

Amicable Dispute Resolution: The Mediation Alternative and the Alberta Environmental Appeal Board⁽¹⁾

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In the past century, with an increase in public awareness of "individual rights",⁽²⁾ legal systems have experienced exponential growth and associated pressures, resulting in lengthy delays to court processes. In an effort to alleviate some of the backlog, "there was a move away from the courts, though not necessarily from adjudication, in the early part of the century..." as "seen in the development of tribunals and arbitration..."⁽³⁾ Nonetheless, "it is only really in the 1980s that the alternative dispute resolution movement has taken off. That it has done so can be related to court congestion, what Galanter has called a 'litigation explosion'".⁽⁴⁾ As noted by numerous authors,⁽⁵⁾ there are definite advantages to alternative dispute resolution (ADR) when used effectively. The Alberta Environmental Appeal Board (EAB) has taken note of the effectiveness of one particular form of ADR - that is, mediation - and applied its process with significant success. But inasmuch as there are benefits to mediation, there are significant pitfalls, especially in the field of environmental administrative law, which one must be aware of and adequately address.

OVERVIEW OF THE DIFFERENT ADR PROCESSES IN ALBERTA

Applebey asks the question "what is ADR?", and begins by outlining the things which are not alternative dispute resolution, "though often confusingly associated with it", including formal adjudication, tribunals, and administrative decision-making.⁽⁶⁾ Generally, ADR encompasses those means by which individuals or entities strive to settle their conflicts other than through formal adjudication. In actuality, the "alternatives" are likely not the exception but rather the rule, as it is estimated that 98% of cases settle prior to trial.⁽⁷⁾ "ADR is a 'halfway house' between the certainty of the adversarial system and the flexibility of private negotiation. There is no one ideology underpinning it. ADR processes may be used to settle existing disputes, or to prevent disputes developing."⁽⁸⁾ Although numerous variations exist,⁽⁹⁾ this paper will only discuss five key forms of ADR - negotiation, mediation, arbitration, the pre-trial conference and judicial dispute resolution - and focus specifically on mediation.

A. NEGOTIATION

The first and most obvious form of ADR is negotiation. It affords the parties in a dispute the greatest degree of flexibility. One would further assume that it also yields the greatest control over the decision-making process to the participants as it occurs devoid of a third party adjudicator imposing judgment. This is not necessarily the case. In conflicts which involve the presence of legal counsel, parties necessarily relinquish significant control over the process to their representatives. "Clients often feel left out of the decision-making process by their lawyer. They experience a loss of control when they turn their claim over to a lawyer."⁽¹⁰⁾ In fact, as we shall see, mediation can and often does provide the affected parties the greatest control.

Negotiation often does not take place at all until the lawyer feels that the case has been fully developed with legal research and argument, sometimes six months or more into the file. Unlike mediation (where the parties are almost always required to be present) clients (unless they are experienced business clients) are rarely directly involved in negotiations. Instead they are required to instruct their lawyer regarding the

level of settlement that would be acceptable to them.[\(11\)](#)

What is obviously lacking from negotiation as a dispute resolution technique is the certainty of a final solution - there is no guarantee that a determination will be reached. Lon Fuller provides a useful outline of the general negotiation process:

When the bargaining process proceeds without the aid of a mediator the usual course pursued by experienced negotiators is something like this: the parties begin by simply talking about the various proposals, explaining in general terms why they want this and why they are opposed to that. During this exploratory or "sounding out" process, which proceeds without any clear-cut offers of settlement, each party conveys - sometimes explicitly, sometimes tacitly, sometimes intentionally, sometimes inadvertently - something about his relative evaluations of the various items under discussion. After these discussions have proceeded for some time, one party is likely to offer a "package deal," proposing in general terms a contract that will settle all the issues under discussion. This offer may be accepted by the other party or he may accept it subject to certain stipulated changes.[\(12\)](#)

An interesting alternative to the common "adversarial negotiation approach" - that is, where parties are "winners" and "losers", and jealously guard their information, interests and preferences - is put forward by Carrie Menkel-Meadow.

Recently, several analysts have suggested that another approach to negotiation, an approach I will call problem-solving, might better accomplish the purposes of negotiation. This problem-solving model seeks to demonstrate how negotiators, on behalf of litigators or planners, can more effectively accomplish their goals by focusing on the parties' actual objectives and creatively attempting to satisfy the needs of both parties, rather than by focusing exclusively on the assumed objectives of maximizing individual gain.[\(13\)](#)

Her submission is that through identifying the parties' underlying needs and objectives and crafting solutions which attempt to first meet these needs directly and second to meet the majority of the needs through expanding the resources available, one can create a "synergistic advantage" over the linear adversarial strategies of "zero-sum negotiations". Although not without its admitted difficulties, her approach effectively highlights the inherent limits to strict adversarial negotiations and puts forward a holistic alternative which could lead to greater efficiency and effectiveness in dispute resolution.

One major difficulty with the negotiation process is the inherent inequality of bargaining positions. Imbalances in power and wealth are recurrent impediments for all forms of dispute resolution. Access to relevant information is another fundamental concern. Depending on the situation and the level of legal involvement, the parties may or may not be required to disclose all relevant and producible information and documentation to the other side.[\(14\)](#) If disclosure is not required, the negotiation process can be encumbered if one party is more fully informed and in a more advantageous bargaining position. Menkel-Meadow's idealistic "problem-solving approach" is likely superior to adversarial negotiation techniques in this regard, so long as all parties collectively focus on striving for creative solutions to satisfy all, not merely on winning or losing the particular dispute.

B. MEDIATION

An emerging and increasingly popular form of ADR is mediation. Although interest in and use of ADR has grown significantly in the past decade, it is still in a relatively early stage of development, especially in Canadian administrative law, when contrasted against the well established use of ADR in the United States.[\(15\)](#) Nonetheless, mediation is currently being utilized by 8 out of 13 Canadian environmental administrative tribunals.[\(16\)](#) In general, the operation of mediation

aims to facilitate the development of consensual solutions by the disputing parties. The mediation process is overseen by a non-partisan third party, the mediator, whose authority rests on the consent of the parties that she facilitate their negotiations. The mediator has no independent decision-making power, or legitimacy, beyond what the parties voluntarily afford her.... While mediators use many strategies and techniques to encourage the parties to reach an agreement, for example helping to generate so-called 'objective criteria' which both parties recognize as valid, and in some cases assisting them with specific provisions of any settlement arrangement, the final result of a mediated agreement must be legitimised by the informal consent of the parties themselves.(17)

Depending on his or her approach and style, the mediator can take an active role in the process or remain more passive, only intervening when necessary to facilitate communication, clarify, or focus the participants on the important issues at hand.

The function of the mediator is determined in part by the desires of the parties and in part by the attitude of the individual mediator. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work only with the party-generated proposals and try to help parties realistically assess their options. Most mediators will provide an environment in which the parties can communicate constructively with each other and assist the parties in overcoming obstacles to settlement.(18)

Legal counsel can be present in the mediation, but they are often encouraged to take a less active role, allowing the parties to dialogue and negotiate themselves. Further, the procedure of the mediation itself is primarily controlled by the parties' mutual agreement (e.g. over confidentiality agreements, the use of caucusing, etc.) with assistance from the mediator.

(O)ne function the mediator can perform in the collective bargaining situation (is) that of reminding the parties that their negotiations constitute a cooperative enterprise and that one does not necessarily make a gain for himself simply because he denies to the other fellow something he wants.... "(T)he rule must be that you give, so far as is possible, what is less valuable to you but more valuable to the receiver; and you receive what is more valuable to you and less valuable to the giver."(19)

Resolution of the dispute, like negotiation, is determined entirely by the participants themselves through mutual agreement - no result will be imposed on them by the mediator. Although the mediator is usually paid for his or her services, a successful mediation will invariably save all parties money on further litigation. Ultimately, "(i)n theory at least, what is common to mediation as it is used in many different contexts is that the outcome is consensual rather than imposed and the solution fashioned by the parties themselves rather than by a third party."(20)

C. ARBITRATION

Arbitration is similar to mediation in that the parties and their counsel(21) appear before a non-partisan third party, but it is fundamentally different in that the third party acts not as a facilitator to settlement, but rather as a decision-maker. There are two general types of arbitration, binding and non-binding.(22) The neutral still renders a decision in non-binding arbitration, but, as the name envisions, it is only advisory in nature.

In nonbinding arbitration, the arbitrator's decision is only as effective as the decision maker's ability to influence the parties' settlement positions. This depends on the parties' personalities, predisposition to respect the advisory opinion, respect for the arbitrator, analysis of why the arbitrator reached his or her decision, and the alternatives to accepting the nonbinding decision.(23)

The process of the arbitration is agreed upon by the parties and often there will be an on-going relationship between the two sides with an arbitration agreement in place prior to any dispute.⁽²⁴⁾ "Members of arbitration panels are selected for their knowledge of the field and are known to the parties."⁽²⁵⁾ The similarities between arbitration and the courts include the potential binding nature of the rulings, impartial adjudicators, and more formalistic proceedings (e.g. witnesses, experts, oral testimony, etc.).⁽²⁶⁾ The *Arbitration Act*⁽²⁷⁾ governs arbitrations in the province of Alberta conducted under either agreement or required/authorized by statute. Decisions of arbitrators can be subject to judicial review in the courts, especially those panels which are created by statute.⁽²⁸⁾ It is arguable whether there is a cost savings in going to arbitration rather than the courts,⁽²⁹⁾ but the parties are guaranteed to have a decision-maker who is experienced, if not an expert, in their area of dispute.

D. THE PRE-TRIAL CONFERENCE

The pre-trial conference is a relatively new dispute resolution technique that has been incorporated into some forms of civil litigation in a mandatory fashion in the province of Alberta. It involves a meeting between all lawyers involved in the action and a judge in order to ensure that all parties are ready for trial and to canvas any potential settlement offers. Pre-trial conferences are mandatory in actions where the trial is anticipated to be longer than 3 days and in situations where court ordered.⁽³⁰⁾

The parties can always ask for a pre-trial conference, and the Practice Notes make them compulsory in a number of situations. A pre-trial conference has two basic aims: to try to settle the suit without trial, and (failing that) to make the trial shorter and more efficient. It cannot force the parties to settle, nor to waive privilege.⁽³¹⁾

Pre-trial conferences are designed to be more of a "one-shot" deal than case management which contemplates the ongoing handling of litigation by a judge up to, but not including trial, including such actions as setting timetables, hearing interlocutory matters, and monitoring the litigation as a whole.⁽³²⁾ The lawyer that attends the pre-trial conference must be the same one that conducts the trial.⁽³³⁾ This requirement is in place to ensure that the parties take the pre-trial conference seriously and come with the authority to settle the suit. Also, the pre-trial conference judge will generally not preside at the subsequent trial of the action unless all participants and the judge consent in writing.⁽³⁴⁾

This form of alternative dispute resolution varies from mediation and negotiation in that it can be mandatory in nature. Further, the parties themselves have less control over the process (which is controlled by the court) and may not even be present as only the lawyer is required to attend. Pre-trial conferences are akin to mediation and negotiation in that any resolution to the matter is only achieved by mutual agreement - the pre-trial judge may provide his or her opinion but will not impose any form of binding decision. The ultimate usefulness of the pre-trial conference will depend on the parties' willingness to creatively canvas potential settlements and the degree to which the presiding judge or master will get involved and facilitate the negotiations.

E. JUDICIAL DISPUTE RESOLUTION

Judicial Dispute Resolution (JDR) is another developing form of ADR in the province of Alberta. As opposed to the pre-trial conference and case management, it is entirely voluntary. It involves both the clients and their lawyers⁽³⁵⁾ as each side is allowed to make submissions before a judge. After hearing the information and arguments,⁽³⁶⁾ the judge will give a non-binding, sample opinion of how he or she would decide the merits of the case. This gives a realistic example of what a court *might* do in the circumstances and is done to encourage future settlement negotiations.⁽³⁷⁾ There is complete confidentiality in a JDR meeting - all parties are required to sign an agreement in this regard - and the judge who sits on the "mini-trial" will not hear the ultimate trial or discuss either the encounter or the

sample opinion with other judges.(38) JDR is not an official activity of the court, though it is governed by Practice Note 9 of the *Alberta Rules of Court*.

JDR is very similar to mediation in that it is consensual and occurs before a non-partisan third party. It differs in that a sample non-binding opinion/resolution is given. Although it is less formal than a trial, it does impart a psychological advantage in that the parties are given the feeling that they have had their day in court - that they have had their case heard before a judge in a court of law. JDRs can be utilized for cases to be heard either at the Court of Queen's Bench or the Court of Appeal level.

THE ALBERTA ENVIRONMENTAL APPEAL BOARD

Prior to 1993, environmental legislation in the Province of Alberta was fragmented and cumbersome. In an effort to simplify the law in this area, the *Environmental Protection and Enhancement Act*(39) (EPEA) was enacted. "The intention was to simplify the environmental regulatory framework by consolidating eight different Acts, each with their own environmental offences and appeal procedures."(40) As a result of the proclamation of this Act on September 1, 1993, most of the existing environmental legislation was replaced, and an administrative tribunal - the Environmental Appeal Board - was created, providing appeal procedures for both industry and the public.(41) The Board

operates consistent with and subject to the purposes of Part 3 of the *Environmental Protection and Enhancement Act (EPEA)*, Part 9 of the *Water Act*, the Environmental Appeal Board Regulation, and the Environmental Protection and Enhancement (Miscellaneous) Regulation. The Board has statutory authority to hear appeals of administrative decisions made with respect to a variety of matters regulated by the *EPEA* and the *Water Act*.(42)

The Board's mission statement avers that it "was established to provide fair, impartial and efficient resolution of all matters before it, and at the same time, ensure that the protection, enhancement and wise use of Alberta's environment are maintained."(43)

Under the current legislation, environmental decisions are made by the Department of the Environment with respect to matters including approvals, registrations and certificates in areas such as contaminated sites (*EPEA* Part 4), conservation and reclamation (*EPEA* Part 6), groundwater drilling (*EPEA* Part 7), hazardous substances and pesticides (*EPEA* Part 8), and waste management (*EPEA* Part 9). Decisions made by the Department, can, subject to Part 3 of the *EPEA* and upon the submission of a valid "notice of objection" under section 84 of the *Act*, be appealed to EAB. As such, the Board acts as an administrative appeal mechanism for governmental decisions. "Administrative appeal boards are typically established at 'arm's length' from the provincial or federal environmental agency for which they hear appeals (or advise on broad rule-making)." (44) This is the case with the EAB as well.

The Board is placed in a unique position in relation to the Department of Environment and the Ministry of Environment. The Board is under the umbrella of the Ministry and reviews and hears appeals made in opposition to decisions made by Directors within the Department of Environment. Being an adjudicative body, the Board operates at arms-length from the government to maintain a necessary degree of independence and impartiality. However, for budgetary reasons and for the purpose of providing the Minister with its decisions and reports, and notwithstanding the Board's effort to balance environmental and economic interests, the Board remains aligned with the operations and goals of the Ministry of Environment.(45)

Under the *EPEA*, the Board is empowered to make final decisions on matters "relating to stays, costs, requests for confidentiality, and administrative penalties" but on other matters, it can only make recommendations to the Minister of Environment, with the Minister making the final decision.(46)

The EAB offers an appeals process for appellants dissatisfied with decisions made by environmental regulators on a wide range of environmental issues. And, in this respect, it exercises what is clearly "quasi-judicial" function. The EAB makes final decisions on administrative penalties and under the new *Water Act*, for other appeals as well. However, in most other cases, the Alberta Environmental Appeal Board does not have final decision-making authority. The Minister of the Environment renders final decisions in appeals dealing with approvals, licenses, and other matters.(47)

Regardless of this potential subversive power, the quality of the decisions and the respect that the Ministry has for the Board, is reflected in the fact that of the 49 Report and Recommendations submitted by the Board to the Minister between September 1, 1993 and December 31, 1999, only one was overturned.(48)

The EAB has all the powers of a commissioner under the *Public Inquiries Act*.(49) "including the right to retain experts to assist with matters before the Board and to compel persons or evidence to be brought before the Board."(50) While the Board's enabling legislation does include a privative clause,(51) "the Board does not replace or eliminate the right of Albertans to seek judicial review in the courts."(52) It is interesting to note that since September 1993 and as of December 31, 1999, only 18 appeal files out of 649 have undergone judicial review, with 6 decisions being upheld, 4 withdrawn, 6 returned to the Board, and 2 pending.(53)

The EAB is made up of 7 Board members including a Chair and Vice-Chair,(54) all of which are appointed by Cabinet under section 83(1) of the *EPEA*. "All members are part-time members and are paid on a *per diem* basis (set by Order in Council) and are reimbursed for their expenses."(55) The Chair of the EAB is Dr. William Tilleman(56) and the Vice-Chair is Dr. John Ogilvie.(57) Other Board members include Dr. Anne Naeth, Mr. Ron Peiluck, Dr. Steve E. Hrudehy, Dr. Edward Best and Dr. Curt Vos.(58) Appeals are heard by a panel of Board members.(59)

Notices of Appeal can be filed with the Board by any party that is directly affected by the relevant decision of the Department of Environment. Persons or groups may be permitted to make representations as interveners if they meet the general test that "their participation will materially assist the Board in deciding the appeal."(60) Each appeal that results in a hearing is afforded a full written decision.

It is the policy of this Board that a written decision is prepared for all hearings, whether they involve a multi-million dollar pollution clean-up or issues of land reclamation. These reasoned decisions would analyze each of the issues raised during the hearing and give clear and cogent reasons for the Board's decision on each issue. Clear written reasons not only show the parties that their evidence and arguments were understood and provide assistance to the courts and the Minister when Board decisions are appealed, but they also provide a permanent record of the Board's reasoning process that helps future parties in determining whether to appeal and if so, how to conduct their appeal effectively.(61)

Nonetheless, many appeals do not result in a full hearing, just as the vast majority of legal claims do not result in trials. In balancing its mission statement, mandate and operating principles against the need for an impartial decision-maker, the Board endeavours to work with the parties to achieve acceptable solutions for everyone, always cognizant of the overriding public interest in environmental matters. To this end, a "serious attempt is made to mediate the dispute in an informal setting with the mediation conducted by a Board member.... Mediation can result in a resolution of the appeal that is more favourable than the hearing process because it is based on choices made by all parties together."(62) "The Alberta Environmental Appeal Board's Rules of Practice contemplate a pre-hearing facilitation process conducted by the Board. These rules give the Board the discretion either to conduct the mediation itself or to appoint a neutral."(63) On the initiative of the Board or at the request of one of the parties, a mediation will be scheduled and reasonable notice will be given to all affected parties of the time, place

and purpose of the mediation.(64) The process is provided by the Board without fee to any party.(65)

At the start of the meeting, the Board requires all parties to sign a "Participants' Agreement to Mediate". This agreement provides that the signatories are authorized to make decisions and to approve the final agreement if one is reached.... Each party, generally starting with the appellant,... presents its position in as much detail as is required or as they wish. When the parties have completed their presentations comments by the other parties will be made.... When a settlement is reached, it is drafted up, reviewed by the parties and the final draft is signed before the parties leave the meeting.(66)

If the mediation does not result in the resolution of the appeal, procedural matters may be set out in accordance with the Regulations(67) and, if no negotiated decision is ultimately reached, a hearing is conducted by a panel of Board Members excluding the one who conducted the mediation. "When the parties agree to a resolution of the notice of appeal at the mediation meeting, the Board shall, within 15 days after the mediation, prepare a Report and Recommendations that is signed by the parties and reflects the agreed upon resolution" with one copy going to each party and one to the Minister "to be dealt with according to the Act."(68)

BENEFITS OF EFFECTIVE MEDIATION

Moving from the background of the Alberta Environmental Appeal Board, and keeping the aforementioned ADR framework in mind, we can now examine some of the important benefits of effective mediation. The EAB offers the following reasons why proper conflict management is more preferential than a full hearing:

- it airs and resolves problems in a private setting;
- prevents more serious conflict;
- stimulates search for new information and solution to problems;
- increases group cohesion and performance;
- meets new standards or expectations;
- results in change whether on a personal, environmental, economic, political or legal basis.(69)

One of the most obvious advantages of a mediated settlement is the potential reduction in cost. If the matter is resolved, there is no further legal or administrative expenses. In this regard, Clay asserts the following:

I think that all the agreements thus far were fair and although several brought less money than a court victory could have, we must remember that we might have lost in court and that the mediated agreement saved the client money, time, and energy, all of which would have been lavished on litigation.(70)

A parallel public benefit of mediated settlements is that they reduce the costs to the administrative body. For our purposes, it is interesting to note the average cost per appeal to the Alberta Environmental Appeal Board. In 1998/1999, the Board spent approximately \$14,543 for each appeal filed, and they estimate that the use of mediation has assisted in a 20% decrease in overall costs.(71) This is all the more significant when one takes into account the increase in number of appeals filed with the EAB since its inception in 1993.(72) So long as the mediation process adheres to the Board's mandate and operating principles and enables the parties to structure mutually conducive resolutions, the taxpaying public, as a whole, will benefit from the increased economic efficiency.

Another very interesting and often underappreciated aspect of the mediation process is the psychological benefit. Disputes arise because individuals have different views and goals. Frequently one or more of the parties *feel* that they have been "wronged" in some manner by the other side's conduct. I highlight "feel"

because disagreements invariably become emotional. Gerald S. Clay, notes the following from his experience as a mediator in a dispute between partners in an architectural firm:

Mediation permits necessary psychological eruptions. Litigation and a court of law do not. A witness who exposes feelings about matters or people connected with the case will be warned by the judge and counsel just to answer the question, please. In the case of the architects, their ability to sound off emotionally had as much to do with the eventual fair settlement as their interest over the money at stake.(73)

Occasionally, long and drawn out conflicts can be improved and even resolved by the simplest of actions (e.g. a heartfelt apology or an acknowledgment of misconduct). In those circumstances where more is required, the mediation process can help to facilitate important dialogue between the parties directly when communication is otherwise impaired, or it can simply be the forum for the sides to "get off their chest" that which is at the heart of their dispute. While, "(m)any clients are intimidated by the formality of the adjudicative process and feel that they cannot or should not participate,"(74) mediation encourages parties themselves to partake in the negotiation and collaborate on the end result.

A corollary benefit of facilitated dialogue is that it may foster or reestablish crucial inter-party relationships. "(A)n important relationship can be repaired or maintained, rather than finally ruptured by the trauma of litigation."(75) When in an ongoing business relationship or, perhaps, in an environmental context when opposing sides are neighbours, preserving communication and the parties' association as a whole may be indispensable.

Ultimately, one of the most heralded advantages of mediation is that it allows both sides to control the negotiations and final outcome. According to EAB Board Member, Dr. John Ogilvie, "(p)robably the greatest benefit to resolution by mediation is that it produces a win-win situation. By giving a little, each party can gain.... By comparison, a judicial hearing produces only a winner and a loser."(76) Fellow Board Member, Dr. Steve Hrudey concurs with this view holding that ADR mechanisms offer "better results for more parties simultaneously," with full hearings usually producing "clear winners and losers."(77)

ASPECTS AND POTENTIAL PITFALLS OF MEDIATION

Achieving a mutually acceptable and beneficial solution is not always an easy process. Mediation, because it involves and is dependant on human interaction and communication, requires trained skills. It also is fraught with potential pitfalls and concerns. With our backgrounds of both alternative dispute resolution and the Alberta Environmental Appeal Board, we now move on to examine some of the main concerns associated with mediation and how they are addressed by the EAB.

A. WHEN MEDIATION WOULD NOT BE APPROPRIATE

While the benefits of mediation are clear, there are a number of instances when the process is not necessarily applicable. For example,

(T)he courtroom is the forum for simple uncontested legal procedures such as debt collection, mechanics' liens, or evictions.... I agree further with critics that mediation does not serve the person whose fundamental rights have been violated or whose case involves an emerging area of law or culpability, such as a claim of tobacco company liability in event cancer strikes a smoker. Also when corporations attempt to conceal known injurious effects of products, only pioneering lawsuits, with their depositions, subpoenas, and other tools of discovery, can bring the offenders to justice.(78)

The participants must look to the subject matter of the dispute and the surrounding circumstances. If the

"primary question is whether or not the party's legal rights have been abridged,... there is a need to set a legal precedent... or a key party is unwilling to 'come to the table'" then mediation cannot proceed.(79) Further, the EAB is bound by its established operating principles to maintain the integrity of the ecosystems and the health of the environment.(80) Hence according to, Dr. Hrudehy, "ADR would not be appropriate if the likely resolution would be contrary to the public interest mandate of the EAB."(81)

(T)ribunals are often restricted by legislation. Also many tribunals find it difficult to implement "alternative" processes away from the traditional notions of natural justice, because their decisions are reviewable by a court that insists on adhering to natural justice, procedural fairness and the hearing rule.(82)

What must be remembered is that mediation is a process by which parties attempt to collectively resolve their disputes. If even one side is not willing to negotiate in good faith, the process will not work. Dr. Ogilvie states that "(i)n some cases, it becomes obvious in the first part of the meeting that mediation will not work as the parties are too far apart and too bound to their own opinions. In these cases, a hearing is the only solution the Board has."(83) Fellow EAB Board member, Dr. Anne Naeth, concurs. She notes that mediation may not be an alternative when "there is long-term hostility between/among the parties" or when the "parties say they definitely don't want a mediation."(84) The parties may have simply "had enough" of each other and require a third party to make a final decision for them.(85)

B. THE LAWYER'S ROLE IN MEDIATION

Gerald Clay, in describing the role of lawyers in mediations, states, "I always accompany my client to mediation. I'm there to advise, give legal counsel and perspective, help get the best settlement and to prevent the client from accepting a blatantly unfair deal."(86) Nonetheless, the lawyer's role in the mediation meeting and process is significantly dissimilar from his or her normal position as advocate. Lawyers often see their role as that of "champion", standing for and promulgating their side's best interests. Hence, with their legal training and expertise as their sword, they attempt to fight for the client's rights and win the ultimate battle. Although obviously not every barrister and solicitor possesses such a mentality, it is clearly the underlying expectation given the adversarial nature of our justice system. Therefore, given the inherent need to address the parties' feelings and interests in the mediation process, it is incumbent that the lawyer alter his or her persona and subvert the ingrained instinct to win the case at the expense of the other side.

What lawyers must appreciate is that their presence at a mediation meeting is subordinate in importance to that of their client. In order to effectively reach a mutually amicable solution, the parties must first identify their true underlying and most important interests. This is achieved through open and honest dialogue *by the parties themselves*. Lawyers must generally take a step back and allow their clients to express seemingly irrelevant feelings which may be critical to finding common ground. "The parties' involvement with determining the outcome increases the likelihood that they will reach settlement since most people are more likely to accept their own ideas than someone else's."(87) What is required is a building of consensus, examination of common interests, and establishment of areas for negotiation, and when one begins the dialogue with potential solutions or settlement offers, one only serves to polarize the sides and illustrate the existing chasm separating them.

This is a difficult shift for most people enrolled in mediation courses, especially if their background is oriented to action, decision and advise. Frequently these individuals want to get to solutions immediately. However, acceptable and optimal solutions are best created after the parties have sufficient 'building blocks' to create an acceptable and optimal resolution. The building blocks most critical to creating a 'win/win' resolution are the underlying interests of both parties, the needs, fears and aspirations that motivate each of them and which will need to be satisfied to some degree.... If these building blocks are

not discovered, impasse is often the result.⁽⁸⁸⁾

In order to facilitate such a discourse, the parties must be allowed to actively engage in open dialogue, unfettered by tangential legal concerns. Dr. Ogilvie affirms that

"(i)n the disputes coming before the Environmental Appeal Board because they are technical and often do not involve a legal issue, lawyers should limit their participation to providing advice to their clients when such is requested. The parties should speak for themselves as they are the ones who know their positions. In other types of mediations involving legal issues, lawyers should be active participants because this is their field of expertise."⁽⁸⁹⁾

"Lawyers can facilitate ADR by being realistic and pragmatic rather than seeking absolute, iron clad legal victory that may not serve the clients' best interests."⁽⁹⁰⁾ They can offer advice and legal counsel when requested, but must accept their relegated position in the mediation. This process can only be successful if the mediation discussions are confidential and conducted "without prejudice", thereby removing the fear that the conversations will impair each party's respective legal position.

C. CONFIDENTIALITY - THE PUBLIC NATURE OF ENVIRONMENTAL DISPUTES

The inherent need for confidentiality in mediation discussions is easily appreciable. "Confidentiality of the mediation process is considered important to ensure that parties feel free to disclose all relevant information in mediation. If confidentiality could not be guaranteed, and mediators were called to give evidence in subsequent proceedings, there would be a strong deterrent to the use of mediation as a pre-trial settlement option."⁽⁹¹⁾ Mediation would not properly function as a form of ADR if the parties involved had to worry that their discussions could later hurt their case. "The central ethical concern relating to confidentiality is one of trust. In order to trust a mediator or a mediation process, parties need to know what will or might happen to the often sensitive information that will be exchanged among the parties or with the mediator."⁽⁹²⁾

While the merit of confidentiality seems inculpable, one must remain cognizant of the public nature of environmental disputes. The Environmental Appeal Board's mission statement affirms that it "will advance the protection, enhancement and wise use of Alberta's environment by providing fair, impartial and efficient resolution of all matters before it."⁽⁹³⁾ Because the public has a vested interest in the sustainability of the environment, one would presume that they would be privy to any discussions thereof. In practice, a careful balance must be made.

To ensure the confidentiality of mediation discussions, the EAB adheres to the following general procedure:

The Environmental Appeal Board requires that all parties be represented at mediations and generally does not permit observers to be present.... The mediator emphasizes that any matters discussed during mediation can only be brought before a hearing (if one is held) with the permission of all parties. In other words, in legal terms the discussions are "without prejudice". The mediator also promises that he or she will not discuss the case with other Board members and cannot, under the Board's rules of practice, sit on a panel if one is called to hear the dispute. Further, if the matter goes before the civil courts, the mediator cannot be called by subpoena to give evidence.⁽⁹⁴⁾

Once it is agreed that the parties will participate in a mediation, they are required to sign a binding agreement to keep the information confidential. Catherine Morris affirms this practice when she states

mediators can do a good deal to provide protection for themselves and their clients from surprises by

making confidentiality provisions a matter of written agreement before entering a mediation. Also, draft settlement memoranda, documents and other letters can be marked 'privileged' and 'without prejudice' to enhance the chances that courts will respect the confidentiality of the process.[\(95\)](#)

As noted, the discussions are generally conducted in private without observers present - only parties directly affected by the situation in question may attend. This test - that one must be directly affected - is key to the balancing of confidentiality against the public's interest in the environment. Yet the issue of standing is often a difficult determination. Generally, "the Board believes that the word 'directly' requires the Appellant to establish, where possible to do so, a direct personal or private interest (economic, environmental, or otherwise) that will be impacted or proximately caused by the Approval in question. It seems clear that generalized grievances do not give a person standing before the Board."[\(96\)](#) Specifically,

the possibility that any given interest will suffice to confer standing diminishes as the causal connection between an approval and the effect on that interest becomes more remote. This first issue is a question of fact, i.e., the extent of the causal connection between the approval and how much it affects a person's interest. This is an important point; the Act requires that individual appellants demonstrate a personal interest that is directly impacted by the approval granted. This would require a discernable effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection. "Directly" means the person claiming to be "affected" must show causation of the harm to her particular interest by the approval challenged on appeal. As a general rule, there must be an unbroken connection between one and the other.[\(97\)](#)

As stated, the burden is on the appellant to prove that they have been directly affected, and "at this preliminary stage of the proceedings whether on a balance of probabilities there is a potential, that is, a reasonable possibility, that any of the parties will be directly affected by the application."[\(98\)](#) Hence the standard of proof is "a preponderance of evidence", not that the appellant will in fact be harmed, but rather, that a potential or reasonable probability for harm exists.[\(99\)](#) One's interest need not be unique - an appellant may be one of many people affected by a Department decision - but it must be more than a generalized interest in the environment.[\(100\)](#)

Although precedents are not necessarily binding on the Board,[\(101\)](#) these decisions provide the groundwork for the general criteria expected. Mediations must retain a degree of confidentiality and it is therefore necessary that the Board limit the number of participants in the overall process. Parties with a genuine interest and something to add to the appeal will normally be permitted to participate, while busybodies will not.

Separate from the issue of standing, Board policies envision a significant degree of open public disclosure. "All documents filed by a party to an appeal are available for inspection at the Board offices by parties to the appeal and by the public" and "(u)ncless otherwise ordered by the Board, the hearing of an appeal is open to the public."[\(102\)](#) If the appeal results in a full hearing by the EAB, a written decision will be issued which is available to the public. This ultimately guarantees the right to access for Albertans concerned with environmental issues. In this manner, the EAB strives for and achieves the necessary equilibrium between the competing interests of public disclosure and party confidentiality. For the most part, mediations are privately held in a "without prejudice" manner, while the final hearing process and related decisions are generally open to the public.

D. NEUTRALITY

It is assumed that the mediator will be a neutral third party without bias against one side or their arguments. But, "(t)he various definitions and uses of the terms "neutrality" and "impartiality" have made these words less than useful. The concepts buried within these terms include at least the following: non-

partisan fairness, the degree of mediator intervention, role limitation and objectivity."[\(103\)](#) One must remember that the mediator is not there to decide the merits of the case or appeal, but rather, in the words of Dr. Hrudey, to "assist parties to understand their own needs and to find ways to meet those needs short of going to a hearing."[\(104\)](#) In this manner, he or she must make every effort to remain non-partisan and objective. "First, the mediator must be independent of all parties to the dispute, including interested government agencies. Second, the mediator must have no authority to impose a settlement of a particular version of disputed facts on the parties."[\(105\)](#) There are three main concerns which must be addressed in this regard.

1. Board members with public interest mandate

We have already seen that environmental administrative boards and bodies have a public interest mandate to preserve society's ecosystems. With this being the case, there is an obvious concern that Board members, who act as mediators, will not be able to remain completely neutral.

Individual conciliation is often carried out by a public official. This may make conciliation more difficult between public authorities and private parties. When parties agree to use the services of a private conciliator for deciding about private disputes they usually select a person whose qualifications and experience are well known to them. In the case of disputes between administrative authorities and private parties, if a public official is appointed as conciliator by the public administration responsible for the matter, he or she will not have been appointed by the parties but by the public administration. Therefore, he will be trusted by the latter but not necessarily by the former. On the other hand, however, it is likelier that the administrative authorities will conform to his or her settlement.[\(106\)](#)

Saxe, in dealing with the issue of water disputes before the Ontario Drainage Review Board, contends "(b)y the time a drainage dispute has reached the Board, it has generally become a public dispute. The ultimate decision-maker is the Board, not the parties themselves. The Board has an obligation to ensure that the public interest is protected, no matter what the parties prefer."[\(107\)](#) In effect,

the mediator's neutrality is limited by his or her mandate to help the parties reach an agreement which, in addition, satisfies the goals of environmental protection, Board policies and public interest. Where the mediator's mandate comes into conflict with the interests of some of the parties, it is apparent that the interests of the parties do not always take precedence over the mediator's institutional interests.[\(108\)](#)

The contrast between private disagreements and public ones, as is the case in appeals filed with the Environmental Appeal Board, is illustrated as follows:

Private disputes are well suited to ADR, and mediation in particular, because the parties "own" their dispute and have the right to settle it. By contrast, the key characteristic of a public dispute is that it affects the public interest and the rights of others who may not be direct parties to the dispute.... In environmental disputes, more specifically, who precisely is affected and ought to have a place at the table becomes even more difficult.[\(109\)](#)

Due to these reasonable concerns, the question must be asked, "can a member of a public board retain the necessary degree of autonomy and neutrality to effectively mediate an environmental dispute?" The answer, like many others in law, is a resounding "maybe". The parties that go into a mediation have to feel comfortable in their surroundings and with their mediator so that they can express their interests and feelings.

Conciliation is thus and above all, a matter of trust; trust in the conciliator's competence and integrity by the administrative authorities and the private parties and a strong conviction of the importance and

usefulness of conciliation. Therefore, conciliation cannot be of use if it becomes bureaucratic routine, particularly so when public authorities are concerned.(110)

Achieving a party's trust can be a very difficult matter. In the case of a public administrative board such as the EAB, Board members are often academic or business people with impressive credentials, generally well respected in their communities. Hence, earning the respect of established oil company executives may be elementary. Further, as is the case with the EAB, the ongoing relationship between the Board and the governmental department likely gives rise to individual familiarity and a significant comfort level - that is, the person representing the Department of Environment may have had numerous previous dealings with the relevant Board member, such that they have an established relationship and level of trust. This may not be the case though if one of the parties is a farmer or fisherman with limited exposure to governmental bodies. In such instances, there may even exist a latent level of *distrust*. Dr. John Ogilvie addresses this problem and utilizes the following techniques:

The first and most important duty of the mediator is to make the parties feel comfortable and relaxed and to get them talking. In cases handled by the EAB, I look on them as assisted negotiations just as much as mediation. The setting is important. Since many of the EAB's cases involve rural people who may be nervous in Government offices, I try to hold the meetings in a locale that will be more comfortable for the appellants. I might select a community hall, a hotel room or even the farmer's kitchen. I dress casually and work on a first name basis where ever possible. The whole objective of these actions is to make the parties feel comfortable and to get them to talk openly.(111)

One must be careful in this regard not to compensate too much and appear to be too accommodating to one party. Again, the goal is neutrality and the attainment of trust by *all* sides. Dr. Naeth underscores the nature of personal perceptions in striving for neutrality.

I try, as a mediator to appear neutral, non-judging. To do so I watch body language - ensure mine is neutral, not facing one or the other party, not use any judgmental facial expressions; watch party body language to clue me in to how parties are responding to each other; I don't wear black formal suits but maybe a green suit or a casual jacket and pants if in a farmer's home. I listen actively and attentively to all parties.(112)

While it may take a greater degree of effort with one party than another, one must remain sentient of everyone's perceptions.

To be effective, a mediator must be a good two-way communicator. That is, he or she must be able to express him or herself clearly and concisely and must be able to understand and interpret the statements made by the parties. The mediator must be able to recognize the nuances in the parties' statements and interpret their body language. The mediator must present to the parties an unbiased but friendly aura and seek to establish a relationship of trust. Only then will the parties speak openly and allow the discussion of their key issues.(113)

Neutrality is a very illusive concept. Acting as a facilitator of disputes requires trust and a level of comfort. While some may argue that true neutrality is unattainable - that everyone possesses levels of bias and partisanship resulting from past experiences - one must make a bona fide effort to achieve this goal. Perhaps it is best to recognize one's own opinions and potential areas for bias and do what one can to overcome the urge to react inappropriately. The greater the mediator's awareness and level of training, the better he or she will be at effectively harmonizing all sides and expediting an amicable solution.

2. Moving from adjudicator to mediator

Another important consideration for the Environmental Appeal Board in its quest for neutrality comes as a result of its inherent adjudicative function. Because mediators in EAB disputes are usually Board members who also act as final decision-makers when full hearings are conducted, it is necessary that they alter their overall persona. "(A) Board must consider whether its authority could be compromised if it takes on both decision-making and mediating functions. By stepping 'off the bench,' some tribunals worry that their overall authority may be impaired. Some members cannot see themselves sitting down, side-by-side with the parties, giving up the trappings of full-scale Board review." [\(114\)](#) Dr. Ogilvie writes

The role of mediator is very different from that of adjudicator as a panel member hearing a dispute before the Board. An adjudicator must be prepared to listen to the evidence presented, ask any questions necessary to clarify that evidence in his or her own mind and finally to make a decision. In changing roles the Board member must remember not to make friendly gestures or overtures to any of the hearing participants. [\(115\)](#)

This issue again highlights the importance of neutrality in mediation discussions. In mediations conducted in-house by EAB Board members, they must be deliberate in recasting their overall approach to how a "solution" is reached. "Board members must be trained to help clearly distinguish, and move between, their role as a mediator without decision-making authority and as a tribunal member with decision-making powers." [\(116\)](#) Dr. Hrudehy avows that "(t)o remain neutral and inclusive requires constant attention to what is said with continuing re-evolution of what should be done by the mediator." [\(117\)](#) A consciousness of this required shift in mentality is primary to one's success as a mediator and can be taught through proper education and training.

3. The perception of the parties - caucusing

An inherent requirement of an effective mediation is open communication. Nevertheless, there will invariably be times in the negotiations where the lines of communication will falter as parties reach an impasse. Sometimes the mediator will be able to re-establish the discourse through a refocusing on the issues at hand. Other times, the entrenchment will be too great. One technique used in such instances is caucusing. This involves the mediator speaking with each party separately to canvas issues, interests and positions. Dr. Ogilvie uses caucusing "to talk privately to the parties, to determine the relative importance of the issues that they have presented and to make suggestions as to how they might change their positions to every party's gain." [\(118\)](#) The greatest risk associated with caucusing is the potential perception of bias by one or more of the parties involved. Dr. Naeth "does not believe caucusing is good before the mediation - it provides too much opportunity for perceived bias" but does maintain its value during the mediation to ensure that the mediator knows "all the details of the issue and can get to the bottom line on what might be accepted." [\(119\)](#) When a mediator meets privately with one of the sides, all others are left out of the communication loop and will inevitably speculate as to the nature of the surreptitious conversations. To counter this hazard, the mediator must take care to properly explain the purpose and process of caucusing and ensure a significant level of trust. Dr. Hrudehy attests that

(c)aucusing should not be done unless it can move the process off of an impasse. There are risks with using caucusing (suspicion about what is going on with the mediator behind closed doors) so these risks should only be taken when there are not good prospects for reaching agreement in the open. Caucusing should be limited to short sessions held on the same premises as the mediation and must be done with all parties for similar lengths of time. [\(120\)](#)

Due to the significance of trust in the party-mediator relationship, one must ensure equality, or at least the appearance thereof, at all times. The mediator cannot have a lengthy exclusive meeting with one side - the longer the absence, the greater the risk of speculation and broken confidence. The deliberation also cannot occur in an intimate setting - that is, the mediator cannot "go for lunch" with one of the parties.

Mediators must establish a relationship of trust, not one of friendship, or else the process will disillusion parties and ultimately fail. To properly use caucusing, the mediator must both educate the parties and uphold the image of impartiality.

E. MEDIATION EDUCATION AND TRAINING

Ultimately, the fundamental skills and potential pitfalls of mediation as a form of dispute resolution can and should be the subject of training and education. All individuals participating as mediators have a duty to ensure that they are acting in a manner that is most beneficial to the interests of the parties involved, especially when they are paid for their services. Clay asserts "the most valuable quality for a mediator is a liking for people and a desire to help them mold a mutually beneficial agreement. Without that basic feeling and desire, the most talented of people will fail as mediators."[\(121\)](#) Benitez highlights the following:

It is needless to say that the conciliators' qualifications are a matter of crucial importance, particularly in the case of individual conciliators. In order for conciliation to be effective, the conciliator must have the trust and confidence of the parties. This requires a number of specified qualities: independence, impartiality and commitment. Moreover, the conciliator must be able to create an informal and friendly atmosphere and have the professional qualifications (legal, management, financial, etc) required by the matter under dispute.[\(122\)](#)

"It is incumbent upon Boards utilizing mediation that its members be properly skilled."[\(123\)](#) Due to the emerging nature of ADR, it is also critical that mediators continuously update their training and skills according to the most recent scholarship. "If Board members decide to mediate themselves, the Board should consider providing on-going process training to build and enhance the skills of its Board members. There is no correlation between effectiveness as a regulator, or litigator, or judge and the skills of mediation. These must be learned."[\(124\)](#) The EAB has made it a policy to ensure that its Board members who conduct mediations be properly trained and exposed to the most current information and ADR techniques.[\(125\)](#) A specific example of this objective in action occurred in February, 2000 when the Board held an advanced mediation workshop, with Lawrence Susskind, Ford Professor of Urban and Environmental Planning at Massachusetts Institute of Technology, Director of the Public Disputes Program at the Program on Negotiation at Harvard Law School and President of the Consensus Building Institute. Dr. Susskind is a very experienced trainer in general and specialized negotiation and consensus building techniques, specifically with regulatory and environmental negotiations on an international scale. Specified and intensive training such as this exemplifies the EAB's commitment to remaining abreast with current ADR trends and ensuring that their Board members have the necessary skills to be effective mediators..

For an individual to be an effective mediator, he or she must have excellent communication and interpersonal skills, along with an awareness of the need for neutrality and removal of biases. While some may innately form a part of one's personality, most techniques must be learned. For administrative bodies utilizing in-house mediators, it is incumbent that they take a pro-active role in the education of its members with the proper and most effective dispute resolution techniques.

F. SPECIALIZED KNOWLEDGE

The skills required of an effective mediator are hence partly learned and partly connate. The next issue that must be addressed is the role that specialized knowledge should play. What is referred to here is knowledge of the subject matter of the dispute in question. There is an argument to be made that when an adjudicator hears an appeal or case, he or she should be like a blank slate, only listening to the relevant facts, law and issues as brought forward by the parties or qualified experts, thereby removing the

possibility for improper personal inferences. This is not necessarily the case in an administrative or mediation context.

Administrative proceedings call for specialised (sic) knowledge (cf. environmental matters, town planning, etc.) which ordinary judges do not necessarily possess. They may not have the training needed to hear these cases and compensate it with expert advice and appraisal. This however entails significant delays and costs. Moreover, it may diminish their authority in the eyes of the authorities and the citizens. [\(126\)](#)

Further, "(t)echnically qualified mediators have obvious appeal in technical disputes.... A technically qualified mediator can quickly understand and assess technical issues, can cut through the jargon, and can help the parties understand the options available to them." [\(127\)](#) One of the benefits of mediation is that it can provide an efficient resolution, both in terms of time and money, to contentious disputes. Hence it is logical that the party conducting the "assisted negotiation" be at least partially familiar with the subject matter of the dispute. Whereas no reasonable person would expect his or her mediator to be an expert in all contended issues in dispute, one would certainly not want to spend unnecessary time explaining and familiarizing. This would counter the intended purpose of the mediation and be all the more frustrating in situations where the mediator was being paid by the parties for his or her services. Dr. Ogilvie, himself possessing a background in metallurgy, chemicals, mines and minerals, forest products and waste management, highlights some important considerations in this regard.

I believe it is preferable if not almost mandatory for the mediator to be aware of the details of the dispute and the public positions of the parties if he or she is going to be effective in assisting the parties to reach a solution. Moreover, the mediator must banish and forget personal opinions and influences that may arise as a result of his or her past experience.... In the matter of past experience, the mediator should take pains to assure the parties that, although he or she may have been exposed to similar situations as a result of past employment, these experiences will not influence the mediator's actions and judgement. [\(128\)](#)

This quote affirms the significance of specialized knowledge but also considers the salience of neutrality. Although it is helpful having a mediator that can easily recognize key areas in the dispute and decipher technical jargon, it is detrimental if this knowledge or these experiences result in a closed mind. The fact that the mediator had previous success with a particular solution in similar circumstances may limit his or her ability to explore other options that may be more beneficial given the parties unique interests and concerns. Dr. Naeth maintains that her "knowledge base in science (reclamation, agrology, etc.) is critical" to "understand that component of the situation and ensure the environment is protected." [\(129\)](#) Dr. Hrudehy states "(p)ersonal knowledge is helpful to ensure an even playing field on technical issues but mediators must not know too much nor ever agree to tell the parties how the mediator thinks the problem should be solved. Above all else, the mediator should not know so much that she/he stops listening to the parties." [\(130\)](#) The mediator's job is to communicate with the parties in an effort to find an amicable solution for *them*. The EAB has done a commendable job in attracting top-quality Board members with a wide range of technical expertise, [\(131\)](#) thereby facilitating a pool of individuals to draw from to find the best mediator possible in the given circumstances. Furthermore, it is laudable to highlight their displayed awareness of the potential concerns in this regard.

CONCLUSION

Alternative dispute resolution, and specifically mediation, is an emerging and increasingly popular tool used to resolve contentious issues in an amicable fashion for all parties involved. The Alberta Environmental Appeal Board is taking steps to ensure that it is a leader among Canadian administrative bodies in the effective use of mediation. Training of staff and Board members is a constant emphasis in the form of aggressive personal and professional development. It has taken strides to establish key

linkages to the public, industry and other administrative boards and agencies to ensure that it is kept abreast with new and more effective forms of dispute resolution.⁽¹³²⁾ It has also developed a questionnaire which it distributes to all parties following a mediation/settlement conference to evaluate their level of satisfaction of the agreed upon resolution.⁽¹³³⁾ Perhaps most importantly, the Board and its members are aware of both the benefits of ADR as well as the potential pitfalls associated with mediation and have taken steps to adequately address these concerns. If these attitudes and courses of action continue, the Alberta Environmental Appeal Board will continue to excel as an administrative body and set a standard for others to wisely follow.

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1. Sincere thanks to Board members Dr. Ogilvie, Dr. Naeth, and Dr. Hrudehy for their help and participation in this paper. I would also like to acknowledge Joanne Taylor for her continued support and benevolence, along with the entire staff of the Alberta Environmental Appeal Board. Research Questionnaires were submitted to the aforementioned Board members on February 15, 2000, and their responses are included as an appendix to this paper. It must be noted that individual Board member opinions and responses do not necessarily reflect the policies of the Alberta Environmental Appeal Board.

2. "The legal profession has been extremely successful in creating widespread public reliance on their services to resolve disputes. This success is largely based on an assumption that where a conflict arises between two or more individuals or organizations, the party with the strongest (or best argued) legal claim will emerge as the 'winner' (where 'winner takes all'). So-called 'rights talk' has entered the public culture in Europe and North America in a way unimaginable 100 years ago, and still unknown in parts of the world where there is little access to legal services for ordinary people.... Even in the majority of cases where the conflict is resolved without recourse to either lawyers or the courtroom, dispute resolution strategies are characterized by the language of rights talk, whether moral, legal, political, or economical, or asserting some other basis of 'right.'"; J. Macfarlane, "An Alternative to What?" in J. Macfarlane, ed., *Rethinking Disputes - The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd., 1997) 1 at 1.

3. M. Freeman, "Introduction" in M. Freeman, ed., *Alternative Dispute Resolution* (New York: New York

University Press, 1995) at xi.

4. *Ibid.*

5. For example, see G. Applebey, "An Overview of Alternative Dispute Resolution" in C. Samson & J. McBride, eds., *Alternative Dispute Resolution* (Sainte-Foy: Les Presses de l'Université Laval, 1993) 25 at 37, where Professor Applebey notes the creativity of solutions, the ability for parties to be directly involved in the process, the fact that settlements may better reflect the merits of the dispute, decreased costs, etc.

6. *Ibid.* at 28.

7. *Ibid.* at 29.

8. *Ibid.* at 37.

9. For example, conciliation is very similar to mediation, but it is usually conducted by a facilitator with each part separately (i.e. the parties are not face to face). Also, "med-arb" is a shorthand reference to mediation-arbitration where the parties "agree to mediate with the understanding that any issues not settled through mediation will be resolved by arbitration."; See Judicial Arbitration & Mediation Services, Inc., "ADR Formats & Procedures" in E. Mirsky, ed., *Dispute Resolution Alternatives Supercourse* (New York: Practising Law Institute, 1993) 203 at 207.

10. *Supra* note 2 at 5.

11. *Ibid.* at 6.

12. L. Fuller, "Mediation - Its Forms and Functions" in M. Freeman, ed., *Alternative Dispute Resolution* (New York: New York University Press, 1995) 115 at 128.

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14. Both oral discovery of witnesses/parties and discovery of documents are governed by specific procedures when a civil action has been commenced. Part 13 of the *Alberta Rules of Court* (Rules 186-216) governs this process and has recently (as of November 1, 1999) been amended resulting in more onerous disclosure requirements. Specifically, the parties are normally required to file and exchange Affidavits of Record within 90 days of filing the Statement of Defence (Rule 187) and prior to conducting an Examination for Discovery (Rule 189).

15. Taylor *et al.*, "Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices" (White Paper commissioned by the Alberta Environmental Appeal Board: The Consensus Building Institute, 1999) [unpublished] at 2.

16. *Ibid.* at Appendix II. The 8 tribunals which use mediation are the Canadian Environmental Assessment Agency, the National Energy Board, the Ontario Environmental Assessment and Appeal Board, the Ontario Energy Board, The Nova Scotia Environmental Assessment Board, the Quebec BAPE, the Manitoba Clean Environment Commission and the Alberta Environmental Appeal Board. Only the tribunals in British Columbia, P.E.I, Saskatchewan, New Brunswick and Newfoundland do not employ mediation as an ADR technique.

17. *Supra* note 2 at 2.
18. *Supra* note 9 at 207.
19. *Supra* note 12 at 126-127.
20. *Supra* note 2 at 3.
21. "While lawyers will generally represent parties, the proceedings are less formal (than court proceedings)."; D. Lemieux, "Arbitration in the Field of Government Contracts" in C. Samson & J. McBride, eds., *Alternative Dispute Resolution* (Sainte-Foy: Les Presses de l'Universite Laval, 1993) 215 at 220.
22. M. Schoenfield & R. Schoenfield, "Legal Negotiations: Getting Maximum Results" in E. Mirsky, ed., *Dispute Resolution Alternatives Supercourse* (New York: Practising Law Institute, 1993) 147 at 154.
23. M. Schoenfield & R. Schoenfield, "36-Hour Negotiating Course" in E. Mirsky, ed., *Dispute Resolution Alternatives Supercourse* (New York: Practising Law Institute, 1993) 173 at 181.
24. Arbitrations can be consensual, the result of contractual arrangements, or statutorily imposed. See *supra* note 21 at 220.
25. *Ibid.*
26. *Ibid.*
27. R.S.A. 1991, c. A-43.1.
28. *Supra* note 21 at 221.
29. *Ibid.* at 220-221.
30. See Rule 219, Practice Note 3 and Practice Note 7 of the *Alberta Rules of Court*.
31. Hon. W.A. Stevenson & Hon. J. E. Cote, *Alberta Civil Procedure Handbook 2000* (Edmonton: Juriliber Ltd., 2000) at 187.
32. See Rule 219.1 and Practice Note 7 of the *Alberta Rules of Court*.
33. Practice Note 3 (6) of the *Alberta Rules of Court*.
34. Practice Note 3 (11) of the *Alberta Rules of Court*.
35. Clients are required to attend. See Practice Note 9 (2) on mini-trials in the *Alberta Rules of Court*.
36. Practice Note 9 (4) & (6) of the *Alberta Rules of Court* recommends that the parties prepare an agreed upon Statement of Facts as no evidence is to be adduced at the mini-trial - "just arguments based upon facts that are agreed upon or essentially agreed upon."
37. For example, a belligerent client who is opposed to settlement, self-assured that he or she has a

"winner" of a case, may be told by a judge that they would decide in favour of the other party, resulting in reevaluation and a renewed willingness to negotiate.

38. Practice Note 9 (9) of the *Alberta Rules of Court*.

39. R.S.A., 1992, c. E-13.3.

40. Alberta, *History of the Environmental Appeal Board: 1993 - December 1999* (Edmonton: Public document available at the Environmental Appeal Board Office, 9 December 1999) at 1.

41. *Ibid.*

42. Alberta, *Environmental Appeal Board: Business Plan 2000-2001 to 2002-2003* (Edmonton: Public document available at the Environmental Appeal Board Office, 23 December 1999) at 1.

43. Alberta, *Environmental Appeal Board of Alberta 1998 Annual Report, January 1, 1998 to December 31, 1998* (Edmonton: Public document available at the Environmental Appeal Board Office, 4 March 1999) at 2.

44. *Supra* note 15 at 9.

45. Alberta, *Environmental Appeal Board: Business Plan 2000-2001 to 2002-2003* (Edmonton: Public document available at the Environmental Appeal Board Office, 23 December 1999) at 2.

46. *Ibid.*

47. *Supra* note 15 at 11.

48. *Supra* note 42 at 20.

49. *Supra* note 39 at s. 87(1).

50. *Supra* note 42 at 2.

51. *Supra* note 39 at s. 92.2.

52. *Supra* note 42 at 19.

53. *Ibid.* at 2.

54. As of March 1, 2000.

55. Alberta, *About the Environmental Appeal Board Members* (Edmonton: Public document available at the Environmental Appeal Board Office, April 1999) at 1.

56. Dr. Tilleman, B. Comm., LL.B., J.D., LL.M., JS.D., is also the Vice-Chair of the Council of Canadian Administrative Tribunals, and adjunct professor at the University of Calgary Faculty of Law. He possesses environmental law experience in both the United States and Canada, as legal counsel, negotiator, mediator and decision-maker.

57. Dr. John Ogilvie has extensive consulting experience throughout North America in the fields of chemicals, mines and metals, forest products, waste management and economics.

58. Dr. Naeth is a professional biologist and agrologist; Mr. Peiluck is Managing Director of SCOPE Environmental Auditing Services Ltd. and has extensive experience as an advisor and witness to 24 judicial and quasi-judicial boards; Dr. Hrudehy has a risk management and environmental health background with a Ph.D. in Public Health Engineering; Dr. Best has extensive experience in the oil and gas industry and is currently in the consulting field; Dr. Vos is a physician in family practice and industrial medicine. See *supra* note 55.

59. Alberta, *Environmental Appeal Board Fact Sheet* (Edmonton: Public document available at the Environmental Appeal Board Office, November 1998) at 1. Also see *supra* note 39 at s. 83.

60. For a more complete listing of the criteria used by the Board in determining intervener status, see Alberta, *Mediation/Settlement Conference Information Brochure: *Mediation* - What is it? Why use it? - Environmental Appeal Board* (Edmonton: Public document available at the Environmental Appeal Board Office, 28 May 1999).

61. *Supra* note 43 at 2.

62. *Ibid.*

63. *Supra* note 15 at 14.

64. *Supra* note 60.

65. *Supra* note 43 at 10.

66. Dr. J. Ogilvie, "Responses to Alternative Dispute Resolution Research Questionnaire" (Conducted by Ron Goltz, 15 February 2000), at page 3 response #10 (attached as Appendix 1 to this paper).

67. See *Supra* note 60 for a list of the procedural matters that can be determined in consultation with the parties.

68. *Ibid.*

69. *Ibid.*

70. F. Knebel & G. S. Clay, *Before You Sue* (New York: William Morrow and Company, Inc, 1987) at 251.

71. *Supra* note 42 at 17.

72. 6 appeals were filed in 1993, 38 in 1994, 34 in 1995, 81 in 1996, 64 in 1997, and 251 in 1998. See Alberta, *Environmental Appeal Board: Business Plan 1999-2000 to 2001-2002* (Edmonton: Public document available at the Environmental Appeal Board Office, 12 April 1999) at 20.

73. *Supra* note 70 at 250.

74. *Supra* note 2 at 5.

75. *Ibid.* at 6
76. *Supra* note 66 at page 2 response #9.
77. Dr. S. Hrudey, "Responses to Alternative Dispute Resolution Research Questionnaire" (Conducted by Ron Goltz, 15 February 2000), at page 2 response #9 (attached as Appendix 2 to this paper).
78. *Supra* note 70 at 251.
79. *Supra* note 15 at 5.
80. *Supra* note 43 at 6.
81. *Supra* note 77 at page 1 response #4.
82. B. Barbour, "Alternative > Appropriate: A shift in thinking about tribunal processes" (Paper presented to the 1999 International Conference - Best Practices in Administrative Justice, hosted by the Council of Canadian Administrative Tribunals, Vancouver, BC, 10, 11 and 12 October 1999) at 12-13 [unpublished].
83. *Supra* note 66 at page 1 response #4.
84. Dr. A. Naeth, "Responses to Alternative Dispute Resolution Research Questionnaire" (Conducted by Ron Goltz, 15 February 2000), at page 1 response #4 (attached as Appendix 3 to this paper).
85. *Ibid.*
86. *Supra* note 70 at 251.
87. J. Higgins, "Mediation: The Training Component" in J. Macfarlane, ed., *Rethinking Disputes - The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd., 1997) at 361.
88. *Ibid.*
89. *Supra* note 66 at page 2 response #8.
90. *Supra* note 77 at page 2 response #8.
91. C. Morris, "The Nature of Discourse on Ethics in Mediation" in J. Macfarlane, ed., *Rethinking Disputes - The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd., 1997) 301 at 332.
92. *Ibid.* at 335.
93. *Supra* note 72 at 1.
94. *Supra* note 66 at page 3 response #10.
95. *Supra* note 91 at 333.
96. *Kostuch v. Director, Air and Water Approvals Division, Alberta Environmental Protection* (August

23, 1995), Appeal No. 94-017 (Alta. E.A.B.) at 10.

97. *Ibid.* at 13.

98. *Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (October 28, 1996), Appeal Nos. 96-015, 96-017, 96-019, 96-067 (Alta. E.A.B.) at 10.

99. *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection* (October 19, 1998), Appeal No. 98-230-D (Alta. E.A.B.) at 18.

100. *Ibid.* at 9-10.

101. "In light of the discretionary nature of the Board's powers, it must decide each case individually in light of the material before it in that particular case. Over time, the Board's prior decisions may provide a useful benchmark to indicate how the Board will view particular types of cases. However, while the Board will generally try to decide similar cases similarly, as a matter of law it must decide each case on its own merits." See Alberta, *Environmental Appeal Board: Rules of Practice* (Edmonton: Public document available at the Environmental Appeal Board Office, June 1999) at 3.

102. *Ibid.* at 3.

103. *Supra* note 91 at 320.

104. *Supra* note 77 at page 1 response #3.

105. *Supra* note 15 at 16.

106. R. A. Benitez, "Alternatives to litigation between administrative authorities and private parties, the pan-European approach" (Paper presented to the 1999 International Conference - Best Practices in Administrative Justice, hosted by the Council of Canadian Administrative Tribunals, Vancouver, BC, 10, 11 and 12 October 1999) at 7 [unpublished].

107. D. Saxe, "Water Disputes in Ontario: Environmental Dispute Resolution and the Public Interest" in J. Macfarlane, ed., *Rethinking Disputes - The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd., 1997) 233 at 246.

108. *Supra* note 15 at 18.

109. *Ibid.* at 4.

110. *Supra* note 106 at 7.

111. *Supra* note 66 at page 1 response #3.

112. *Supra* note 84 at page 1 response #3.

113. *Supra* note 66 at page 1 response #5.

114. *Supra* note 15 at 22.

115. *Supra* note 66 at page 1 response #3.
116. *Supra* note 15 at 25.
117. *Supra* note 77 at page 1 response #3.
118. *Supra* note 66 at page 2 response #7.
119. *Supra* note 84 at page 1 response #7.
120. *Supra* note 77 at page 1 response #7.
121. *Supra* note 70 at 247.
122. *Supra* note 106 at 7.
123. *Supra* note 15 at 24.
124. *Ibid.* at 25.
125. *Supra* note 42 at 6, 8, 13-14
126. *Supra* note 106 at 9.
127. *Supra* note 107 at 237.
128. *Supra* note 66 at page 2 response #6.
129. *Supra* note 84 at page 1 response #6.
130. *Supra* note 77 at page 1 response #6.
131. For a full description of each Board member's qualifications and background, see *supra* note 55.
132. For example, the EAB hosted the 1999 International Conference entitled "Best Practices in Administrative Justice" in Vancouver, BC.
133. *Supra* note 42 at 19.

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