

Submission for  
Department of Justice, Canada Dispute Resolution Award in Law Studies

**Mediator Interactions  
within  
Ethnically Diverse Westernized Cultures**

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**Abstract**

Many cultures and ethnicities contribute to the diversity in Canadian society. While issues of culture or ethnicity may not necessarily give rise to a conflict requiring mediation, such considerations may nevertheless provide an added aspect to both the conflict and the mediation. Where mediation may be required to resolve a dispute, a mediator's handle on issues of culture and ethnicity, in addition to his or her own background, could impact how the disputants approach mediation.

For a mediator, basic ideals such as listening, fact eliciting, and reframing are valuable tools in fostering the lines of communication in any mediation. That a mediator is of the same ethnicity as the disputants, or that the disputants themselves are of the same ethnicity does not necessarily ease the pathway to open communication in the mediation. Consideration should be given to factors such as inter-generational issues, gender differences in a traditionally patriarchal ethnic community, or confidentiality concerns in a close-knit community. Further, one person is influenced by many cultures, of which ethnicity is just one of those influencing cultures. Other possible influencing cultures include the neighbourhood they live in, the province they hail from, the area they work in, or the sports team they belong to. A mediator needs to acknowledge these "multicultural" influences before considering the views of the disputants.

Finally, regardless of the ethnicity of the mediator, cultural sensitivity awareness training is arguably a useful tool in helping a mediator recognize and discover underlying interests, as well as for fostering communication with the disputants. There is also value in allowing the disputants choose a mediator who they feel shares the same principles or beliefs. Yet where such choice is not possible, as in a court-annexed mediation, then having a team two or more co-mediators, particularly where ethnically diverse, may eliminate a disputant's fear of bias by contributing to the perception of similarity, as well as help each mediator increase their understanding of underlying issues.

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*The disputing parties at the mediation table were both Chinese immigrants who have been Canadian citizens for five to ten years. One owned a community paper, whereas the other was a small business owner. The co-mediators come from different backgrounds: he has a Polish heritage and she has an Indonesian heritage.*



## **Introduction**

Whether explicitly or implicitly, the presence of multiculturalism in Canadian society can be an added dimension in person-to-person interactions. Culture or ethnicity itself may not necessarily give rise to a conflict, yet it may bring an added aspect to an existing conflict. Such considerations could arise regardless of whether the disputants are of different ethnic backgrounds or of similar ethnic backgrounds. Similarly, in the alternative dispute resolution forum of mediation, ethnic “differences sometimes play a crucial role in the outcome of a mediation.”<sup>1</sup> As such, the mediator’s handle on culturally or ethnically sensitive issues, in addition to his or her own background may impact how the disputants approach the mediation.

### **a) Mediation Ideals**

While theorists may argue over the effectiveness of mediation, there are certain basic ideals for mediation that are highlighted in the literature. Mediation aims to “produce a voluntary, consensual settlement outcome.”<sup>2</sup> A mediator encourages the parties to come to this consensus, though notably, a mediator does not have the authority

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<sup>1</sup> D.M. Stringer & L. Lusardo, “Bridging Cultural Gaps in Mediation” (2001) 56 DRJ 29 at 30.

<sup>2</sup> J. Macfarlane, “What is Mediation?” in J. Macfarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery Publications Limited, 1999) 257 at 257.

to impose an outcome.<sup>3</sup> Mediation is an interests-based approach to dispute resolution, thereby encouraging the parties to examine the interests and needs that lie behind the positions they have taken.<sup>4</sup> Finally, in creating a forum for parties to feel free to discuss the issues surrounding the dispute, the discussions taking place in mediation should remain confidential.<sup>5</sup> Similarly, it has also been noted that mediation is “marked by four common elements: privacy, procedural informality, absence of substantive rules and emphasis on compromise.”<sup>6</sup>

Within these mediation ideals, a mediator’s role becomes multi-faceted. The mediator should create an atmosphere conducive to discussion. The facts surrounding a conflict need to be elicited. The mediator listens and understands each party’s perspective and communicates that understanding so that each party feels that they are being heard. Parties should be encouraged to discover their underlying interests. The interplay between parties needs to be balanced between having the parties communicate with civility, while allowing these parties to vent. A mediator can smooth communications by reframing statements and positions made by the parties. Finally, a mediator can encourage parties to generate options for settlement based on the underlying interests.<sup>7</sup>

The question then becomes whether a mediator can successfully mediate between parties where the disputants are of a different ethnicity from the mediator, or from each other.

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<sup>3</sup> *Ibid.* at 257

<sup>4</sup> *Ibid.* at 258.

<sup>5</sup> *Ibid.* at 260

<sup>6</sup> I.R. Gunning, “Diversity Issues in Mediation: Controlling Negative Cultural Myths” [1995] *JDR* 55 at 56.

<sup>7</sup> G. Chornenki and C. Hart, “ByPass Court” in J. Macfarlane, ed., *Dispute Resolution: Readings and Case Studies* (Toronto: Emond Montgomery Publications Limited, 1999) 260 at 262.

## b) Culture vs. Ethnicity

Whether as a disputant or a mediator, a person's culture and ethnicity may become a factor in a conflict within a Westernized culture. The word "ethnic" has been defined as "relating to or characteristic of a human group having racial, religious, linguistic, and certain other traits in common," or as "a member of an ethnic group, especially a minority group."<sup>8</sup> By contrast, "cultural" relates to "culture," defined as "the total of the inherited ideas, beliefs, values, and knowledge, which constitute the shared basis of social actions."<sup>9</sup> Similarly, culture has also been described as "the configuration of learned behaviour and results of behaviour whose components and elements are shared and transmitted by the members of a particular society."<sup>10</sup> One could abridge "ethnicity" as the sum of race, religion, and language, whereas "culture" would be the sum of ideas, beliefs, values, and the shared basis of social interactions.

As such, an "individual's value orientations cannot necessarily be predicted through knowledge of the individual's ethnicity."<sup>11</sup> A single person can be influenced by more than one group or culture. Ethnicity would be but one cultural group in addition to a number of other cultural groups a person would identify with, whether it is the neighbourhood they live in, the province they hail from, the area they work in, or the sports team they belong to. In a sense, "each person is multicultural in identity [...and] culturally unique."<sup>12</sup> This notion of multicultural identity is contrary to a perceived trend toward the homogenization of society, in which there is sometimes a need to box or

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<sup>8</sup> *Collins English Dictionary*, 2nd ed., s.v. "ethnic".

<sup>9</sup> *Ibid.* s.v. "cultural" & "culture".

<sup>10</sup> L.L. Wilson & S.M. Stith, "Culturally Sensitive Therapy with Black Clients" in D.R. Atkinson et al, eds. *Counseling American Minorities: A Cross-Cultural Perspective* (1993) at 5.

<sup>11</sup> C. A. Savage, "Culture and Mediation: A Red Herring" (1996) 5 *AMUJGL* 269 at 277.

classify individuals into discrete groups, such that there is a give and take between diversity and uniformity.<sup>13</sup>

Mediators in a diverse Canadian society need to be aware of such issues. In *R. v. RDS*, L'Heureux-Dubé J. commented on the impartiality and biases of judges in this context of multiculturalism:

They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. [...] [N]otwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all the parties before them.<sup>14</sup>

Similarly, this statement could apply to mediators as well. Arguably, in mediating between disputants, a mediator should acknowledge and use his or her experiences with cross-cultural issues within Canadian society when listening to both sides of the dispute. “A mediator who is aware of these subtleties and is sensitive enough to act accordingly is most likely to succeed in helping parties with different cultural backgrounds achieve a satisfying resolution to their dispute.”<sup>15</sup> Furthermore, mediation essentials such as fact eliciting, listening, understanding, and reframing, become a valuable tool in dealing with these cross-cultural issues, and ultimately in successfully mediating between disputants, whether of different ethnicities or not.

In analyzing this contention, the following issues that arise in the context of court-annexed mediation will be addressed in this paper:

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<sup>12</sup> D.W. Augsburger, *Conflict Mediation Across Cultures: Pathways and Patterns*, 1st ed. (Louisville: Westminster/John Know Press, 1992) at 28.

<sup>13</sup> *Supra* 12 at 7.

<sup>14</sup> *R. v. RDS*, [1997] 3 SCR 484, at paras. 38, 40.

<sup>15</sup> “Introduction” (2001) 56 DRJ 29 at 29.

1. Given that such mediation is the product of Western culture, are people of different ethnicities likely to take part in this process to resolve their dispute?
2. Where both disputants at the table are from one ethnic group, is it necessarily best to have a mediator from that same group?
3. In a court-annexed mediation, disputants may not get to choose their mediator. A mediator may not be of the same ethnicity as the parties. Disputants may not themselves share the same ethnicity. In such cases, how should a mediator approach the dispute?

Notably, discussing culture or ethnicity in any context is rather awkward. Much of the literature refers to ethnicity and culture interchangeably. Furthermore, from this author's Canadian perspective, there is no obvious control group. While many research papers on the subject have implicitly, and sometimes explicitly, used a White Anglo-Saxon demographic as the control group, this paper will focus in more on the interaction of ethnicities within a Westernized culture.



*Where they would have otherwise prolonged their dispute due to the absence of a witness, the disputing parties at the table had instead both agreed in front of the judge to take part in the mediation.*



- 1. Given that court-annexed mediation is the product of Western culture, are people of different ethnicities likely to take part in this process to resolve their dispute?**

**a) Low-Context Cultures**

While conflict is a universal concept across cultures, each one has developed a unique pattern in managing differences and resolving disputes.<sup>16</sup> In analyzing cultural differences, David Augsburger has highlighted the notion of low-context cultures and high-context cultures. He classifies a North American culture as a low-context culture, where “directness, specificity, frankness in stating demands, confrontation and open self-disclosure are preferred.”<sup>17</sup> In such a culture, a conflict is provoked when an *individual’s* expectations of what is appropriate behaviour is violated.<sup>18</sup>

### **b) High-Context Cultures**

By contrast, a Southeast Asian culture would be classified as a high-context culture. In this case, emphasis is on the *collectivistic* nature of the culture, where preference is given to “indirect, ambiguous, cautious, nonconfrontational, and subtle ways of working through communication and relational tangles.”<sup>19</sup> Conflict would likely emerge where normative expectations of accepted behaviour are violated.<sup>20</sup> Furthermore, in comparison to a low-context group, a high-context group would more likely value harmony, interdependence, honour, and the maintaining of face.<sup>21</sup> Jennifer Beer observes that high-context cultures tend to be more difficult to enter as an outsider since an outsider does not intuitively know any of the contextual information about the culture, such that close relationships are more difficult to form.<sup>22</sup>

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<sup>16</sup> *Supra* 12 at 22.

<sup>17</sup> *Supra* 12 at 28.

<sup>18</sup> *Supra* 12 at 29.

<sup>19</sup> *Supra* 12 at 28.

<sup>20</sup> *Supra* 12 at 30.

<sup>21</sup> *Supra* 12 at 32.

<sup>22</sup> J.E. Beer, “Cross-Cultural Communication” (1998), online: JB Intercultural Consulting <<http://www.culture-at-work.com/overh1.html>> (date accessed: 9 December 2002).

Similarly, in discussing African Americans in the context of mediation, Cynthia Mabry notes “African Americans tend to be collectivists while white Americans tend to be individualists.”<sup>23</sup> She makes further assertions, albeit strong ones, that a white American family will emphasize certain values like independence, material assets, youth and power, whereas an African American family will place more emphasis on “sharing, obedience to authority, spirituality, and respect for elders and heritage.”<sup>24</sup>

### c) High-Context Groups within a Westernized Process

In light of such differences, the question then becomes whether high-context groups would be willing to participate in a court-annexed mediation, where such a process is arguably the product of a low-context culture. Indeed, “[m]ediation may be an imported process. [...] It may bring theory, methodology, and praxis from another culture, another vocabulary, another world of thought.”<sup>25</sup>

Stringer and Lusardo note two contrasts within high-context groups. On the one hand, some high-context groups may be more likely to trust authority where an authority traditionally maintains the harmony and is representative of the collective ideal.<sup>26</sup> Where the mediator is perceived as the authority, parties may be more likely to take part in mediation. For example, in Southeast Asian cultures, a respected mediator may be perceived as one who can help parties regain harmony.<sup>27</sup>

On the other hand, other high-context groups are distrustful of “outsiders,” and by extension, outside authorities. There is consequently reluctance in letting a third party

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<sup>23</sup> C.R. Mabry, “African Americans ‘Are Not Carbon Copies’ of White Americans” (1998) 13 OHSJDR 405 at 434-5.

<sup>24</sup> *Ibid.* at 436-7.

<sup>25</sup> *Supra* 12 at 35.

<sup>26</sup> *Supra* 1 at 30.

mediator into the dispute.<sup>28</sup> Such reluctance may be exacerbated for groups originating from countries with a history of abusive or corrupt officials. Similarly, groups who have “experienced differential impacts” of the justice system may view court-annexed mediation as an extension of a system they distrust,<sup>29</sup> particularly where there is a history of racism.<sup>30</sup>

#### **d) Proceeding with the Mediation in the Face of Systemic Distrust**

In situations of distrust, it is still possible for a mediator to proceed with mediation. In discussing family law disputes between African American parties, Mabry asserts that a mediator would have to gain the disputants’ trust.<sup>31</sup> For instance, a mediator should tailor the mediation sessions to “cultural values of people of colour and their divergent social and physical environments,” or more specifically, African American family values.<sup>32</sup> Stringer and Lusardo also emphasize the importance of trust in the mediator, noting that a mediator needs to manage the distrust and personalize it in order to further the effectiveness of mediation.<sup>33</sup> Furthermore, where past racism may affect the parties’ views of the process, the practice of reframing can help disputants and mediator “avoid stereotypical bias in interpreting behaviours.”<sup>34</sup> As such, reframing will help parties view a dispute “from a more positive perspective, thereby generating all possible reasons for the behaviour.”<sup>35</sup>

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<sup>27</sup> *Supra* 12 at 97.

<sup>28</sup> *Supra* 1 at 32.

<sup>29</sup> *Supra* 1 at 32.

<sup>30</sup> *Supra* 23 at 426.

<sup>31</sup> *Supra* 23 at 424.

<sup>32</sup> *Supra* 23 at 421.

<sup>33</sup> *Supra* 1 at 32.

<sup>34</sup> *Supra* 1 at 37.

<sup>35</sup> *Ibid.*

While there are ways for a mediator to handle distrust, people in certain high-context collectivistic cultures will nevertheless be more reluctant to take part in a court-annexed process, where it is viewed as an extension of a Westernized system. Conversely, people in other high-context cultures may be more willing to take part in mediation, where there is a respect for authority, as an extension of preserving harmony.

## **2. Where both disputants at the table are from one ethnic group, is it necessarily best to have a mediator from that same group?**

There is admittedly certain logic to the notion that peoples of one ethnic group would prefer a mediator of the same group. This implies shared values and often the same religion. Mabry asserts that it would be easier to trust someone of the same ethnicity than someone of a different racial group.<sup>36</sup> Stringer and Lusardo observe that many ethnic groups would rather keep their conflicts within their own community in order to save face in regards to “outsiders,” particularly where the disputed issues are related to religion, family, or health care.<sup>37</sup>

### **a) Language Difficulties**

A Scottish study on family law disputes within ethnic communities<sup>38</sup> supports the notion of two disputants / one mediator / one ethnicity, particularly where there is a language barrier. Certainly, a lack of communication may impede the process, perhaps exacerbating the probable miscommunication that brought the parties to mediation in the first place. While the use of interpreters has been suggested to help in the process, it has

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<sup>36</sup> *Supra* 23 at 420.

<sup>37</sup> *Supra* 1 at 33.

<sup>38</sup> V. Pankaj, “Family Mediation Services for Minority Ethnic Families in Scotland” (2000), online: Scottish Executive <<http://www.scotland.gov.uk/cru/kd01/purple/mediation-01.htm>> (last accessed: November 26, 2002) (hereinafter “Scottish Study”).

been further suggested that the use of interpreters is not always satisfactory.<sup>39</sup> Having the interpreter as an extra person at the table has been seen to dilute confidentiality. There is also the worry that the interpreter may not be translating a party's statements accurately, such that some of the nuances, emotion, or venting gets lost in the translation.<sup>40</sup> The study instead suggests that a bilingual mediator would be preferable.<sup>41</sup> Such a person could of course communicate with those who had difficulty with the English language, but also communicate with those, who, while belonging to the same ethnic community, may still prefer to communicate in English, particularly if they are from a younger generation.

#### **b) Inherent Knowledge of the Shared Values within an Ethnic Group**

Notwithstanding the possible language barriers, suppose the parties and the mediator spoke English fluently. Is a mediator of the same ethnicity still preferable? There is empirical evidence that disputants from high-context groups do prefer that option due to shared values regarding factors such as familial interactions, tradition, and religion. Such a mediator would already know to address certain high-context cultural values since he or she already carries "the context information internally."<sup>42</sup> For instance, the Scottish Study indicates that African-Caribbean groups consider that all of the members of the extended family should collectively raise a child, a tenet that an African-Caribbean mediator may inherently know, and is expected to know.<sup>43</sup>

#### **c) Fears of Confidentiality Dilution**

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<sup>39</sup> *Supra* 38 at para. 8.4.3.

<sup>40</sup> *Supra* 38 at para. 2.3.3.

<sup>41</sup> *Supra* 38 at para. 2.3.3.

<sup>42</sup> J. E. Beer "Cross-Cultural Communication" (1998), online: <<http://www.culture-at-work.com/overh1.html>> (date accessed: 9 December 2002).

<sup>43</sup> *Supra* 38 at para. 5.3.

Conversely, individuals within certain high-context cultures, particularly South Asian ones, would prefer not to have a mediator of the same ethnic community due to fears that the mediation would not be kept confidential.<sup>44</sup> This is especially true where the ethnic community is close-knit<sup>45</sup> and sometimes prone to gossip.<sup>46</sup> If the presence of a mediator from the same ethnic community is seen to dilute confidentiality, then parties will certainly not participate fully in the mediation process. This fear is increased in situations where parties would like to save face within their own ethnic community, in light of issues such as divorce, where there is an attached social stigma.<sup>47</sup> In considering how to balance this issue of confidentiality against the issue of having a mediator who inherently knows the nuances of a particular ethnic group, the following suggestion was made by participants in the study: use a mediator of the same ethnicity and same values, who hails from a different town or a different community.<sup>48</sup>

#### **d) Modernization vs. Tradition**

Yet even within the same ethnic communities, culture is not immutable, particularly when placed within a low-context Westernized society. Consequently, the dynamics surrounding disputes between those of the same ethnic origin are an added consideration for mediators. Augsburger put forward the notion that:

[T]he scientific revolution, the homogenization of culture through communications technology, the parallel processes of modernization and urbanization, and the pressures of ecological survival and economic sufficiency threaten to minimize or even obliterate our diversity.<sup>49</sup>

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<sup>44</sup> *Supra* 38 at para. 2.3.3.

<sup>45</sup> *Supra* 38 at para. 2.3.2.

<sup>46</sup> *Supra* 38 at para. 6.5.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Supra* 38 at para. 6.6.2.

<sup>49</sup> *Supra* 12 at 7.

Having made that assertion, he did however note that although threatened, diversity is likely to flourish and contribute to the richness of society.<sup>50</sup> Nevertheless, the tension described has been observed: with a Westernized society as a backdrop, “a range of attitudes, experiences and values exists within a single community.”<sup>51</sup> Differences over traditional values have been observed between disputants of different generations.<sup>52</sup> Similarly, tensions have arisen between a person who grew up in a Westernized society and one who is newly immigrated.<sup>53</sup> A mediator should evidently be prepared for these different dynamics. Interestingly, it was suggested by a South Asian in the Scottish Study that an individual from a younger generation who grew up in a Westernized society would be less particular in regards to a mediator’s ethnicity.<sup>54</sup>



*Despite the fact that the two Chinese disputants were of the same high-context group, their perceptions of what was proper normative behaviour differed over several letters of overdue payment that the plaintiff had faxed to the defendant’s place of business. The plaintiff felt that this was the appropriate thing to do, as the letters related to services rendered in relation to the defendant’s business. Conversely, the defendant felt this was highly inappropriate and that he was losing face, given that everyone and anyone at the office could see these letters.*



#### e) Gender Dynamics within a Patriarchal Society

Mediators should also consider gender issues, particularly where an ethnic group has patriarchal traditions. Augsburger asserts that “with the discovery of a new self-consciousness, women are resisting the cultural domination permitted men as well as the

<sup>50</sup> *Supra* 12 at 7.

<sup>51</sup> *Supra* 38 at para. 2.3.3.

<sup>52</sup> *Supra* 38 at paras. 3.5 (Pakistani group), 4.5 (Chinese group) and 5.3 (African-Caribbean group).

<sup>53</sup> *Supra* 38 at paras 2.2, 3.4 (Pakistani group), 4.4 (Chinese group), 6.4 (Indian group), and 7.3.2.

<sup>54</sup> *Supra* 38 at para. 4.6.2.

discrimination favouring men.”<sup>55</sup> The Scottish Study highlighted tensions within South Asian communities, where women struggle between the traditional roles of housekeeper and childcare giver versus more independent pursuits such as education and career.<sup>56</sup>

#### **f) A Mediator for Two Disputants – Limited to one Ethnicity?**

One of the conclusions made in the Scottish Study was that all of the ethnic groups surveyed “agreed that effective communication required the mediator to be aware of the cultural and religious beliefs of individuals to whom the service was being provided.” It was further noted that cultural sensitivity is an important issue, as is cultural awareness training.<sup>57</sup> Interestingly, professional training was also highlighted as important by those of Chinese and Indian ethnicities, such that a non-Chinese or a non-Indian mediator was deemed acceptable.<sup>58</sup> Nevertheless, where language was in issue, someone who could communicate in the same language was still preferable.

There is logic to having a mediator who is of the same ethnicity because this person will already be aware of the relevant values and traditions. In the context of African American disputes, Mabry does believe disputants are more likely to trust an African American mediator.<sup>59</sup> She nonetheless suggests that mediators of a different ethnicity could undergo formal instruction on African American culture and values, thereby introducing mediators to cultural sensitivity.<sup>60</sup> The Scottish Study similarly advocates training for mediators in cultural awareness.<sup>61</sup>

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<sup>55</sup> *Supra* 12 at 181.

<sup>56</sup> *Supra* 38 at paras 3.3 (Pakistani group) & 6.4 (Indian group).

<sup>57</sup> *Supra* 38 at para. 2.3.3.

<sup>58</sup> *Supra* 38 at 7.4.7.

<sup>59</sup> *Supra* 23 at 420.

<sup>60</sup> *Supra* 23 at 458.

<sup>61</sup> *Supra* 38 at para. 2.6.

Certain tensions may be resolved if disputants are given an opportunity to choose their mediator. Gunning observes that while Americans are comfortable with having a stranger third party conduct the mediation, some would prefer to at least be familiar with the mediators' values before proceeding.<sup>62</sup> The Scottish Study advocates providing choice of mediator to disputants, particularly where it is not evident whether a disputant would prefer a mediator from the same ethnic background or not.<sup>63</sup> Mabry makes this same suggestion and takes it a step further by proposing team mediation, where there is a "White mediator [paired] with someone who is culturally aware of African American customs."<sup>64</sup>

Savage argues that it is simply a matter of getting a fresh perspective by increasing the diversity among mediators. She remarks that "in many communities, mediators are overwhelmingly white and middle-class," thereby creating "a possible dearth of acceptable mediators, particularly where language differences exist."<sup>65</sup> The Scottish Study makes a similar recommendation to recruit mediators from minority ethnic communities where language is a problem.<sup>66</sup>

Stringer and Lusardo suggest that a two-person mediation team would prove to be effective where individuals are culturally similar to the disputants. "This is not to assume that being from the same culture implies that similarity will always be present, but that the perception of similarity on the part of the parties can be important to establishing trust and safety."<sup>67</sup>

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<sup>62</sup> *Supra* 6 at 90.

<sup>63</sup> *Supra* 38 at para. 2.3.3.

<sup>64</sup> *Supra* 23 at 459.

<sup>65</sup> *Supra* 11 at 291.

<sup>66</sup> *Supra* 38 at para. 10.4.

<sup>67</sup> *Supra* 1 at 33.

Indeed, cultures are mutable, and there exist outside factors that continue to impact them. A mediator, whether of the same ethnic background or not, would still have to explore the issues and the impact of many cultures on the mediation, whether central to the dispute or not. As such, in a Westernized society, a mediator with a shared cultural background with the parties is not necessarily different from a mediator without this common background. Indeed, “rather than to approach differences in terms of racial, ethnic or other single identifying characteristics, it would be more effective in mediation to approach recognition of differences in terms of value orientations, thus allowing for individual differences and the effects of multiple ‘cultures.’”<sup>68</sup> Certainly, it is worthwhile to understand the issues that are present within specific cultures. Consequently, perhaps mediator training in regards to these issues is not uncalled for. Yet given the variability that can exist within one ethnic group, such training should arguably be given to all mediators, regardless of ethnicity.



*In this court-annexed mediation, the disputing parties were not provided with a choice of mediators; by coincidence however, the mediation team was ethnically diverse.*



**3. In a court-annexed mediation, disputants may not get to choose their mediator. A mediator may not be of the same ethnicity as the parties. Disputants may not themselves share the same ethnicity. In such a case, how should a mediator approach the dispute?**

**a) Approach to Multi-Ethnic Mediation**

As noted previously, comments made by L’Heureux-Dubé J. in *R v. RDS* regarding a judge’s impartiality can also apply to mediators in a mediation where the

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<sup>68</sup>*Supra* 11 at 191-2.

disputants are of ethnicities or cultures different from their own: “notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all the parties before them.”<sup>69</sup>

Notably, L’Heureux-Dubé writes that judicial *neutrality* is impossible, and that what is indeed being strived for is judicial *impartiality*.<sup>70</sup>

A mediator should acknowledge his or her own multicultural experiences before considering the views put forth by both parties. Cynthia Savage notes that in subsequently identifying the “value orientations” of the disputants, a mediator bears the burden of “being aware of their own value orientations and how these orientations impact their conception of mediation. The mediators should then elicit information regarding each participant’s value orientations, discuss any differences, and negotiate an acceptable approach.”<sup>71</sup>

However, much of the literature cautions against stereotyping. Indeed, to identify the cross-cultural issues or value orientations in a dispute does not entail highlighting specific differences in ethnicity,<sup>72</sup> nor does it mean to equate culture with ethnicity.<sup>73</sup> To oversimplify underlying issues in such a way perpetuates harmful stereotypes, and ignores the many cultures that are a part of a person, the combination of which is unique to each person.<sup>74</sup> In the context of a Westernized society, many of the high-context cultures have been subject to racism and oppression and its individuals are conceivably

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<sup>69</sup> *Supra* 14 at para. 40.

<sup>70</sup> *Supra* 14 at para 48.

<sup>71</sup> *Supra* 11 at 285.

<sup>72</sup> *Supra* 1 at 30.

<sup>73</sup> *Supra* 11 at 274.

<sup>74</sup> *Supra* 11 at 274.

distrustful of a court-annexed mediation.<sup>75</sup> To oversimplify relevant cultural or ethnical issues would be detrimental to the mediation process: parties will be less willing to participate as the forum is not conducive to open discussion, and mediators would consequently not be able to get to underlying interests given that eliciting facts from the disputants would be difficult.

As noted above,<sup>76</sup> in walking into mediation where different ethnic groups are represented, mediators arguably have a pre-mediation burden to deal with, given the distrust that individuals in high-context cultures may have for the justice system. A mediator needs to manage and personalize such distrust.<sup>77</sup>

Mabry argues that before a mediator sits down at the table with disputants of different ethnicities, the mediator should leave his or her ethnicity at the door.<sup>78</sup> Respectfully, one would have to disagree. To oversimplify in this fashion as Mabry suggests would be tantamount to equating ethnicity with culture. Failing to acknowledge differences between mediator and parties would seem to be at odds with the mediation ideal of an open atmosphere conducive to discussion.<sup>79</sup> It would arguably fuel the initial distrust that a mediator is supposed to overcome. Furthermore, an individual's experiences are affected by the juxtaposition of many cultural influences, including ethnicity.<sup>80</sup> A mediator "cannot be expected to divorce themselves from these experiences."<sup>81</sup> Indeed, Augsburger suggests that individuals should recognize, enhance,

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<sup>75</sup> *Supra* 1 at 32.

<sup>76</sup> *Supra* p. 8, section 1(d).

<sup>77</sup> *Supra* 1 at 32.

<sup>78</sup> *Supra* 23 at 460.

<sup>79</sup> *Supra* 7 at 262.

<sup>80</sup> *Supra* 12 at 26-7.

<sup>81</sup> *Supra* 14 at para. 38.

and use each culture's conflict wisdom.<sup>82</sup> Similarly, Stringer and Lusardo assert that a mediator who is aware of such cultural subtleties and is culturally sensitive enough to act accordingly would most likely successfully mediate between parties of different ethnic backgrounds.<sup>83</sup>

### **b) Language Differences**

As noted above,<sup>84</sup> given the essential nature of communication in the context of mediations, any language difficulty will render a mediation process more difficult and frustrating for mediator and disputants alike. Certainly, in such situations, an interpreter or a bilingual mediator is desirable.

On the subject of language, Lusardo and Stringer discuss the situation between two disputants fluent in English, but where the use of words may vary due to such factors as geographical area or education, or the fact that English may be an individual's second language. Where a mediator is uncertain about a disputant's use of a term, he or she can attempt to reframe or ask questions of definition or clarification,<sup>85</sup> in order to avoid confusion for the mediator, as well as the other disputant.



*The co-mediators both had trouble following the two disputants, both of whom had a rapid manner of speaking and accented voices. Tactfully interjecting and reframing on one of the co-mediators' part were very effective ways to clarify what was being said, in addition to slowing the disputants down.*



### **c) Confidentiality & Disclosure**

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<sup>82</sup> *Supra* 12 at 6.

<sup>83</sup> *Supra* 1 at 30.

<sup>84</sup> *Supra* p. 9, section 2(a).

Stringer and Lusardo observe that many ethnic communities are conscious of discussing their conflicts with “outsiders,” not wanting to “air their dirty laundry.”<sup>86</sup> Such contentious issues include anything from childcare and religion, to allegations of controlled substance abuse or extramarital affairs.<sup>87</sup> Disputants worry over saving face in regards to their ethnic community, which leads to parties withholding information from the mediation.<sup>88</sup> In addition to a mediator laying down the rules of confidentiality in the opening statement, a mediator can also reassure a worried disputant that anything said at the mediation table would be kept confidential. Should the disputant be worried about the other disputant being less than discreet, a mediator could still try to encourage both sides to communicate with each other, in the hopes of fostering a frank discussion.

However, as previously noted,<sup>89</sup> ethnic groups such as the South Asian ones described in the Scottish Study feel that having a mediator of a different ethnicity at the table is more conducive to an open discussion.<sup>90</sup> The fear of disclosure is seemingly related to the close-knit ties of an ethnic community.<sup>91</sup>



*In this case, worries over confidentiality meant that the defendant was disinclined from considering any settlement options. The defendant wanted assurances that his name and his wife’s name would be kept out of the community newspaper.*



#### **d) Co-Mediation**

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<sup>85</sup> *Supra* 1 at 33.

<sup>86</sup> *Supra* 1 at 33.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Supra* p. 10, section 2(c).

<sup>90</sup> *Supra* 38 at para. 2.3.3.

<sup>91</sup> *Supra* 38 at para. 2.3.2.

In a court-annexed mediation, the disputants may not get to choose from a bank of mediators. The result is a random grouping of mediator and disputants of possibly different ethnicities. If, for instance, as observed in the Scottish Study, the disputant is of a high-context culture, yet is part of a younger generation and has resided in a Westernized society for a significant interval of time, such a disputant would be less likely to be concerned with the ethnicity of the mediator.<sup>92</sup> However, where the converse is true, and there is concern over the ethnicity of the mediator, then for one-mediator mediations, one could hypothesize that the success rate would arguably be lower unless parties were allowed to choose their mediators based on their personal values. Concerns over distrust, bias, and systemic injustice would rise to the surface once again.

A possible solution that is often suggested in the literature is having two or more mediators conduct the mediations, particularly where the disputants themselves are of different ethnicities. Fred Butler notes that providing multiple mediators, “where the parties are multiethnic, etc., appears to eliminate any feelings of bias.”<sup>93</sup> Stringer and Lusardo take this notion further by noting that a mediation team that is ethnically similar to the disputants would be especially helpful. Not only does such a mediation team contribute to the “perception of similarity,” but it “can also begin to increase the mediator’s understanding of hidden issues, create greater trust in the mediators, and reduce potential communication issues.”<sup>94</sup> It is further noted that this mediation team may be able to more quickly elicit a disputant’s concerns, such as authority and public disclosure.<sup>95</sup>

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<sup>92</sup> *Supra* 38 at para. 4.6.2.

<sup>93</sup> F.D. Butler, “The Question of Race, Gender & Culture in Mediator Selection” (2001) 55 DRJ 36 at 38.

<sup>94</sup> *Supra* 1 at 33.

<sup>95</sup> *Ibid.*



*The disputants were initially more comfortable in directing their statements to the co-mediator with her Indonesian heritage, rather than the co-mediator with his Polish heritage. However, as facts were elicited and issues were reframed, it became evident that his experiences of being part of a cultural community were a valuable resource to tap into in getting one party in particular to reconsider his position.*



## Conclusion

In looking towards a colour-blind and culture-neutral society,<sup>96</sup> Butler made the following statement:

When I consider the question of when race, gender, or culture should be a factor when choosing a mediator, I come up with this answer: When the parties believe that the consideration of the race, gender, or culture of the mediator would help resolve their dispute.<sup>97</sup>

Given the lack of homogeneity in our Canadian society, whether culturally or ethnically speaking, Butler's vision of neutrality and colourlessness may never come to pass. Given that culture can be qualified as shared beliefs, values, and a basis for shared social interactions,<sup>98</sup> dispensing with the notion of culture altogether is arguably unrealistic within a society of rational actors. However, this notion that race, gender, or culture become factors in choosing a mediator only when the disputants make them their considerations, is approximated by Savage.

Savage notes that "Every mediation is intercultural; it is only a matter of degree as to how different the parties' cultures are."<sup>99</sup> Furthermore, rather than approach a conflict

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<sup>96</sup> *Supra* 93 at 39.

<sup>97</sup> *Supra* 93 at 36.

<sup>98</sup> *Ibid.* at 379.

<sup>99</sup> *Supra* 11 at 291.

using terms of race or ethnicity, Savage would approach conflicts in terms of “value orientations,” to allow for individual differences and multiple cultures.<sup>100</sup>

Conversely, in discussing “cultural differences among African Americans and other Americans,” Mabry does focus on questions of ethnicity. Other cultural factors that she considers in her paper are products of the issues of ethnicity.

In discussing the mediator’s role, Stringer and Lusardo note:

Being impartial, for example, does not imply that the mediator’s own cultural expectations, styles, and approaches will not affect the process or the outcome of mediation. Consequently, as we explore cross-cultural issues involved in mediation, it is important that the mediator understand her or his own cultural patterns in order to be effective.<sup>101</sup>

In order to mediate successfully, there are arguably certain advantages to having a shared ethnicity with the disputants. There is the perception that the element of distrust would be lessened. There is the reassurance that a mediator of the same ethnicity shares similar values, such as family or religion.

However, because culture is not immutable, there is a struggle that arises when individuals of the same ethnicity find themselves in a Westernized society. Differences between generations and lengths of time spent in the Westernized society highlight this struggle. There are also gender dynamics to consider where the ethnic community is a traditionally patriarchal society. Furthermore, for certain close-knit ethnic communities, the need for confidentiality is seemingly heightened, such that the preferred mediator is either altogether not of the same ethnicity, or shares the same ethnicity, but is from another town or community. Ultimately, given the mutability of culture, a mediator of the

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<sup>100</sup> *Supra* 11 at 292.

<sup>101</sup> *Supra* 1 at 30.

same ethnicity as the disputants still needs to elicit facts and discover the underlying issues and interests of the dispute.

In situations where disputants and mediator are randomly matched together, and where ethnic differences seem to be present, a mediator can arguably still successfully facilitate the dispute. A mediator should acknowledge his or her own multicultural experiences before moving on to consider the views of the disputants. Given that a high-context cultural group may be distrustful of a Westernized process, a mediator should not oversimplify by highlighting ethnicity as necessarily the source of conflict, nor should the mediator be ignorant to the possible role it may play, albeit indirectly, in the dispute. Furthermore, much of the literature recommends some form of cultural sensitivity training for mediators. Such training would certainly be of help to mediators in discovering underlying issues, and would foster a trust between him or her and the disputants.

Finally, co-mediation is seemingly the ideal forum to use where disputants and mediators may be matched together randomly, especially where the disputants are of different ethnic backgrounds. The presence of co-mediators with different ethnicities would seem to alleviate disputants' fears of bias. Where it is possible, having mediators of the same ethnicities as the disputants would further a perception of similarity, in addition to increasing a mediator's understanding of underlying issues.



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