, whether on appeal or on applications to set aside awards.

Second, while many parties choose commercial arbitration for its time and cost efficiencies, it is only in rare instances that parties ask for unreasoned awards.

The reality is that parties invest a great deal of time, money, and energy in their cases, and they expect awards akin to the quality of court judgments to a degree sufficient to withstand judicial scrutiny. The reasoning that supports the ultimate arbitral decisions forms a significant part of user expectations. 🏠

- 1 *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 (CanLII); [2007] 2 S.C.R. 801, at para. 51
- 2 *Arbitration Act, 1991*, S.O. 1991, c. 17, (the “Ontario Act”), sections 19 and 31
- 3 Ontario Act, section 45 of the Ontario Act
- 4 Ontario Act, section 46 of the Ontario Act; UNCITRAL Model Law, article 35.
- 5 2019 ONSC 6597 (CanLII)
- 6 Relying on grounds 6 and 7 set out in section 46(1) of the Ontario Act.
- 7 Ontario Act, section 38(1)
- 8 *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62
- 9 *Rodaro v. Royal Bank of Canada* (2002), 59 OR (3d) 74 (ONCA); *Moore v. Sweet*, 2017 ONCA 182, para 29
- 10 At para. 60
- 11 2019 SCC 65
- 12 2017 SCC 32 at para 84;
- 13 Citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para 190
- 14 At para. 86

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Reading Research on Micro-Facial Expression and Sequel to “Bamboozled No More”

Genevieve: In the Spring 2020 issue of this journal, Ruth Corbin explained how to master the art of reading research by applying three principles—reliability, validity, and relevance. So, raise your hand if since then you’ve read an original piece of social science research that touches on dispute resolution. Have you investigated the assumptions embedded in our cherished ideas about human nature?

Take, for instance, the notion of micro expressions, those involuntary and irrepressible facial movements that are said to reveal one of seven universal emotions: anger, contempt, disgust, fear, happiness, sadness, and surprise. You can learn about micro expressions on the internet and see them referenced in ADR course outlines and ADR blogs.

Or maybe it’s all in the eyebrows as this poster suggests. A colleague forwarded it to help me navigate in a COVID-19 world.



But here’s the question: do reliable indicia of people’s feelings really exist? Can dispute resolution practitioners reliably infer someone else’s emotions from their facial expressions, micro or macro? An article in the February 22nd–28th 2020 issue of *The Economist* mentioned a recent meta-analysis on the subject of facial expressions, so I decided to follow up.

Lisa Feldman Barrett, a psychologist at Northeastern University in Boston, Massachusetts, researches emotions from the perspective of psychology and neuroscience. In a



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2019 paper, she and her colleagues reviewed existing research about what facial expressions do and do not reveal. I asked Ruth Corbin to help me understand Feldman Barrett’s paper. What was her study about and what did she conclude? How do the concepts of reliability, validity and relevance apply to her study?

Ruth: Emojis—those charming cartoon faces that instantly communicate a message-sender’s mindset—may give you a false sense of confidence. Facial expressions in real life are not so blatantly readable. There is no universal truth in any linkage between facial cues and thought patterns or emotions. That is the unavoidable conclusion of Lisa Feldman Barrett’s fascinating and comprehensive research report entitled “Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements.”¹



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Feldman Barrett's 2019 research paper assembles the findings of nearly 400 sources spanning more than fifty years. She and her co-authors conduct what is called a meta-analysis, examining the link between facial expressions and emotive states as tested in distinctly different contexts. They conclude that, while "scientists agree that facial movements convey a range of information and are important for social communication,"² there are no predictors yet established that can be statistically useful in settings where different types of people take part.

"How people communicate anger, disgust, fear, happiness, sadness, and surprise varies substantially across cultures, situations, and even across people within a single situation. Furthermore, similar configurations of facial movements variably express instances of more than one emotion category."³

Genevieve: Or, as *The Economist* quoted Feldman Barrett on the meaning of a scowl, "People scowl when they're concentrating, they scowl when someone tells them a bad joke, they scowl when they have gas, they scowl for lots

of reasons."

Ruth: Right. And while perhaps disappointing to some ADR practitioners, the research conclusion could hardly have been otherwise. People of different cultures or different demographic groups, or even the same people in different contexts, use their faces differently in communicating. Characters in Canada's iconic comedy *Schitt's Creek*⁴ demonstrate the extremes. Drama queen Alexis communicates every mood of panic, disgust, dismay, lust or coquettishness in rapidly changing facial expressions, while Stevie the hotel manager is the model of facial deadpan calm. Yet both are fully-developed multi-dimensional characters. Surely Feldman Barrett's sixty-nine page, publicly-funded, international research program tells us more than we could learn on a single TV episode of a popular sit-com. It does.

Feldman Barrett's research crystallizes the criteria for evaluating research and equips interested ADR practitioners with additional tools. It generates implications for what it means to be an excellent mediator. It suggests the next frontier for artificial intelligence in ADR.

In an earlier article in this Journal,⁵ I advised arming yourself with the criteria of reliability, validity and relevance to discern the truth and value of any single scientific study. Reliability and validity are usually applied to single scientific stud-

ies, but in the type of meta-analysis conducted by Feldman Barrett and her colleagues, Genevieve asks how the principles of reliability, validity and relevance get applied.

Fortunately, you don't need to assess the reliability and validity of every study cited by Feldman Barrett *et al*, because they lead to no collective conclusion.⁶ Any one of those studies may be reliable—its results may be generalizable to a broader population under identical circumstances. Any one study may be valid in measuring no more and no less than what it sets out to measure. Yet like jumbled signs at a cottage country intersection, they collectively lead to conclusions in different directions.



“Relevance,” however, the third of those previously explained criteria, is left to the reader to assess. Relevance of research refers to the purpose to which the user needs to put the research. ADR practitioners should read the article (which obviously had not been written with ADR applications specifically in mind), to infer what it means for their own real-world applications or skill improvements. Relevance was always about what you make of it. Research experts can help you to assess statistical reliability or experimental-design validity. But relevance is up to the user's professional judgment. Indeed, in arbitration settings or in the courtroom, the determination of relevance is at the discretion of the trier of fact, after hearing from counsel.

Ask yourself as you spend quality time reading the Feldman Barrett article what you want to learn from it. Perhaps the question of relevance to ADR practitioners is, “How do I perfect my ability to read participants in mediations so I can be more effective?” Or “How do I tell who is lying in an arbitration hearing?” Or for academic researchers, “How do we build a Virtual AI mediator to be as effective as a human”?

The answer to the first question may be deflating for practitioners seeking to perfect their ability to read people. Feldman Barrett's meta-analysis demonstrates that facial expressions alone will never be a substantively useful guide to

knowing how ADR participants are feeling. There is a statistically significant finding that certain expressions—like smiling—are predictive of emotions or mindsets. But the predictability is weak. It is not guaranteed. Rely on it at your own risk. Hypothetically, if you had to lay a bet on what a big smile means, your best bet is “happiness.” Just don't bet the farm.

Can reading the Feldman Barrett article help in detecting liars? Again, no. We may think we're good at detecting liars by facial cues, perhaps by shifty eyes, or reddening faces. We're not. Experiments across all types of people—law enforcement officers, students, psychologists, job interviewers and even judges have demonstrated liar-detection skills that are no better than chance.⁷ It is the very reliability and validity of the peer-reviewed scientific studies in Feldman Barrett's meta-analysis that account for why it will *not* help you substantially in liar-detection. Put another way, the fact that respected studies of facial expressions in different contexts lead to different conclusions, alerts us that there can be no stable foundation for linking facial movements to lying behaviours.

Cutting through all the noise of disparate research findings, this one guideline remains true: Variability does not mean randomness. Disparate results should not make you throw up your hands. Facial cues do mean *something* in the context of culture, circumstance, and other body language. Context is everything. Notwithstanding Feldman Barrett's impressively

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organized and focussed meta-analysis, its parameters are too broad to generate practical “do’s and don’ts” for ADR practitioners. Future research needs to be more segmented by context. In the meantime, what ADR practitioners learn is that they should glean everything possible, early on, about the history and disposition of their participants so that facial cues can be interpreted in their empirical context. Any initial inferences about the mood and disposition of participants can be tested in real time with direct questioning or requests for reactions to different ideas. You learn as you go. This style of dynamic information gathering to reach conclusions is consistent with psychologists’ “Bayesian models of learning” which show that learning is optimized by constantly incorporating new information as it unfolds, and adjusting inferences accordingly⁸. Put another way, a well-honed “learn-as-you-go” approach is not just a matter of muddling through: it can be the theoretically best approach—the one most likely to lead to correct conclusions—in situations where the meaning of certain cues (like facial expressions) is ambiguous, and where not all information is knowable in advance. Optimization comes about when the decision-maker remains alert to detecting and using emerging information.

ADR practitioners working on artificial intelligence (AI) opportunities have their work cut out for them. Robotic assistants cannot be programmed to interpret facial expressions independently from other variables in a given context. Indeed, online face readers are available today, offering to read your mood in exchange for a few seconds of peering into your computer’s camera. Though promoted with great enthusiasm, such out-of-context expression-readers may hold no more promise than the mood rings of the 1970s for reliably predicting people’s true frame of mind.

Conclusions for reading research? The following compact list expands the repertoire presented in “Bamboozled no More” that was published in the previous edition of this journal.

1. Reliability, validity, and relevance remain universal principles for evaluating individual scientific studies. They have been endorsed by the Supreme Court of Canada as suitable criteria for weighing expert evidence.
2. When reviewing a meta-analysis, a collection of a large number of studies, these principles need to be broadened. Readers should take note of whether the results of different studies all point in the same direction. If they all lead to a similar conclusion, researchers use the term “convergent validity.” (If it walks like a duck, quacks like a duck, swims like a duck, the conclusion that you’re looking at a duck becomes increasingly clear.) Feldman Barrett’s meta-analysis shows an *absence* of convergent validity. The

studies of facial expressions that she examined do not all point in the same direction. Instead, they indicate that facial expressions can be clustered together by meaning. For instance, smiles often mean happiness, but they can also mean nervousness or feigned happiness, depending on context. Her meta-analysis leads you to conclude that there must be other relevant factors that demonstrate a person’s emotions besides facial movements alone.

3. However, in the absence of convergent validity (that is when results of different studies do not suggest that a particular facial expression means a particular emotion), it is incorrect to infer that “anything goes.” Variability does not mean randomness. It means that the field of inquiry has been too broad to detect enduring consistent principles of behaviour. Context is key.
4. Future research, as Feldman Barrett herself concludes, needs more focussed segmentation of contexts. AI algorithms of the future will need to be sensitive to multiple inputs. In the meantime, excellent ADR skills for interpreting facial expressions will continue to rely on alertness to every dimension of context that presents itself.

Genevieve: Thank you for helping me and other readers understand this research on interpreting facial expressions, Ruth. As you suggest, whenever we intervene as mediators, arbitrators, or investigators, we need to remain alert to the participants and the context. May I suggest that we also need a good dose of humility? Our conclusions about other people’s emotions are hypotheses at best and need to be tested, lest we be wrong. As an instructor said in a course I once took, the only way you can really know what somebody else is feeling is if (i) you ask them, (ii) they know the answer themselves, and (iii) they’re prepared to tell you! 🏠

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1. L. Feldman Barrett, R. Adolphs, S. Marcella, A. Martinez, S. Pollak, “Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements.” *Psychological Science in the Public Interest*, 2019, Vol 20(1), pp. 1 – 68.
 2. Feldman Barrett et al, *supra*, at p. 1
 3. *ibid*
 4. Reruns of the television series are available on Netflix.
 5. Corbin, R. “Reading Research: Bamboozled no More,” *Canadian Arbitration and Mediation Journal*, 2020, Vol 29 (1), pp. 8-10.
 6. If it were otherwise, that is, if multiple studies produced the same general conclusion, then “convergent validity” would apply. Each study, differently conducted, reinforces the conclusions of another and leads to increased confidence that the conclusion is true. Interested readers can learn more about the concept of convergent validity in K. Carlson and A. Herdman, “Understanding the Impact of Convergent Validity on Research Results” in *Organizational Research Methods*, 2012, Vol 15 (1), pp. 17-32.
 7. See, e.g. L. Zimmerman, “Deception Detection,” *APA Monitor*, 2016, Vol 47(3), online version at <https://www.apa.org/monitor/2016/03/deception>, accessed May 20, 2020. The studies summarized by the author are not restricted to facial expressions only, so query whether the addition of other cues helps or hurts the perceived linkage between facial expressions and lie-detection.
 8. Bayesian models are presented in academic literature in highly technical language of probabilistic inference and cognitive systems. The excitement surrounding them is their ability to express the human brain as a complex learning machine, without our being aware of such processes as we go about our everyday lives. Interested readers may consult, e.g., Love B.C., Jones M. (2012) Bayesian Learning. In: Seel N.M. (ed) *Encyclopedia of the Sciences of Learning*. Springer, Boston.

Domestic Violence Theories and Family Mediation: The Mediator's Dilemma

Family mediators, particularly those working with individuals who have experienced domestic violence, have a duty to follow current research and be familiar with the literature in their field. Why? To inform how they screen for and conduct individual mediations, to work with colleagues in developing best practices, and—importantly—to ensure that government and court programs are evidence based.

A long-term study conducted by C. Beck et al., published in 2011 for the National Institute of Justice (Beck, Walsh, Mechanic, Figueredo, & Mei-Juang, 2011) considered inter-partner abuse in mandatory mediation. The study spanned nearly a decade and involved 569 cases referred to mandatory mediation. Mediators identified inter-partner abuse in 59% of the referrals. The report also found that inter-partner abuse does not end at separation or divorce. In other words, domestic violence is a pervasive issue that mediators have to respond to.

I can attest to that. I work as a family mediator for a court-connected mediation program and conduct about 125 mediations per year. In about 30% of cases I find myself responding to a client who discloses some history of domestic violence.

The question for family mediators like me is whether mediation is appropriate in the context of domestic violence if a mediator is obligated to “do no harm.” At a first glance the solution is obvious: if a client reports a history of domestic violence one should not provide mediation services because the mediation process can put her in harm's way. In addition, the promises of mediation such as client self-determination and mediator neutrality cannot be met in circumstances of abuse.

But is it really that straight forward? The mediator's dilemma is that some clients may choose not to disclose their experiences of violence for reasons that are explored below. Yet a client's silence, does not relieve a mediator from the professional obligation to provide safety. In addition, couples whose inability to resolve conflict may escalate to violence could benefit from mediation as a way to find a resolution and learn new conflict resolution practices.

To help me understand better how to adjust my practice and to support my peers, I analyzed three years of data from over 800 mediation records and related it to the way we assess risk, gender, mediation outcomes, and time spent in mediation. I also conducted a literature search to

understand some of the thinking in the field and/or how domestic violence is conceived of and dealt with in various jurisdictions.

This article is my attempt to tie together the literature review I conducted about domestic violence to make sense of the data I was looking at. This is what I learned.

1. The Dominant Narrative about Family Mediation and Domestic Violence

Typically, mediators are trained to utilize an integrative mediation style (Kressel, Henderson, Reich, & Cohen, Winter 2012) to resolve conflicts by helping participants define the issue or issues between them, creating a mutual understanding of underlying needs and interests, and supporting parties to achieve a resolution that responds to their underlying needs or interests. Well established principles of participant self-determination, independence of the participants, confidentiality of the process, and neutrality of the mediator are the foundation of interest-based mediation and also apply to family mediation.

Yet these principles are often cited as contraindications for mediation when parties disclose a history of

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domestic violence. The thinking is that a victim of domestic violence cannot exercise self-determination because she has to be concerned about her safety. She does not have independence because domestic violence is a tool to achieve power and control and the confidentiality of the process means that there is a lack of accountability for decisions made in mediation that are unfavourable to the victim (Maxwell, 2017). Also, the neutrality of the mediator prevents the mediator from advocating for the victim.

In addition, safety concerns can create issues about the efficacy of the process; they indicate a power imbalance that will affect how the party perceived to have less power engages in the mediation process and represents her interests. The risk is that a power imbalance will result in a mediation agreement that does meet her needs and, worse, create the potential for future abuse, for example, by increasing access of the offender to the victim. A mediator may choose to intervene to balance the power between the parties with the intent to allow both parties to fully express their interest so they achieve a genuinely collaborative agreement, but the intervention can have negative consequences for the victim of domestic violence. The abuser may fear a loss of power and control as the victim finds her voice, and may feel a need to re-establish control through abuse outside of the mediation process.

2. Defining Domestic Violence

The consensus among researchers is clear. The time of separation is a particularly sensitive time for the victim of domestic violence. The report “What You Don’t Know Can Hurt You” (Cross, Crann, Mazzuocco, & Morton, 2018) states that:

The importance of maintaining a safety focus cannot be overstated. Ontario’s Domestic Violence Death Review consistently finds (2003–2016) that a history of domestic violence and pending or recent separation are the first and second highest risk factors for lethality in domestic homicides.

Domestic violence is commonly classified by the form of the abuse, i.e. physical, sexual, financial, emotional or psychological, and spiritual abuse between an offender and a victim that live in an intimate relationship. It can include isolation or intimidation (Calgary Women’s Emergency Shelter, 2007). The degree or intensity of the abuse can vary. Physical abuse can range from blocking a door to assault that results in death (CBC, 2020). Sexual abuse can range from unwanted touch to rape. Consequently, responses to domestic violence are designed to take the type and degree of the abuse into account. For example, an assault may result in criminal charges against the perpetra-

tor, whereas a push or shove will not. This perspective creates ethical challenges for assessors—at what point is domestic violence unacceptable?—and creates risks for the victim because it is generally accepted in research that domestic violence tends to escalate over time (Aris, 2018).

A common misperception is that victims of domestic violence are passive. When domestic violence is rooted in coercive control, victims tend to resist abuse as a matter of course, and perpetrators try to stop victims from resisting. Perpetrators commit abuse as a deliberate effort to control the victim. It is important to note that both victims and perpetrators strive to obscure violence for different reasons. Victims tend to obscure their resistance to domestic violence to maintain their safety. Perpetrators tend to disguise the abuse to prevent being held accountable for their actions. For these reasons, observers may not be necessarily aware of the abuse (Alberta Council of Women’s Shelters, n.d.).

Jennifer Lawson, in her article “Sociological Theories of Intimate Partner Violence” (Lawson, 2012) explores and synthesizes feminist and family violence theorists’ perspectives on intimate partner violence. From a feminist theoretical point of view, intimate partner violence is about patriarchal domination and can only be understood from a gender-informed lens. Intimate partner violence is gender asymmetrical; abuse is committed by men against women. From a family violence theorists’ point of view, intimate partner violence is gender symmetrical, both parties perpetrate abuse, and the violence has conflict-based root causes.

Lawson also points to integrative theorists such as

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Michael Johnson who developed a typology of intimate partner violence that is inclusive of both family theories as well as feminist theories (Johnson, 2008). Johnson refers to *situational couple violence* – rooted in conflict between the parties (gender symmetrical), *intimate terrorism* – rooted in gender roles and concepts of control and domination (gender asymmetrical), *violent resistance* – violence utilized in response to intimate terrorism, and *mutual violent control* – both partners use violence to control each other. It is important to note that it is the root cause and not the degree of violence that matters in Johnson's typology. In a sense, Lawson lays out a conceptual framework or map to understand domestic violence theories (Table 1). The map suggests that mediation may be appropriate, with some accommodations, if the violence is rooted in conflict; and that mediation is not appropriate if the conflict is rooted in coercive control.

3. Screening for Domestic Violence and Coercive Control

The "Inventory of Promising Practices - Safety from Domestic Violence" (Alberta Council of Women's Shelters, n.d.), published with funding from Justice and Solicitor General Alberta, identifies risk assessment as:

...essential in establishing the safety of women and

children fleeing violence: it helps determine the risk of re-assault and/or femicide, and helps survivors and service providers collaborate to manage specific risks.

Existing approaches to screening share a common goal, to prevent harm. Secondly, some screening approaches increase accountability, transparency, consistency for assessors, and attempt to protect the rights of the alleged perpetrator. General risk factors include a history of violence or abusive behaviour towards family members and intimate partners, escalation of violence, previous criminality, substance abuse problems, mental health problems, relationship problems, and attitudes that support violence towards women. Victim-focussed risk factors include a victim's concern about future violence, having a biological child with a different partner, a history of assault while pregnant, and barriers to accessing supports (Cross, Crann, Mazzuocco, & Morton, 2018).

Screening approaches can be divided into three broad categories, (i) experienced assessors conducting informal interviews with alleged perpetrators and, sometimes, victims, (ii) clinical models concerned about mental health factors that may be the underlying causes of domestic violence occurring, and (iii) actuarial approaches considering risk factors to predict if domestic violence is likely to occur.



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Research shows that the most accurate assessments include both the offender and victim responses. An important consideration is that non-structured approaches and informal interviews even by an experienced assessor, for example, a family mediator, are considered to be not significantly better than chance at predicting future violence.

If there is a disclosure of domestic violence, mediators also need to be aware of any personal bias that may lead them to judge a client's claim of being a victim of domestic violence as a strategy to influence the mediator rather than a truthful statement. For screening to be accurate and effective, mediators need to be familiar with screening approaches and have a minimal level of understanding of domestic violence.

Applying the Literature: Accommodations for Mediations Involving Domestic Violence

As a result of what I learned from the literature review, I adapted the way I practise family mediation, where possible. Beyond my personal adaptations, some of what I learned could change the way mediation programs are designed. The suggestions below are meant to be a starting point for mediators to consider for their practices and discuss with their clients before entering into mediation.

1. Family mediators and family mediation programs are faced with the decision of if and how to proceed when they become aware of domestic violence. Restorative justice programs require an offender to admit to and take responsibility for their acts. Similarly, in circumstances where clients disclosed a history of domestic violence, mediation should only proceed if the perpetrator admits to the violence and the question of whether domestic violence occurred is not itself an issue to be mediated.
2. If a mediator decides to proceed with mediation because she has determined that the conflict between the parties is rooted in an escalation of the conflict rather than coercive control, the next step is to adapt the process with the intent to increase safety for the parties, to manage the power balance between the parties, and to support self-determination of the victim of domestic violence. It is important to recognize that clients must be able to predict accurately the level of risk the mediation process will expose them to. For that reason, safety planning should always be developed with the clients. An additional, equally important consideration is the safety of the mediator during the mediation process.
3. Accommodations to support the safety of the clients should be part of a comprehensive review of identified risk factors during the screening process. Minimizing contact between the parties can include the use of caucusing or shuttle mediation with staggered arrival and

departure times or the use of online or phone mediation processes. Also, during the mediation process, the mediator can plan to increase safety by choosing a time of day when other people are nearby and placement of the victim during mediation sessions near available exits. It is important to consider that there will be contact between the clients at some point and that any escalation during the mediation that remains unresolved is likely to increase the risk for the victim of domestic violence at a future contact between the clients.

4. Interventions a mediator can use to balance power during mediation include exploring alternatives to mediation with both the victim and the perpetrator of domestic violence, establishing ground rules and, established separately with the victim, a comprehensive safety plan. A mediator needs to understand and be aware of how power and control are expressed by the perpetrator. These behaviours are often perceived as threatening only in the context of the relationship between the parties. This information can be provided by the victim before the mediation process and should be included in a safety plan. During the mediation process, the mediator needs to be attuned to and able to respond promptly to expressions of intimidation.
5. Mediation can only be successful if both clients can exercise self-determination and make independent decisions. In the context of domestic violence and the associated power imbalance, this can be achieved by delaying finalizing agreements between the parties until both parties have the opportunity to review the agreement with access to resources such as professional or legal advice. Additionally, agreements can be formalized in different ways so that they become binding on both parties. Agreements can also include Ulysses type clauses that come into effect if certain conditions have been met. For example, if a domestic violence incident occurs in the future, the agreement is no longer valid. Finally, agreements should stipulate strategies to mitigate risk factors. An agreement could include requirements to participate in therapy or treatment before increased contact, or non-supervised contact, is possible.
6. Additional participants in the mediation process can increase safety during the mediation in different ways. The presence of a co-mediator, emotional supports, allies, advocates, and legal counsel can play a significant role in changing the mediation environment in such a way that a perpetrator can no longer obscure intimidation. A pre-requisite condition is that the parties agree to modify the mediation process accordingly and have a shared understanding of the roles that additional

participants would have during the mediation process.

Path Forward

Wider acceptance of standards and policies for family mediators would significantly improve the availability of experienced practitioners to victims of domestic violence. The *BC Family Law Act* (Sec 8) requires family dispute resolution professionals including family mediators to assess the safety of a party or family member and their ability to participate in mediation, and the *Family Law Act Regulation* (Sec 4 (2) d iv) requires that a mediator must have some family violence training to mediate family disputes.

Whether or not there is a legislated requirement, all accreditation processes for family mediators must require specific training to increase awareness about domestic violence and screening methodologies. Examples of certifying organizations that require such training are Family Mediation Canada (2004) and the Ontario Association for Family Mediation (2016). Examples of institutions that provide training are the Justice Institute of BC and the Continuing Legal Education Society of BC.

Many organizations that support victims of domestic violence generally have outreach programs to increase awareness. Currently, it is up to individual mediators to initiate contact with these organizations and develop their own practice modifications. It is important to recognize that partnerships between organizations that support victims of domestic violence and mediators, mediation programs, and the organizations that represent mediators will result in enhanced services for victims of domestic violence. 🏠

Table 1: Map of Domestic Violence Theories

Family Violence Theories (FVT)	Integrated Theories
Gender symmetry	Typology of domestic violence based on the purpose of the violence (M. Johnson)
Rooted in conflict	Common Couple's Violence (conflict)
Based on general population studies	
Feminist Theories	Integrated Theories
Gender asymmetry	Intimate Terrorism (dominance)
Rooted in dominance and control	Violent Response (response to intimate terrorism)
Data comes from shelters, police, emergency rooms	Mutual Violent Control (dominance by both parties)

Based on Jennifer Lawson, Sociological Theories of Intimate Partner Violence (2012)

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Review:

Comparative Effectiveness of Dispute Resolution Processes in Family Law Conflicts

By Paul Godin, C.Med

Paetsch JJ, Bertrand LD, Boyd J-PE. Boyd, An evaluation of the cost of family law disputes: Measuring the cost implication of various dispute resolution methods <https://www.cfcj-fcjc.org/sites/default/files/docs/Cost-Implication-of-Family-Law-Disputes.pdf>

The Question: What Dispute Resolution Process Provides the Best Value in Family Law Conflicts?

A 2017 study compared the costs, effectiveness, and value of the four main methods of resolving family law disputes: collaborative settlement processes, mediation, arbitration and litigation.¹ To quantify the value received by clients, the study measured the social, environmental, and economic impact of the use of each route, producing a figure called the “social return on investment” (SROI).

The Conclusion

Mediation and collaborative law processes provide significantly higher value to parties than arbitration and litigation in most cases. There was higher value received from mediation and collaborative lawyering in the absolute sense than for litigation, and up to twenty-eight times more value received per dollar spent. Collaborative law and mediation produced client satisfaction levels twice that of litigation.

Research Methodology

The study is based on surveys of 166 family law lawyers across four provinces (Alberta, BC, Nova Scotia and Ontario). The survey data was compiled by self-reporting from the lawyers surveyed, so it does not give us client views, except indirectly through the lens of their lawyers. Even through that lens, the results paint a very clear picture about costs and benefits of various dispute resolution choices.

The surveys asked questions about:

- Average costs of the total bill to their clients for low and high conflict disputes
- Their preferences for using the procedures
- Whether the results achieved were in their client’s interests
- Whether the results achieved were in the interests of their client’s children
- Whether clients were satisfied with the results achieved
- Whether the process makes future cooperation between the parties easier
- Speed and efficiency of the process
- Cost-effectiveness
- Effectiveness for complex issues
- Suitability for high conflict disputes
- Ease of getting adequate disclosure.

Research Findings

What process where?

Lawyers from Nova Scotia reported using *collaboration* the most (86 per cent), compared to Ontario with 48 per cent, Alberta with 63 per cent and British Columbia with 68 per cent.

Mediation was most used by lawyers from Ontario (89 per cent), followed by British Columbia (87 per cent) and Alberta (77 per cent) with Nova Scotia reporting the lowest mediation usage (61.5 per cent). Note that Nova Scotia also had the highest resort to litigation.

Arbitration was the least-used procedure of the four, with Alberta at 39 per cent, Ontario at 28 per cent, BC at 23 per cent and Nova Scotia only 8 per cent.

Litigation was most used by lawyers in Nova Scotia (100 per cent), followed by B.C. (92 per cent), Alberta (89 per cent) and Ontario with the lowest usage at 76 per cent.

How long and how much?

The table below identifies the typical durations of disputes, with the range of durations, as well as the typical bills for legal fees, with the range seen for those. The average billings set out below do not include the cost of disbursements or other professionals retained (like financial experts, or child specialists), just lawyers’ fees.

PROCESS	Typical time required for low-conflict disputes	Typical time required for high-conflict disputes	Average bill for low-conflict disputes	Average bill for high-conflict dispute
Collaboration	5 months (range 1-18)	14.8 months (range 2-38)	\$6,269 (range 1-30K)	\$25,110 (range 5-100K)
Mediation	4.8 months (range 1-24)	13.7 months (range 1-60)	\$6,345 (range 630-30K)	\$31,140 (range 630-250K)
Arbitration	6.6 months (range 1-15)	14.8 months (range 1-24)	\$12,328 (range 2.5-50K)	\$40,107 (range 7-100K)
Litigation	10.8 months (range 1-36)	27.7 months (range 6-80)	\$12,395 (range 2-75K)	\$40,107 (range 5-625K)

Mediators’ fees cost an average of \$376 per hour. Interestingly, in cases using mediators, the average cost of the mediator is \$4,423 plus an average cost for additional experts of \$5,664 for a total average disbursement of \$10,087 above and beyond legal fees.

For litigation, the average cost of other professionals is

\$9,353 but parties may or may not be required to use a mediator anyway, depending on the jurisdiction. The survey suggests that collaboration can have much higher average costs for “other professionals,” depending on the case and the lawyer’s preferences. Using a financial specialist and a child specialist averages more than \$13,000, for example. Overall, mediation and collaboration appear to have significantly lower total costs to parties for both low- and high-conflict family law disputes.

Usefulness and value of each process

In addition to cost-effectiveness, the survey measured the usefulness and value of each process in terms of various factors: how well the results met the client’s and their children’s interests; client satisfaction; speed and efficiency; and effect on future cooperation/relationship between the parties.

For low-conflict disputes, mediation was considered the most useful process, followed closely by collaboration. Mediation was seen as “very useful” by 88 per cent of respondents and somewhat useful by a further 10 per cent, whereas litigation was seen as “very useful” by only 9.5 per cent (and “not useful” by a whopping 44 per cent).

For high-conflict disputes, litigation was considered by the lawyers to be the most useful process in terms of results, with 54 per cent ranking it as “very useful” and 41 per cent as “somewhat useful.” Mediation was seen as “very useful” by 14 per cent and as somewhat useful by a further 48 per cent in high conflict cases. Collaboration ranked lowest in usefulness for high conflict disputes.

Mediation ranked highest as being useful for three specific types of dispute: a) care of children and parenting; b) child or spousal support; and c) division of property and debt. Approximately two-thirds of lawyers found mediation “very useful” for those disputes (and more than 96 per cent found mediation to be “very useful” or “somewhat useful”). By contrast, litigation was only seen as “very useful” by an average of 34 per cent of respondents across those three categories.

Litigation was seen as most useful for questions related to urgent risk of harm to people or property, and substance-abuse situations, but got very low results for the impact on future cooperation between parties.

In terms of meeting the goals and concerns of clients and their children, and generating satisfaction, the results are stark. The table below shows what percentage of respondents “strongly agree” with the listed views.

PROCESS	Results are in client's interests	Results are in client's children's interests	Clients are satisfied	Makes future cooperation easier	Process is fast and efficient	Process is cost-effective
Collaboration	94%	99%	94%	93%	62%	68%
Mediation	90%	85%	81%	83%	69%	78%
Arbitration	34%	39%	58%	19%	69%	61%
Litigation	31%	30%	41%	6%	9%	5%

Collaboration and mediation both ranked highly in terms of generating good results in a timely and cost-effective way. Collaboration produced slightly more satisfactory results than mediation, but mediation was seen as slightly more time- and cost-effective. Litigation ranked lowest in all categories.

While not surveyed, the choice of process is likely related to the degree of conflict in the case on average (i.e., parties willing to voluntarily choose collaboration are likely lower-conflict than those choosing mediation, who are likely lower-conflict than those opting for pure litigation). In high-conflict cases, parties might resist using collaboration or mediation at all, or engage in such processes in fundamentally more adversarial ways, forcing the issues into litigation on one or both sides.

Return on Investment

The study measured a) the average cost of each process to the parties and b) the overall **social return on investment (SROI)** for that process (i.e., the value received by the parties). This measure allows direct comparison of the value per dollar for each process. The authors assigned a dollar value to certain non-monetary outcomes, such as timeliness, degree of stress, fairness, satisfaction, reduction of conflict, and legal cost savings for the family.

Value Received Per Dollar of Cost				
	Collaboration	Mediation	Arbitration	Litigation
Low Conflict Cases	\$2.06	\$2.78	\$0.57	\$0.39
High Conflict Cases	\$1.12	\$1.00	\$0.38	\$0.04

Value Received Relative to Litigation				
	Collaboration	Mediation	Arbitration	Litigation
Low Conflict Cases	5.4x more	7.1x more	1.5x more	1
High Conflict Cases	28x more	25x more	9.5x more	1

For low-conflict cases, mediation generates the greatest value per dollar spent (\$2.78), with litigation producing only \$0.39 in value received. For high-conflict cases, collaborative law generates the greatest value per dollar spent (\$1.12), with litigation producing only 4 cents in value received. Mediation generated 7x more value per dollar than litigation in low conflict cases, and 25x more value than litigation in high conflict cases. That being said, when there is truly high conflict, one or both parties may have no choice but to resort to litigation to achieve a result.

Commentary and Conclusions

One area of uncertainty in the study is around the definition of collaboration. The survey asked lawyers about their use of “collaborative settlement processes,” so respondents were self-defining what that phrase meant. From

the results, it appears likely that the meaning of “collaboration” ranged from strictly defined “collaborative law” approaches through to cooperative approaches used by lawyers (who were not “collaborative law” practitioners) on some or many of their files.

One limit of this study is its reliance on lawyers’ impressions of value received by their clients as opposed to direct client feedback. To their credit, the authors initially tried to get direct client feedback as well, but were unable to get sufficient responses from parties to create a meaningful sample. That being said, several other mediation studies² show that client satisfaction levels with mediation tend to be either equal to or slightly better than lawyers’ estimations, so this study is likely a good approximation.

Based on this valuable study, parties and their lawyers should strongly consider using mediation and collaborative law to resolve most family law disputes, even in high conflict cases. It is recognized, however, that some issues may require the intervention of the courts (e.g.,

when safety is the issue or when parties are fully locked in). Though not cost-effective or value-effective, the court may be the only route that can provide a binding answer in such cases.

Mediation and collaborative approaches are both significantly more time-effective and cost-effective than litigation, and far more likely to achieve results that are in the parties’ interests and those of their children. These methods also minimize relationship damage, maximizing the chance for productive cooperation in the future. When coordinated parenting is an issue, that cooperation alone can be incredibly valuable to parties. 🏠

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- 1 Paetsch et al. published their comparative study with the Canadian Research Institute for Law and the Family. Regrettably, after three decades of conducting research the institute closed for want of sufficient funding.
 - 2 See Hann, R. G., C. Baar, L. Axon, S. Binnie, and F. Zemans. 2001. Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final report—the first 23 months. Toronto: Queens Printer, p. 96-97; Rooke, J., 2009. Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen’s Bench of Alberta, unpublished thesis, p. 631, 716.

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Administrative Justice in Ontario: A Cautionary Tale

If a person residing in Canada has filed a complaint about their human rights, if they have a disagreement with their landlord or tenant, or if they think their employer has not paid them their proper wages, there's a very good chance their claim will be mediated or heard and decided by a member of a tribunal. Administrative justice—the use of specialized tribunals to determine people's rights and responsibilities—is well established in Canada, and as Professor Ron Ellis has said, “Administrative justice *is* justice.” As such, and like other credible systems of dispute resolution, it needs to be adequately resourced and perceived as independent.

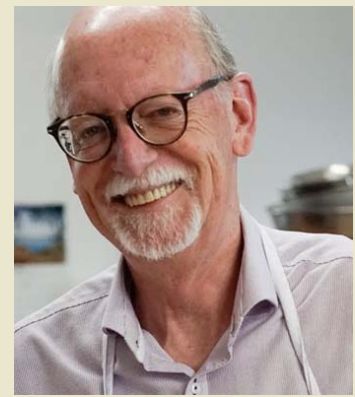
As someone who served as counsel to an administrative tribunal for over 20 years, I know firsthand how important resources and independence are to a stable, well-functioning organization. Partisan considerations should not be the dictating force that populates administrative tribunals, and members should not have their appointments revoked merely because a government changes, whether at a provincial or a federal level.

In Ontario, as in other Canadian jurisdictions, more citizens have their disputes determined by administrative tribunals than ever see the inside of a court room. Ontario's tribunal system—and there are over 100 different adjudicative agencies, boards, commissions and regulators—is a vital part of the justice community. But it is often overlooked in discussions of provincial responsibility. The provincial government is mandated to appoint decision makers to tribunals. While decisions made by judges appear in newspapers and other media reports, the day-to-day decision-making of people's everyday lives occurs in tribunals and is rarely the subject of a media report. Mediators and adjudicators “in the

trenches” are really some of Ontario's unsung heroes.

Unfortunately, the stability of Ontario's system of administrative justice is on shaky ground. Many decision makers—professionals well versed in their subject matter and committed to helping citizens resolve their disputes (and some of those disputes are with government offices or agencies)—have been removed from their positions and vacancies are not being filled in a timely manner.

The Advocates' Society identifies independent institutions as crucial to a robust democracy.¹ In the fall of 2019, it published a letter it had addressed to the Attorney General of Ontario, raising concerns with a proposal to alter the way judges are appointed and warning that judicial independence and the arm's-length status of the court system was imperiled.² Similar concerns apply to the tribunal community. Delays in filling the spots resulting from tribunal appointments that were revoked or not renewed has resulted in significant tribunal backlogs and the postponement of hearings for lack of resources³. One agency, the Human Rights Tribunal of Ontario (HRTO), has posted a warning



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on its website, alerting parties that their matters will not be adjudicated any time soon, given the tribunal's vacant decision-maker positions. The HRTO at one time had more than twenty full-time decision makers hearing cases. That number has dropped since June 2018 to only twelve at the beginning of this year. A recent story on the CBC reported that, similarly, Ontario's Landlord and Tenant Board has been stripped of half its adjudicators. Both tenants and landlords are alarmed—at the delay, the uncertainty, and the literal cost of trying to do business in such a climate.

Moreover, during the past year, the government appointed decision-makers to a variety of tribunals with given terms that expired on December 31, 2019. Terms of less than one year do not give adjudicators adequate time to learn the culture of their tribunal and its mandate, offer no career stability, and negatively impact consistency, predictability and reliability in a decision-mak-

ing institution. It is unclear from the government's websites whether these recent appointees have had their tenure extended. Such uncertainty would never pass muster in a standard employment relationship. It can be argued that this might make it difficult for these decision-makers to make independent (free of bias or influence), impartial rulings for the parties appearing before them, when their own status is so tenuous. If the individual adjudicators are not seen to be independent, the reputation of the tribunal itself is in jeopardy.

The current Ontario government, like many of its predecessors, relies for guidance on Agencies and Appointments Directive to assist in a measured, predictable process for appointing decision-makers to its tribunals. The directive sets out the rules and accountability framework for provincial agencies, short-term advisory bodies and special advisors, as well as guidance for government appointments.

An update to the Appointments Directive, effective November 1, 2019, introduced several more troubling changes to the process.

The original directive provided for a ten-year rule for the maximum length of appointments, framed as a two-year appointment, followed by a three-year renewal and a five-year renewal, subject only to the recommendation of a tribunal's head (often called a Chair). The directive has been tweaked to insert the words "up to" before the 2-, 3- and 5-year time frames meaning that shorter term lengths are possible and have in fact been made.


These short-term appointments to adjudicative tribunals "fly under the radar" because their candidacy is not vetted by any standing committee at the Legislature. Indeed, the government amended adjudicative tribunals legislation to allow itself to make these short-term appointments without traditional multi-party scrutiny. One might venture to say that the word "ac-

countability" has effectively been removed from the *Adjudicative Tribunals Accountability, Governance and Appointments Act*.

The lack of a predictable and transparent appointment and re-appointment process significantly undermines adjudicator independence, much like tampering with the appointment of judges to our courts may jeopardize the perception of impartiality. This is particularly a problem for those tribunals at which the government appears as a party—where claimants are up against government officials who may have ruled against them, such as for social or disability benefits, employment standards or environmental inspections.

The amendments to the Appointments Directive overall reduce foreseeability of employment for decision makers and as a result potentially undermine the independence of these professional decision makers and—consequently—the independence of the tribunal as an institution. Adjudicators are professional decision-makers, steeped in their respective fields of knowledge, trained to preside over contentious, sometimes volatile, proceed-

ings, acknowledged for their ability to make difficult rulings and articulate them in written decisions for the benefit of the parties and the administration of justice.

This is a description of the lay of the adjudicative land in Canada's most populous province. No doubt, aspects of the narrative will resonate with readers across the country, be they private practitioners or tribunal mediators and decision-makers. The administrative justice system may not be the judiciary, but parties mediating or litigating matters before adjudicative agencies should have timely access to justice. They should also always be confident that the persons leading their settlement discussions or hearing their disputes are independent, impartial professionals knowledgeable in their field and secure in their tenure. 

- 1 [Judicial Independence Defending an Honoured Principle in a New Age](#)
- 2 Letter dated March 9, 2020, The Advocates' Society
- 3 As of January 6, 2020, the Public Appointments Secretariat website reports "there are 348 vacant positions right now," despite a number of appointments that took effect in early January 2020. That number vastly understates actual need. For example, it does not include any vacancies at the Human Rights Tribunal or the Landlord and Tenant Board which both clearly require more members.

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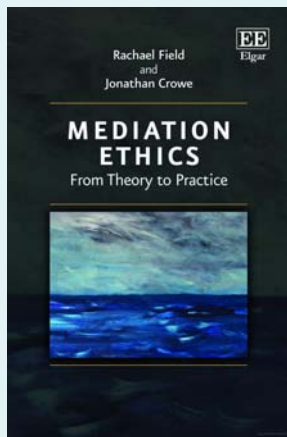
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Mediation Ethics: From Theory to Practice

Rachael Field and Jonathan Crowe,
Edward Elgar Publishing—May 7, 2020

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Reviewed by: Kathryn Munn, C.Arb, C.Med

Mediation Ethics: From Theory to Practice is a clear, well-reasoned, and thoroughly enjoyable book. As advertised in the title, the authors thoughtfully explore the current theory and then propose practical ideas for change. But a warning—reading this book may cause your ideas of mediation ethics to shift, and possibly even change permanently. Mine did.

It was a surprise and a pleasure to read a mediation book that fundamentally challenges the current list of generally-accepted rules. I admit that I was skeptical at first. Although “let’s keep doing it because we’ve always done it that way” is not the ideal way to operate, I am just as fearful as most other people to throw out the old. As a mediator and arbitrator for over 25 years with a background in law practice, I read *Mediation Ethics* through the eyes of a mediation practitioner and a teacher of mediators. I also brought my experience on the ADR Institute of Canada’s Ethics and Professional Practice Committee where, in the last couple of years, I’ve participated as a representative of the ADR Institute of Ontario.

Authors Field and Crowe are both professors in the Faculty of Law at Bond University in Australia. Following the usual roadmap of academic writing, they start their book with an analysis of current mediation models and highlight facilitative mediation as the “vast middle of the mediation movement” which has been used to judge the other methods of mediation. They analyse in detail the current ethical framework for mediators, found mainly in the form of standards or rules. Their focus is Western countries such as Australia, the United States, the United Kingdom, and Canada.

By this point, I was already convinced about the value of this book. The thorough canvas of existing literature since the 1970s and the comparisons made across various jurisdictions build readers’ understanding about where we have been and give readers who might be less familiar with the background, enough information to follow the authors as they describe their recommended changes.

Field and Crowe expose our current and logic-defying challenges



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with the key concepts of mediator neutrality, impartiality, and party self-determination. They do a deep dive into the ideas of mediator neutrality and mediator impartiality, which may in theory be distinguishable but in practice are indistinguishable.

They are careful to point out that their suggestions for change are not premised on bad mediation practice—what mediators are doing now is not bad or wrong—but they contend that the existing ethics framework of standards or rules is not reflected in current mediation practice, nor is it helpful to mediators.

Spoiler alert: The change proposed by the authors is that the core of mediation ethics should be mediator support for the parties’ achievement of genuine self-determination. In short, let us stop trying to parse “neutral” and “impartial” or layering them with new meanings. Toss out neutrality as an

ethical principle; use it only as one of the tools or techniques to achieve self-determination.

In order to achieve that focus on self-determination, the authors propose that a contextual ethical method replace the existing standards and rules, and they offer four guidelines for ethical mediation practice. First of all, party self-determination is paramount; it is a fiduciary obligation of the mediator. The second guideline is the other side of the same coin: the ethical mediator never imposes a decision on the parties. Third, informed consent by the parties is the measure of ethical action by mediators. Finally, the mediator “embraces the multi-dimensional nature of the mediation environment,” perceives the parties as individuals in their unique context and must choose ethical action that is “relational and caring.”

In discussing their contextual method, the authors touch on the need to support it with education and with the development of “reflexive” practice by mediators. My Oxford dictionary defines “reflexive” as “characterized by reflection or serious thought,” or, in another definition, as a theory “that

takes account of itself, or especially of the effect of the personality or presence of the researcher on what is being investigated.” Their proposed framework of contextual ethics is not the world of “anything goes.” Rather, because of its focus on the achievement of party self-determination, it is principled, practical, and holds mediators accountable.

The authors frequently provide examples from various studies of mediators to illustrate the application of their concepts. For example, after describing their new approach and the four guidelines, they described three case studies of very frequent and challenging ethical decisions for mediators: whether to go ahead with settlement when the party pushing for settlement is negotiating at a disadvantage because of factors like lack of legal advice; whether to offer an opinion about outcomes; and whether to assist the parties to generate options. The authors provided a practical analysis of the application of their proposed new method for those three situations, ones which likely have been encountered by every mediator.

Mediation Ethics: From

Theory to Practice is available in paper and electronic format. I read the offline e-book version in which each chapter is downloaded as a separate file. One suggestion I have about that format is that it would be easier to read the chapters in order if the chapter number was included with the name of the chapter title on each file. This is a minor problem and easily remedied in future editions.

In the way that the 1976 Pound conference in the United States was a turning point in the development of mediation in Western legal cultures, this book has the potential to be as important in the development of mediation ethics. The authors convinced me that their new paradigm “will enable the achievement of authentic party self-determination and assure the credibility and legitimacy of the mediation process into the future.”

Have I piqued your interest?

Because of its hands-on style, every mediator and mediation student should read this book. It is a useful guide for professionals who support or advise people who attend mediations. This includes lawyers, accountants, social workers, counsellors, and family therapists.

Another group of people who will find this book helpful are those who develop and administer processes for complaints and discipline for members of mediator associations. Finally, as mediators gradually gain professional status in Western legal systems, this book is a must-read for those who are developing the criteria for ethical mediation practice.

In their final sentence the authors offered their vision for the future:

It is our hope that mediators around the world will find the ethical paradigm developed in this book a workable and inspiring model for their professional practice.

I, for one, am sure I will. 🏠

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Mediation of Investment Treaty Disputes: Problems and Prescriptions

Introduction

In this world of globalisation, increased transboundary trade and investment make it essential for nations to promote their bilateral relationships. To foster development that is sustainable, governments try to attract foreign investment by incentivizing investors with tax benefits or lowering the restrictions on foreign direct investment (FDI).

When disputes or misunderstandings arise out of bilateral investment treaties (BITs), relations between nations can be strained, so states put in a lot of effort into resolving these disputes. More often than not, however, instead of reconciliation, the differences between countries are widened. One of the reasons for this is that the dispute resolution method used—primarily binding arbitration—lacks efficiency and competence, and

promotes demands for monetary compensation or retribution rather than reconciliation.

The use of Investor-State Dispute Settlement (ISDS), a dispute settlement system between nations which primarily uses arbitration, has worsened the problem. Arbitration is mostly governed by BITs and held at a tribunal chosen by the parties. Although these tribunals were not seen as a problem when they were established, they have proved to be a menace in the long run.

In this comment, I will analyze the deficiencies of the investment arbitration tribunals and argue that mediation has the upper hand as a dispute resolution mechanism. Further, I will also investigate how things have developed in favor of mediation in recent times.

ISDS as a bone of contention

ISDS is a recent development, with the first case being just 30 years old, and less than 50 lawsuits having been filed before 2000.¹ Under this mechanism, the investor is allowed to sue the host state in a binding arbitration tribunal if any of the changes in laws or regulations introduced by the host state tend to go against their interests.² In some instances, investors are also entitled to claim anticipated profits and potential increases to their investment.³ These entitlements are unlike anything available in a judicial process and grant investors rights not otherwise available in the field of international law. Moreover, such entitlements are enforceable against host states.⁴

The main aim of ISDS was to protect foreign investor in the host state because of the lack of international laws for the same.⁵ The idea was to save the investor from expropriation of their property on the grounds of public welfare. However, these are not the aims that

arbitration tribunals foster. ISDS has turned into a capricious, powerful legal weapon that creates a business-friendly environment for investors at the expense of national interests.⁶

ISDS was questioned recently by the public in light of the Trans-Pacific Partnership (TPP) which includes less-developed nations who cannot bear the heavy monetary burdens that ISDS may impose. Moreover, the entitlements available to foreign investors are not reciprocal; ISDS prevents governments from suing the investors except in the domestic courts.⁷ Concerns about ISDS have also been raised in relation to the Transatlantic Trade and Investment Partnership (TTIP), with the EU worrying about threats to democracy and stagnant policy innovation,⁸ and in relation to the Comprehensive and Economic Trade Agreement (CETA). The general concerns about ISDS are the lack of transparency and interest-based mechanism,⁹ the absence of an appeal against

arbitral awards, and the need for more accountability by arbitrators who are



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essentially private judges. Because of these concerns, many nations have ended their Bilateral Investment Treaties.¹⁰ EU members in 2019 pulled out of around 200 treaties with each other.¹¹ Italy left the Energy Charter Treaty to prevent the solar power investors from suing the state for a “Spalma Incentive” decree.¹² The UK has started an online petition for a fight against ISDS and Corporate Courts,¹³ which exclusively hear business and commercial disputes.

It must be noted that the root of the problem with ISDS is the binding nature of the arbitration clause and the bias of the panel members. Other problems with arbitration are its combative nature and the huge settlements that are awarded. In a 2011 survey by Chartered Institute of Arbitrators, out of 254 cases during 1991–2000, the duration of an average arbitration was 17 to 20 months and the average award was around 2 million USD.¹⁴ In *Slovakia v. Achemea*, €29.5 million assets of Slovakia were seized abroad because it was hesitant to pay a €22 million arbitral award.¹⁵ So, arbitration does not stop with the infliction of a wound; it adds salt to it. Interestingly, in the *Slovakia* case, the par-

ties pressed for arbitration even though mediation was an option for them.

Against this backdrop, I will now discuss the various deficiencies associated with investment arbitration that is the favoured mechanism to resolve disputes between a host state and its investors.

Criticisms of investment arbitration

The first problem with investment arbitration is the considerable cost associated with it¹⁶ in terms of both arbitral awards and procedural cost. Looking at it from the perspective of the losing party, the lowest amount that was ever awarded in the history of International Centre for Settlement of Investment Disputes (ICSID) is US \$460,000¹⁷ and the highest award is US \$1,769,625,000.¹⁸ Further, the costs involved in the course of the proceedings are also high. Both parties have to fly to the seat of the tribunal.

The second problem associated with investment arbitration is the duration of the proceedings. This is significant because arbitration is supposed to be a time-saving method of dispute resolution.¹⁹ However, one study concluded that proceedings under the ICSID’s rules

take an average of 3.6 years for completion.²⁰ The length of time brings into question both the efficiency of the process and its legitimacy.²¹

The third problem is the decision regarding jurisdiction. The “competence-competence” doctrine states that the jurisdiction of the arbitration is to be decided by the arbitrators.²² In the initial 26 years of ICSID, no arbitral tribunal ever denied itself jurisdiction,²³ suggesting that in deciding the question arbitrators were governed by self-interest.²⁴

The foregoing criticisms are not exclusive to investment arbitration; they extend to commercial arbitration as well, but some problems are exclusive to investment arbitration.

In the current system of investment arbitration, the sovereignty of a state is undermined. With investors using ISDS to place restrictions on the implementation of policies in health, education and other fields, states have little or no room for improvement.²⁵ The fear of facing huge arbitration cost, states are hesitant to introduce a law that works for the welfare of the population but at the same time reduces the profits of the investors. Lack of transparency is another issue. Arbitration is mainly chosen for its confidential nature, but when the issue at hand is of public interest, and taxpayers’ money is involved, there is a case for a greater transparency and more open decisions.²⁶ The absence of a uniform framework for computing damages is another problem. Tribunals choose their own valuation method, and this results in contradictory decisions.

Cooling off period

A cooling-off period is a specific period which the parties have to go through before they can initiate arbitral proceedings, and almost 90% of the treaties²⁷ prescribe one. This is beneficial for both parties, as the dispute might terminate in this phase and parties save the cost of the arbitration process.²⁸

As the majority of BITs,²⁹ Model



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BITs,³⁰ Multilateral Treaties³¹ have the cooling-off period, mediation has always been a dispute resolution option³², but it is not given due importance. Even Article 33 of the UN Charter favours a cooling off period in treaty.³³

A cooling-off period is generally six months, but it can be as short as 60 days³⁴ or as long as 24 months.³⁵ This period allows the parties to negotiate, but they never take advantage of it and only settle once the arbitration is underway.³⁶ ICSID statistics show that 24% of cases during 1972–2012 were settled during the arbitration phase.³⁷

Clearly, mediation is still not considered a “mainstream” dispute resolution method. The underutilisation of the cooling-off period, lack of access and importance given to mediation, small number of parties resorting to mediation, and majority choice of investment arbitration all prove the point while at the same time giving reason to resort to mediation.

The need for mediation

Investment arbitration has recently lost some of its shine owing to the criticism it has faced, so mediation may be the way

forward;³⁸ it offers inherent advantages over arbitration for resolving investor-state disputes.

Mediation is about facilitating dialogue among the parties so that they can reach a mutual agreement without a decision being imposed on them by a tribunal.³⁹ Mediation also helps in establishing trust and fostering mutual understanding. Unlike arbitration, the parties themselves solve the issues in mediation, which gives them control over the end-result⁴⁰ and more satisfaction.⁴¹ Mediation helps parties understand the underlying motives and the challenges regarding investment at issue.

As a non-adversarial process, mediation can have a wide array of outcomes, unlike arbitration. Further, it also helps in preserving relationships. As foreign investment is typically long term, keeping good relations goes a long way. There is no win-lose situation here because of the collaborative spirit of the method.

Gradually, investors and states will become aware of the positives of mediation. The progression will not be sudden—it might take some years—but as it takes place mediation will evolve

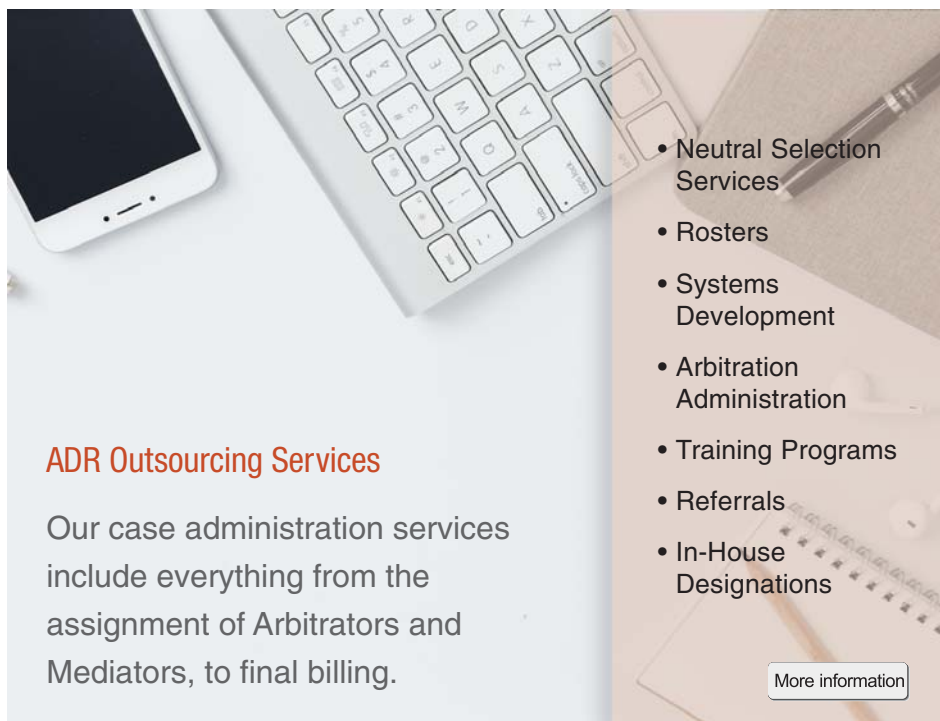
and improve its image as a way to resolve investment treaty disputes.

A general argument against mediation is that, unlike arbitration, it does not produce a binding outcome. But this objection can be overcome. Mediation can be made binding: in 15 ICSID cases, negotiated settlements were made into consent awards in order to make them enforceable under ICSID convention.⁴² Nothing is stopping the parties from doing the same after mediation. Once the terms have been agreed, an arbitrator can be appointed to frame the settlement as a consent award to make it binding under the ICSID or other type of *ad-hoc* award that might be binding under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The success rate of mediation is commendable; according to the statistical report of International Chamber of Commerce (ICC), in 2012, 16 of 21 cases (76%) filed under the International Chamber of Commerce, Alternate Dispute Resolution rules were settled by mediation.⁴³

Mediation has helped to resolve significant insolvency cases like Lehman Brothers and MF Holdings.⁴⁴ It could also be used to solve huge investment cases when the parties are not satisfied with the result of arbitration. Consider, for instance, the case of *Metalclad Corp. v. The United Mexico States*, where, even after winning \$17 million USD, CEO Grant Keser was dissatisfied with the process and wished that they had resorted to other options.⁴⁵

With the advantages of mediation over arbitration, we also need to know the reason for the shift towards arbitration from the court proceedings in the first place. Initially, the parties considered court proceedings as very formal and cumbersome. They required a process that was informal, interest-based, and friendly, while at the same time being enforceable. Arbitration seemed to be the best alternative.

However, over time, this infor-



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mal process became overburdened with rules and procedures that made it court-like in many aspects. Now, a shift towards mediation is sought. Critics fear that mediation might also succumb to this overburden. Many rules and conventions have been established recently,⁴⁶ but it is hard to conclusively evaluate their effect as to the regulation of mediation at this stage.

The way ahead

Considering the various advantages, parties and investors have realized how mediation can resolve the disputes and preserve business relationships at the same time. With new rules, agreements and conventions for mediation coming to the fore in the past decade, it is the right time to switch to mediation and give it a push.

The Singapore Mediation Convention is the latest development in the field of mediation. It was opened for membership in August 2019, with 46 nations signing the convention at the signing ceremony. The convention was drafted and signed by all the parties within three years. This reflects the urgency with which a protocol was required. Although the convention is primarily about commercial mediation, the principles can easily be applied to investor-state disputes.⁴⁷

The International Bar Association

(IBA) Rules for Investor-State Mediation are another crucial step ahead. With innovative solutions like Mediation Management Conference in Article 9,⁴⁸ all 12 articles assist in increasing the importance of mediation.


The "Guide on Investment Mediation" was approved at the Energy Charter Conference.⁴⁹ It specifically encourages the parties to take up voluntary mediation as one of the parts of the resolution process.

Another advantage that is often overlooked is that mediation encapsulates the culture of a place while resolving disputes, as many problems crop up from this issue. Mediators who understand the cultures of both countries help to bridge the gap between them.⁵⁰ Investment treaty signatories hail from entirely different cultures and do not account for the cultural considerations that parties may have. For example, the Japanese are very reluctant to proceed with litigation and arbitration as they prefer to harmonize and preserve relationships.⁵¹ Hence, it is crucial to understand the perspective of both the parties involved. Dispute resolution is more effective if the mediator understands the cultures of both parties. For some clients, it is necessary that the nuances of language and culture are well understood by the mediator.⁵²

In time, mediation will become an essential part of the dispute resolution process for investor-state disputes. The Singapore Mediation Convention and the IBA Rules now give it formal recognition, increasing the legitimacy of mediated outcomes and allowing people to have more faith in the process. This will help to increase awareness and correct the misconception that mediation is simply about "splitting the pie into two halves."⁵³

Conclusion

Arbitration has been the baton carrier for the settlement of investor-state disputes, but its use and its contrast with alternative methods have exposed numerous problems. As the number of contradictory arbitral decisions grows in the realm of investor-state arbitration, I predict that mediation will replace arbitration as the primary dispute resolution choice. Perhaps a hybrid process led by a single neutral like med-arb-med or arb-med will also find a place.

Whatever developments take place in the future, the primary dispute resolution goal must be increased access to justice with the timely disposal of issues. If care is taken not to overburden mediation with rules and regulations, it will be an efficient and effective choice for investor-state disputes. 

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