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## Dispute Resolution in Environmental Conflicts: Panacea or Placebo?

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Dispute resolution techniques have caught the public imagination as a painless way to reconcile conflicting positions. The techniques have also been sold as providing fast resolution to a broad spectrum of dispute types. Are alternative dispute resolution techniques appropriate for use in resolving environmental conflicts? How are they appropriate and further how does the Canadian Environmental Assessment Act' (CEAA) deal with some current criticisms of the dispute resolution process. Dispute resolution is a growing and changing discipline which has made progress since it was first used, 20 years ago. In order to show how resolution techniques fit environmental conflicts, a brief history of dispute resolution use in the US and Canada is appropriate. This discussion will lead into an outline of the mediation process, how litigation has failed and a general look at the Canadian legislative scheme already in place. Then we will examine the specific application of dispute resolution techniques to public interest disputes, a definition of environmental conflict and a brief examination of political influences on environmental mediation. The final portion will examine how CEAA deals with several current issues in the dispute resolution community such as participation, precedent value, power imbalance and the environment as a party in the mediation. Dispute resolution techniques are a very good fit with environmental conflicts and with some minor modifications, many of the criticisms of dispute resolution can be dealt with inside of the process.

1 CEAA. S.C. 1992 c. 37

Dispute resolution came into wide usage in the USA during the mid 1960's due to the enactment of new federal legislation.<sup>2</sup> Congress enacted pre-emptive federal legislation on a wide variety of environmental issues. The delegated federal agencies were charged with set compliance deadlines, articulating national goals and enforcing standards. The federal courts were charged with reviewing all challenges of administrative decisions. The result of the legislation was an explosion of environmental disputes under statutes such as the National Environmental Policy Act (1969), the Clean Air Act (Amended 1970) and the Clean Water Act (Amended 1977).

**2** Rounthwaite, H.!. "Alternative Dispute Resolution in Environmental Law: Uses, Limitations and Potentials" in Hughes, E.L., A.R. Lucas, and W.A.Tilleman (eds) *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Ltd., 1998) at 515.

The legislation provided little guidance on solving the disputes and no precedent existed to deal with complex environmental issues. The legislation provided that members of the public had standing to challenge breaches of the statute. Public interest style legislation gives standing to many agencies, individuals and groups. Broad standing policy means that many parties have the power to delay proceedings, but not the authority to accomplish a planned objective. Alternative dispute resolution provided an attractive alternative to gears of delay.

### **History of Environmental Conflict Resolution in Canada**

During the 1970's, environmental advocates argued strongly for greater public participation in environmental decision making process. In response, the government introduced the environmental impact assessment guidelines and put greater emphasis on public consultation in legislation and administrative decision-making.<sup>3</sup> The increased public participation was to achieve better quality

environmental decisions by incorporating feedback from the general public. The public was specifically asked to participate and give their views on matters of serious concern. In return, the public expected that their views would be reflected in the decisions of government authorities. For a while, this process silenced activists.

3 *Ibid* at 515.

It was soon realized that public consultation was a distortion of the process; listening, but not incorporating public opinion into policy and administrative decisions.<sup>4</sup> The public consultation aspect of decision making became isolated from the established governmental decision-making process. Failure of the decision makers to meet public expectations resulted in a loss of confidence in the democratic process.<sup>5</sup>

4 Tingley, D. "Consultative Mechanisms and the Law Reform Process" in Kennett, S. (eds) *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) 319 -334 at 319.

5 *Ibid*

On the part of government, there was a general realization that the cost and delay factors inherent in the public consultation system could not be justified and did not result in greater acceptance of their decisions.

The release of the Brundtland Report in the late 1980's saw a change in government attempts to provide for public participation. The federal and provincial levels of government implemented a system of roundtables to broaden the debate over environmental legislation and policy options. Roundtables are a consultative process, not alternative dispute resolution. The Purpose of roundtable is to produce a variety of potential resolutions and present them, in a report, to the decision-makers.<sup>6</sup> No resolution is sought at all. Roundtables feature facilitated discussion with representatives of the interested parties. Issues are delineated, facts are presented and the issues are debated. Several factors converged in the early 1990s to promote the use of ADR in natural resources management issues. Environmental issues have several distinct characteristics which require high financial and resource commitments. The disputes themselves are becoming increasingly complex as more scientific knowledge is available, leaving more questions asked and unanswered. Resource disputes affect the public interest, so decisions must be made carefully.

6 Robinson, M.P. "Mediation Roundtables: The Recent Northwest Territories and Hawaiian Experience" in Kennett, S. (ed) *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) 367 - 382 at 369.

Public interest disputes inherently attract multiple parties, potentially including whole communities and far flung environmental protection groups. Environmental non-governmental organizations (ENGO's) have been hesitant to litigate since the Green Case.<sup>7</sup> Judge Lemer awarded party and party costs against a non-profit environmental organization for bringing suit. This precedent bred a climate of litigation fear. Since the 1970's environmental organizations have been forced to weigh the potential gain of a favourable precedent against a potential loss and having to pay costs. These factors have been compounded by economic recession and increased concern about finances. Consequently, dispute resolution has been given a closer look by ENGO's, academics, industry, government and aboriginal groups.<sup>8</sup>

## **Discussion of Dispute Resolution**

Dispute resolution techniques are designed to provide parties with a way to settle their conflicts without resorting to costly and time consuming court system. The techniques used range from consensual processes like mediation to quasi-adjudicative techniques such as arbitration. Mediation is the technique most commonly used to resolve environmental conflicts in Canada.

*Green v. The Queen in Right of the Province of Ontario et al.* (1973), 2 OR 396 (H.C.). 8 *Supra*, note 6 at 14.

Mediation is a non-adversarial approach which focuses on consensus building. All parties must agree to submit to mediation and are free to terminate the mediation at any time. An impartial third party facilitates discussion at face to face meetings between the parties. Agreements are generated through a collaborative approach. The parties are asked to solve problems together.

The philosophy underlying mediation is that the parties know their disputes the best and are the best judges possible solutions. The optimum settlement is not one-party-takes-all, but a decision which both parties can both live with.

Mediation is an appropriate choice whenever all of the interested parties have been identified and are willing to participate, and a consensus appears possible. It is particularly effective where there are a small number of interested parties and the environmental issues are limited in scope and number. It can be sensitive to local concerns and less costly than a panel review in terms of time and resources. Participants also gain a sense of having contributed to the resolution of a problem. Even with this high praise it is estimated that only 10% of environmental conflicts are suitable for dispute resolution.<sup>9</sup>

According to the federal government guidelines,<sup>10</sup> a successful mediation reflects the following guiding principles: Participation must be voluntary, and participants must see the value of such an approach. All legitimate stakeholders must be allowed to participate. The mediator must be independent and impartial. The mediator must be acceptable to all the parties involved and the resolution must also be acceptable to all parties.

Talbot, A. *Settling Things* (Washington: The Conservation Foundation, 1983) at 9 1.

<sup>10</sup> www.ceaa.gc.ca.

## **Dispute Resolution Process**

There are three primary methods of resolving disputes - negotiation, mediation and arbitration. Negotiation essentially involves communication between the parties regarding a dispute. The parties discuss the actions that they could take to resolve the conflict between them. Mediation involves facilitation by a impartial third party, of settlement discussions between all the parties. The mediator has no decision making power but intervenes to promote effective communication. A voluntary, mutually agreeable resolution is the desired result. Arbitration involves presenting evidence and argument to a neutral third party who has the power to make a binding decision. This process is not formal court adjudication, but mirrors the court process. Arbitration features fewer formalities, flexibility in awards and involves an expert decision maker chosen by the parties.

Each Dispute Resolution technique features unique aspects. Mediation is most often used in environmental disputes so the following is in examination of the mediation process. There are many

mediation process models, but they all follow the same general structure. This structure, although well established must be flexible enough to respond to changing needs and circumstances as the mediation progresses.

The first stage is to present an overview of the process and develop a rapport with the parties.<sup>11</sup> This stage is also an important opportunity for the mediator to emphasize that the process will succeed or fail on the commitment of the parties. The parties and mediator work together to set guidelines and rules to guide the process. These may include access to information and mutually acceptable forms of technical support. These sorts of rules are discussed later in this paper. The purpose of the first stage is to orient the parties in the process and increase their confidence.

11 Magnuson, Janis. Law 663: Dispute Resolution. Class Lecture. University of Calgary. Calgary, Alberta. February 9, 1999.

The second stage is for the parties to identify issues and set the agenda.<sup>12</sup> The focus is on broad concepts. At this stage, the mediator restates issues so that they are common issues, not simply demands or accusations from each party. At this stage, the mediator plays a large role in maintaining a safe environment for contribution by the parties. By restating the party's position in neutral language, the mediator can depoliticize issues and foster understanding. At the same time, the mediator must ask "why" questions to discover what underlies the wants of the parties.

The third stage involves clarifying interests, seeking information and developing options.<sup>13</sup> In environmental mediation, the information seeking and communicating stage may be protracted. The parties need to fully understand the technical positions in order to evaluate options later in the process. Due to the technical requirements, experts may be retained to comment on information. Once all the relevant information is assembled, a list of options must be made. This is done by brainstorming. The mediator discourages criticism or evaluation. At the conclusion of this stage the parties should have cooperatively developed a list of options and a mutual understanding.

The fourth stage sees the parties negotiating an agreement based on the options developed in the last stage.<sup>14</sup> At this point the options should be fine tuned; eliminating options which are unrealistic, not feasible or not economically practical. The remaining options are prioritized. The parties then determine what options they can accept and what works best for them. Optimally, the parties generate a resolution which they can both live with.

12 *Ibid*

13 *Ibid*

14 *Ibid*

### **Why litigation is inappropriate**

Litigation has been used to address environmental conflicts for more than 20 years. Over that time, dissatisfaction with litigation has grown. Law makers have been pushed to find new and more satisfactory ways of dealing with the wide range of disputes which arise. Due to the technical nature of data required in environmental cases, administrative tribunals have long been charged with responsibility of hearing environmental matters. One advantage to tribunal control is that panel members have an opportunity to develop expertise to deal with the complex technical issues and uncertain or inadequate empirical data. Consequently, evidentiary difficulties and inadequacies have made the court

shy of dealing with substantive issues. It has effectively restricted the supervisory role of the court to procedural doctrines such as ultra vires, natural justice and fairness.<sup>5</sup> In the judicial review process judges have been unable or unwilling to adequately address the substantive aspects of environmental disputes.

Litigation, by its nature, is inappropriate to deal with environmental conflicts. Litigation is an adversarial process designed to address only legal issues. Doctrines such as stare decisis encourage parties to frame issues to fit into narrow legal definitions.<sup>6</sup> The inevitable result is that the political, economic, social and environmental values underlying the issue are not addressed.<sup>7</sup> In environmental cases individuals not only seek legal protection but they also seek entrenchment of their own values into the law. For example, where a landowner believes that corporate development on the adjacent land will damage his own land, the landowner also seeks an injunction against the corporation. What is not recognized by the law is that the landowner also seeks recognition that land development will indeed damage the land. By extension, the landowner wants to know that the Canadian courts hold values similar to his. Unfortunately, the court has seldom been prepared to comment on political or social values in their environmental decisions. Litigants are disappointed where the primary issue is not the economic ramifications.

**15** Rounthwaite, H.!. "Alternative Dispute Resolution in Environmental Law: Uses, Limitations and Potentials" in Hughes, E.L., A.R. Lucas, and W.A.Tilleman (eds) *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Ltd., 1998) at 513.

**16** *Ibid.*

**17** *Ibid.*

The limitations of procedural review and monetary awards have resulted in widespread dissatisfaction with the court as a means to resolving environmental disputes. The shortcomings of litigation have prompted the exploration of alternative conflict resolution processes.

Attempts have been made to formalize dispute resolution techniques and bring them within existing judicial and legislative systems. This integration has been attempted by mandating dispute resolution, using legislation to establish formal rules and standards.<sup>18</sup> This process of formalization and mandate is called institutionalization.

Institutionalization makes the dispute resolution process predictable and provides clear mechanisms for enforcement. The ability to enforce provides a measure of protection for the parties who choose to use dispute resolution. The only drawback to institutionalization is the difficulty in creating comprehensive legislation for a process which is highly complex and intricate. The main problem is in achieving the proper balance between the flexibility required for effective dispute resolution and achieving the certainty required to form effective legislation. Institutionalization could have the effect of destroying the very flexibility which makes dispute resolution useful.<sup>19</sup>

**18** Swanson, E.J. "Alternative Dispute Resolution and Environmental Conflict: The Case for Law Reform" (1995) 34(1) *Alberta Law Review* 267.

**19** *Ibid.*

**CEAA: The Federal Legislative Scheme**

The first attempt at incorporating dispute resolution techniques into environmental mediation was passed in 1992. The Canadian Environmental Assessment Act<sup>20</sup> (CEAA) functions as a planning tool. Once a project is initiated by government, requires an approval or is to receive federal funding, the CEAA review process is triggered. The purpose is to attach terms and conditions the approval. CEAA provides the public with an opportunity to help determine the terms and conditions. Public input an debate on environmental and social impacts of a project before its implementation is meant to help design better development projects.

To accomplish this the procedural machinery awakens. The Canadian Environmental Assessment Agency, an administrative body, holds panel reviews and/or meditations.<sup>21</sup> The act allows for some or all of the issues to be referred to mediation at the discretion of the Minister. In lieu of a reference, the default is the panel review. In order for mediation to be used, the parties must be identifiable and willing to participate in the process. The public are invited to attend panel reviews and make submissions but the meditations are by invitation only. In this process, a mediator is appointed by the Minister after consulting with the responsible government agency and the other parties to the mediation. The mediator is chosen from a list maintained by the Minister. The Minister has discretion to determine the issues to be discussed. The Minister has full discretion until the mediation begins. Where issues are inappropriate for mediation, they are determined in the panel review.

<sup>20</sup> Canadian Environmental Assessment Act, S.C. 1992 c.37.

<sup>21</sup> Doelle, M. "The Canadian Environmental Assessment Act: New uncertainties, but a step in the right direction." (1994) 4 JELP 59-91 at 80.

### **Canadian Model**

In Canada, 3 main procedures have been used to resolve environmental disputes; consensus building, negotiated regulation and consultation.<sup>22</sup>

#### Consensus building processes

Consensus building is a problem solving approach which emphasizes the common interests of the participants in order to define issues and later to resolve the dispute<sup>23</sup>. Parties work together to design a dispute resolution process. Once the process has been agreed upon, the parties work as equals to ascertain acceptable actions and achieve outcomes. The objective is to improve communications and relations between parties who are normally opposed in interest to each other. The process ensures that the work is done without imposing the views or authority of

one group onto another.<sup>24</sup>

The participants do not need to agree with all portions of the agreement, they only need to be able to live with the total package. Due to the flexibility of the consensus building process, it can be adapted to fit almost any situation. In the case of environmental disputes, it is used to compliment existing government and private sector decision making processes.

This process, although informal compared to litigation, features face to face interaction between participants with the goal of reaching a decision. Consensus building may, but doesn't need to result in recommendations or a decision between the parties. The strength of this process is that it allows innovative, thoughtful solutions that could not otherwise be created under the current political and legal constraints. In Canada, consensus building has been used to develop policy, regulations and procedures

and modify project design and programs in response to community concerns.

**22** Bingham and Haygood "Environmental Dispute Resolution: The first 10 years." (1986) 41:4 The Arbitration Journal 3 at 4.

**23** Supra, note 16

**24** Cormick, G., N. Dale, P. Emond, S.G. Sigurdson and B. Stuart. "Building Consensus for a Sustainable Future: Putting Principles into Practice" (Ottawa: National Roundtable on the Environment and Economy, 1996) at 5.

### Negotiating regulation

"Regulatory negotiation is a process of policy formulation that brings representatives of affected interests together to reach consensus on the content and sometimes the language of a proposed rulemaking."<sup>25</sup> Negotiating has been used to set environmental standards, in lieu of enacting regulations. That said, negotiated regulation is intended to complement the conventional enforcement and compliance process. Instead of replacing the conventional process, it is hoped that the resolution of a negotiation would be more satisfactory than top-down regulation determined unilaterally by government.

Negotiation differs from environmental mediation. The controversies that negotiation attempts to resolve are not specific to a dispute or geographic site. The purpose is to define general rules which have broad policy applicability. Specifically, the purpose is to alter behavior by clarifying and fixing standards. By its nature, regulatory negotiation is prospective in its orientation; it functions less to resolve specific disputes and more to define standards.

In Canada, one successful example of negotiated regulation is the creation of air pollution standards which are tailored to the output of the corporation. Each corporation signs a contract with the government, providing for emissions standards and the consequences of breach of those standards. The resulting contract may also incorporate incentives for reduction. Contract regulation provides security for corporations who are affected by changing environmental standards imposed by government.

The process of negotiated regulation is a fluid one, depending on the participants, negotiation style and perception of the government's position.<sup>26</sup> Participants must be carefully chosen to represent government and industry. The negotiation must include government and industry staff who are senior enough to express agency view with credibility and authorize an agreement.<sup>27</sup> Environmental interests are rarely invited to participate. Information is openly exchanged to facilitate an agreement. The face to face interaction between parties can be credited with focusing the process on realistic expectations.

During the negotiation, a government agency participates as a party-at-interest.<sup>28</sup> Like any other party, the agency can block agreement or withdraw from the negotiation at any point. The agency is responsible for ensuring that the agreement is consistent with its policy and standards. The agency is also responsible for separating its procedural role as convener and facilitator with its status as a party in the dispute. This is accomplished by contracting with outside parties to facilitate and convene the negotiation. Once the panel has convened, it adopts its own protocols and determines its use of resources, terms and mode of operation.

<sup>25</sup> Fiorino, D.J. "Regulatory Negotiation as a policy process" (1988) July/August Public Administration Review 764.

26 Grad, F.P. "Alternative dispute resolution in environmental law" (1989) 14 Columbia Journal of Environmental Law 157 at 162.

27 Supra, note 16.

28 Supra, note 25 at 765.

### Public consultation

Public consultation is not intended to produce a resolution of the dispute but to provide decision makers with a diverse sampling of opinions from the public. Public consultation mechanisms simply allow the public to give advice to decision makers on how their interests might best be represented. The purpose is to constrain the discretionary power of government and provide mechanisms for productive interaction between government affected citizens. The structure favours participation of the local community to the exclusion of broader interests such as public interest groups. The focus remains on local community, even though there is often outcry from the general public about the use of public resources.<sup>29</sup> Consultation is an opportunity for the public to vent, express positions and try to influence the decision makers. On the other hand, consensus building process is different from consultation because it encourages agreement and fosters understanding between the parties.

### Application of DISPUTE RESOLUTION to public disputes

Dispute Resolution techniques are commonly applied to private disputes. This is appropriate as the resolution achieved only affects those parties at the discussion table. Private disputes have different characteristics than public disputes. It has been debated whether dispute resolution is suitable for public policy conflicts because the public, who is not at the discussion table has an interest in the outcome of the dispute.

In Canada, public policy disputes often take place over the use of natural resources. Natural resources are of central importance to the Canadian economy and way of life. Conflict over resources generates heated response from the public and similarly high intensity political pressure from citizens and corporations to resolve the dispute. Twenty years ago, that resolution would have involved a quiet agreement between political leaders and corporations. Now, the government is faced with political pressure from its citizens.

To accommodate these expanded interests, the current approach to policy creation is far more inclusive. The parties have expanded to include the persons who are directly affected, adjacent landowners, aboriginal interests, corporations and the government department who has responsibility for the subject matter of the conflict.

29 Benidickson, J. "Environmental law survey part H (1980-2)" (1993) 25:1 Ottawa Law Review 123 at 131.

Public disputes exhibit several characteristics which distinguish them from other types of conflict. The mediation or negotiation dynamic in public disputes is unique because no party has exclusive ownership of the dispute, there may be a large number of parties, government involvement and the parties are likely in a long term relationship.<sup>30</sup> These factors are unique to public interest disputes and process.

The most conspicuous difference from private disputes is that no party has exclusive ownership over an environmental dispute. As an example of a private dispute, two neighbors fight over who should build



the fence between their properties. The acts of the landowners only affect each other. There are no other parties who should bear the responsibility for building the fence. There are no parties outside the neighbors who would benefit or be injured by the proposed fence. The only possible affected or interested parties are the landowners.

In a similar public dispute where one neighbour has dumped a toxic substance on his own property, a large number of stakeholders may exist. The dumping landowner has not only affected their own land, but may affect all the neighboring landowners. The value of the adjacent lands may decline. The adjacent lands may no longer be useful for purposes like crop farming, animal grazing or families playing. If the toxic substance has found its way into the local water source, the health and welfare of the community may be affected. Fish habitat in the waterway may be affected, triggering involvement by several levels of government as well as the involvement of local and national sport-fishing organizations. Please note that, with the exception of the originating landowner, no particular party has a better claim to helping resolve the conflict. The community, neighbours, governments and environmental organizations may all claim a right to contribute. Each potential party has an equally valid claim to involvement in the dispute resolution process.

30 Macfarlane, J. "Mediation" in Macfarlane, J, (ed) *Dispute Resolution* (Toronto: Emond Montgomery Publications Ltd, 1999) at 386.

The second characteristic of environmental disputes is that they typically attract multiple parties. In the last example, the originating landowner and adjacent property owners are not the only parties who will be interested in contributing. The dumping event may strain municipal agencies and trigger response/involvement of all levels of government. Organizations on the periphery such as local, national and international environmental groups and the corporation who manufactured the toxic substance may wish to participate in any discussion. Diverse interest groups may seek resolution of a wide variety of issues such as safety and prevention, clean up of the toxic substances, costs and attribution of costs for any damage caused and proper methods of enforcing existing environmental regulations. The result of multiparty involvement is a complex maze of issues and interests.

The third characteristic of environmental disputes is government involvement. The presence of the government can drastically change the dynamics of a negotiation. The government not only represents a very deep pocket, but also a party with decision making authority. The presence of a government department, especially where the department has clear authority may undermine the perception of a consensual outcome. The result may be that interest holders feel unduly pressured and feel as though they have no real opportunity to participate in the resolution.

A final and conclusive adjudication is rarely in the best interests of the parties. In environmental disputes, the parties are often stuck with each other for a long period of time. This might be in the context of neighbours, communities or corporations running long-term operations within communities. The parties would benefit where they had an ongoing system to resolve

disputes.

These unique and defining circumstances seem like a criticism of the use of DISPUTE RESOLUTION in private disputes, but the real question is how can litigation handle these defining characteristics. Litigation is and inherently exclusionist forum. The litigation process distills issues to those that stem from or effect legally definable rights and obligations. This largely ignores the interests of the community. The result is a tangled web of positions and interests.

## Environmental Conflict

Loosely defined, environmental conflict is a dispute between parties which is about or directly relevant to the natural environment.<sup>31</sup> Environmental issues are not confined to land use conflicts. They affect many people on a deeply personal level because they impact the health and well-being of the community. These types of disputes are often fraught with emotion and fear on the part of citizens. In this context, the dispute is not only a contest between rights and obligations recognized by law, but also about their personal perspectives and perception of the parties.

There are roughly five categories of dispute (1) party to party, (2) issuance of licenses or permits, (3) preliminary or "in principle" approvals, (4) content of law and policy and (5) compliance and enforcement.<sup>32</sup> Conflict types 1, 2 and 5 are often between private individuals or is individuals and government. The dominant characteristic of these types of disputes is that they involve a conflict of interests, not values. These disputes are not based on the belief that a project should not go ahead but rather, on the desire for a different outcome or impact. A dispute based on interests can be solved when the parties have an opportunity to communicate about their preferences and limitations. The second broad type of dispute is not so easily dealt with. Conflict types 3 and 4 involve disputes over values.<sup>33</sup> A party holds the belief that an approval should not be granted or a policy should not be implemented. As a confounding factor, the government has absolute authority to make decisions in the area of approvals and policy formation. Where one party has all the power, there is very little incentive for them to resolve any disputes which might arise, unless there is a threat of litigation.

31 Supra, note 16.

32 Supra, note 16.

Dispute resolution allows equal input from all participants. Within the resolution the parties can negotiate for recognition of their values such as apologies and particular mitigation steps. Competing Values in Environmental Conflict

Environmental conflicts, at some basic level, stem from differences in beliefs and values. These values have been categorized by theorists into a broad spectrum of environmental ethics. Awareness of the breadth of the spectrum is useful in examining any environmental issue. Three of the representative points on the spectrum are Anthropocentrism, Ecocentrism and Social Ecology Theory. Adoption of one ethic over another can result in vastly different consequences in the resolution of conflict. Parties characteristically adopt one ethic over another and use it to support their view or desired result.

At one end of the spectrum, Anthropocentrism represents the view that human interests should take priority over all other considerations. The environment is strictly a tool for human use. As a tool, the environment is not owed any moral obligation by humans. This theory nicely encapsulates the view that common lands and resources should be exploited for human use without an eye to preservation or conservation of the resource.

Supra, note 16.

At the middle of the spectrum, Ecocentrism or "the land ethic" views land as a living organism. This view spawns the idea that living things, as biotic citizens, deserve rights. Each living thing, including humans, relies on the existence of healthy land and healthy food chain. Deterioration of one species or land hurts all other living things within the ecosystem. The priority is to preserve all species and their diversity in order to preserve the stability of a whole interconnected system. Ideally, any change to the

environment should be slow and allow the environment to maintain its ability to self-regulate.

At the other end of the spectrum, Social Ecology Theory views the domination of nature by humans as analogous to social domination. Domination is a highly negative activity as the current social structure struggles to eliminate cultural, gender, religious and economic discrimination. Under this theory, the fact that nature has no political voice is as intolerable as the notion that women should not be allowed to vote or that some societal groups should be inherently more valuable than others. The logical extension of this theory is that humans should not dominate nature.

It is trite to say that the social structure is only as good as the dominant political beliefs. Environmental legislation is no different. The view currently espoused in environmental legislation is between anthropocentric and ecocentric. The goal of this legislation is to minimize or at least be able to predict the impact of changes to the environment. There is some small recognition that the natural environment has innate value. That said, the dominant political climate holds development and economic realities in high esteem. CEAA does not function to stop development, only temper it with concession to community and environmental interests.

#### *Canadian Environmental Assessment Act*

Dispute resolution has been incorporated into several Canadian environmental statutes. Law reform in this area has taken two forms; legislation dealing exclusively with ADR across a legislative subject matter and legislation providing for use of ADR in the context of a particular subject matter.<sup>34</sup> An example of the second type of legislation in the CEAA, incorporates dispute resolution into the statutory scheme for reviewing proposed projects.

In 1995, CEAA was the only federal environmental legislation providing for use of dispute resolution. Now most of the provinces include dispute resolution in their environmental assessment statutes. CEAA explicitly deals with many of the criticisms of dispute resolution such as precedent value, confidentiality, mediator qualifications and participants. It does not deal with representation of the environment and power imbalances. Each of these factors should further the purposes of the act.

4. The purposes of this Act are (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them; (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy; (b. 1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process; (c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and (d) to ensure that there be an opportunity for public participation in the environmental assessment process.<sup>35</sup>

The broad general purpose of the Act is to ensure that environmental impacts are considered before the proposed project has begun. This is tempered with the caveat that development should be environmentally and economically sound. To ensure the best designs for the project, public participation has been built into the process.

Supra, note 16.

CEAA S.C. 1992 c.37.

## **Precedent Value, Privilege and Confidentiality**

One drastic disadvantage to using the American model or the classic mediation model is that the resulting agreements are largely confidential. Corporations can seek to use mediation in order to avoid generating creating damaging precedents.<sup>36</sup> Corporations also have the unique opportunity to suppress damaging information. While mediation solves many efficiency issues, it also provides safe haven for parties who wish to hide behind confidentiality.

This issue has already been dealt with by CEAA. The mediator is required to prepare a report at the end of the mediation.<sup>37</sup> The report outlines the issues which were resolved and the agreed resolution nothing more. The Act also provides that all statements made within the mediation are inadmissible as evidence in later court or tribunal proceedings unless consent of the mediator or party is obtained.<sup>38</sup> The report is then included in the panel review report and released to the public.<sup>39</sup> A public registry has been established by s. 55 and can be accessed through the Canadian Environmental Assessment Agency's website.<sup>40</sup>

CEAA obtains the best of both worlds, protecting confidentiality and setting some form ,of precedent. The confidentiality of information and offers made during the mediation is preserved. Only resolved issues are reported for public and industry information.

36 Mehta, A. "Resolving environmental disputes in the hush-hush world of mediation: a guideline for confidentiality." (1997) 10(3) Georgetown Journal of Legal Ethics 521 at 521.

37 CEAA s. 32(1)

38 CEAA s. 32(2)

39 CEAA s. 55

40 [www.ceaa.gc.ca](http://www.ceaa.gc.ca)

## **Mediator qualifications**

The act sets out a general guideline which states that the mediator shall be experienced, unbiased and free from conflict.

30.(1)...

(a) appoint as mediator any person who

(i) is unbiased and free from any conflict of interest relative to the project and who has knowledge or experience in acting as a mediator, and (ii) may have been selected from a roster established pursuant to subsection (2); and

(2) The Minister may establish a roster of persons to act as mediators to be appointed pursuant to paragraph (1)(a).<sup>41</sup>

The courts have told us who cannot be a mediator. In *Carpenter Fishing Corp. v. Canada (Minister of Fisheries and Oceans)*<sup>42</sup>, the federal court reviewed the facilitative process designed by the Department of Fisheries and Oceans (DFO) to reach agreement on fishing quotas. The DFO had a strong interest in

implementing quota system. A DFO employee was used as a facilitator in group discussions. Mr. Justice Campbell found that this arrangement gave rise to "direct, intensive and personal" interest in the outcome of the mediation. Ministry employees cannot be mediators under the CEAA process.

The Act sets out a very spartan description of a mediator's qualifications. Caselaw says that mediators cannot be agency employees. I have only to add that potential mediators should be qualified in some respect to mediate, that is certified or conducted an adequate number of meditations.

41 *Supra*, note 35.

42 1 FC 874 (ID).

Who participates in the mediation?

"interested party" means, in respect of an environmental assessment, any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious;

29.(2) An environmental assessment or a part thereof shall not be referred to a mediator unless the interested parties have been identified and are willing to participate in the mediation.

31. The mediator may, at any time, allow an additional interested party to participate in a mediation.

CEAA has defined "Interested Party" as any body having an interest in the outcome of the environmental assessment, so long as their purpose is not frivolous or vexatious. A dispute cannot be referred to a mediator until the parties have been identified and consented to participating in the process. Once the mediation has begun, new parties may be added at the mediator's discretion. This is as far as the parties are restricted or defined under the act. In practice however, interested party has been effectively defined as directly affected parties.

The Dona Lake mediation, an early test run of the mediation process, involved a proposed gold mine in Northern Ontario.<sup>43</sup> Community native groups had many concerns that they wanted to have addressed. The parties were defined to include native groups and industry but to exclude environmental interest groups, concerned citizens, hunters, trappers, tourists, local residents other than the native groups. In the end, four parties participated; the two levels of government, the company and native groups.

Many different interest groups were excluded from the mediation because the main issue of concern for the government and industry was native interests. The participants agreed that other groups would only complicate the process. There was a general feeling that a variety of interested parties would have jeopardized the negotiation and therefore jeopardized the mining project<sup>44</sup>. This practice was justified by the presence of the Ministry of the Environment, to represent the unrepresented at the table. It is important to note that the Ministry, pinned with the hopes of the unrepresented, only took part as an observer and had no significant impact on the final product.<sup>45</sup> The agreement itself did not resolve any environmental issues, nor were they seriously discussed. Even social and economic issues were not given much discussion.

Doelle, M. "Regulating the environment by mediation and contract negotiation: A case study of the Dona Lake Agreement" (1993) 2 JELP 188.

At first glance CEAA allows broad participation, only excluding frivolous or vexatious parties. In

reality, CEAA's mandate has been interpreted by the Canadian Environmental Assessment Agency more narrowly. Affected parties include residents who will be affected by the project but excludes interest groups who make use of affected land for recreational purposes. Does the pipeline have to be running through your basement in order to get standing at a CEAA mediation? Pretty close.

This exclusion of interested parties, although understandable from an efficiency perspective, can result in agreements which do not seriously consider the environmental impacts of a project. The inclusion of fish and game groups would promote conservation and habitat preservation, which CEAA, as environmental protection legislation should protect. The exclusion of interested parties pushes mediated agreements outside the objectives stated in the act.

To exclude environmental organizations or some representation for the environment from the table results in environmental interests being neglected in the final agreement. Where there is no environmental representative, it is impossible reach an agreement which balances environmental and development interests, in compliance with the objectives of the Act.

44 *Ibid at 196.*

*Ibid at 201.*

In light of governmental refusal to include potential environmental interests, the legislation must be altered to include a representative for the environment in every mediation. The representative could be called from government, fish and game organizations or public interest environmental advocates to fit the situation. Without this change the act cannot achieve its lofty goals.

"The Environment" as an interested party

The philosophy of dispute resolution dictates that all affected parties should be included in the decision making process. Affected parties should have input into any decision making process which will impact their lives or well-being. The environment is affected by development and tribunal decisions. As such, it should have moral standing. At the very least, non-human interests should be considered.

### **Who should represent the environment?**

There are many choices to represent the environment. It may even be argued that environmental concerns are inherently protected in the process. By balancing the competing interests of landowners, community groups, corporations and governments, the result will likely reflect the best interest of the each participating group. Following the Ecocentric theory, the best interest of the participating groups includes some form of conservation which preserves the stability of the whole system. Is this a reliable method of ensuring the objective of an agreement which fully considers the environmental impacts? No.

The government and landowners each have their own agendas.<sup>46</sup> The government has an interest in promoting development. Increase developed means more jobs and money for the coffers. Landowners have no duty to their communities. They will often be satisfied where their own short term needs cared for.

<sup>46</sup> Stephens, W.O., J.B. Stephens and F. Duke "The Ethics of Environmental Mediation" in Blackburn and Bruce (eds) *Mediating Environmental Conflicts: Theory and Practice* (London: Quorum Books, 1995) at 180.

Environmental Interest Groups sometimes claim to have a special understanding of environmental concerns. They also have their own interests to consider among them, increasing membership and funding.<sup>47</sup> A particular concern is that interest groups have an interest in attracting and retaining political support. Many interest groups claim to advocate for environmental concerns but in reality, none have pure intentions.

There are no easy answers to the question of who should represent the environment. It is best to recognize that each choice has some inherent drawbacks.

### **Power Imbalance**

There are three types of power imbalance evident in mediation; political, information, lack of representation.

Power imbalances in mediation is a fact of the reigning political climate. It is clear that inequity between participants can undermine the extent to which the process is representative, fair and voluntary. Mediation has a strong image of being an egalitarian process. This image tends to lend an air of political legitimacy to mediated agreements. Douglas Amy<sup>48</sup> provides a cynical example of the greedy developer.

"Even if the developer could prevail in a bitter court battle, the political costs and bad publicity might be large. The developer would risk being seen as a selfish special interest or as a "heavy" in the eyes of the public. But if he can achieve virtually the same goals (minus a few concessions) through mediation, he can achieve a major public relations coup. He now appears reasonable and flexible, and his project now has the seal of approval from environmentalists."

*Ibid.*

<sup>48</sup> Douglas Amy (Politics of Environmental Mediation (New York: Columbia University Press, 1987) at 149

This example assumes that the exchange between the developers and environmental groups is negative, occurring at the expense of some interest. It is the nature of mediation that parties at the table have an equal opportunity to contribute to the decision.

The current political paradigm strongly supports development. The purpose of environmental mediation is not to stop development, but to ensure that development implementation is done in a way which accommodates community and environmental interests. A basic tenet of dispute resolution is that the parties know best how solve their problems. Referring back to the example, if minor concessions are all that is required to make the project acceptable to all the parties, assuming that the relevant parties are included, where is the harm?

### Mediator Action **Political** power imbalance

The answer to political and representation power imbalances is mediator action. During the classic mediation process, the mediator provides information, advice and support to weak parties. Additional action may require moving past the traditional role. The mediator can take three types of action to diffuse a power imbalance create by resource inequity and political power; educate the parties, active reality testing and diversifying the representation. Each action involves moving beyond the accepted role of a third party, which is facilitating discussion, keeping focus on the issues and raising questions with the parties to cover gaps in the discussion.

Educating the parties is normally part of the mediation process. In order to counteract a power imbalance, third parties may take steps to educate themselves and introduce information

sources which have not been advanced by the parties. The new information should be used by the mediator to reality-test the parties. The effect is that the third party uses information in order to point out consequences of each potential decision. The Society of Professionals in Dispute Resolution (SPIDR) standards allow a mediator to express concern about possible consequences of an agreement if "the needs of the parties dictate." Although this option seems like an easy solution, such active participation by the mediator may destroy the perception of neutrality which is essential to the process. This action borders on substantive counsel.

The chief criticism for mediator activism is that the mediator is no longer a facilitator, working with the parties toward their own resolution. The mediator becomes a party at the table, with an interest in the outcome. When this happens, the mediator is no longer a neutral party. Trust from the participants is eroded. The parties may leave the process feeling manipulated, feeling that they did not fully participate or voluntarily accept the resolution.

Mediator action is not the only option to deal with political power inequities, party training, group agenda setting and use of integrative procedures such as brainstorming can be used during the mediation to equalize power.<sup>49</sup> Training for participants should be offered at the beginning of the process. Its aim is to help equalize ability levels. The effect of the training is to empower groups and provide them with the confidence and skills to work effectively within the process. Mediator neutrality is not compromised during the training process since all groups can participate and benefit from the session.

After training, all parties should be given an equal say in the agenda setting process. All parties must have an equal opportunity to set rules, protocols and codes of conduct.<sup>50</sup> Several suggested rules include speaking orders, time limits, rules against interruption and attendance requirements. The purpose is to allow all parties the equal opportunity to voice an opinion on the issues under discussion.

Smith, E. "Danger - Inequality of resources present: Can the environmental mediation process provide the answer." (1996) 2 *Journal of Dispute Resolution* 379 at 392.

During the option exploration portion of the process, integrative procedures such as brainstorming, role-playing and workshops can be used. These procedures encourage communication and trust between the groups. Integrative procedures can be used by the mediator to enhance understanding of opposing views and encourage consensual solutions.

### **Inadequate information**

The participants in environmental dispute resolution may be wide ranging, from corporations and governments to private citizens and environmental groups. The range of participants often exhibit a wide disparity in resources which gives rise to a perception of power imbalance. The problem essentially arises out of some parties having far more information. In an environmental dispute access to scientific, empirical information is essential to evaluating the problem. The parties without resources will be unable to evaluate predictions and representations made by proponents. This may disadvantage an already disadvantaged party in the bargaining process. Disadvantaged groups may accept unfair agreements because they don't know any better or don't have the resources to continue the mediation.

### **Mediator Action Lack of information**



Information deficit can be counteracted by mediator action such as including rules regarding open sharing of information between groups, allowing use of technical expertise from government agencies or allowing sympathetic environmental groups to offer consultation and technical support.<sup>5</sup> Sharing is likely to increase as trust is built in the process. Proponents of a project have an incentive to share because disseminating information can clarify misunderstandings about the proposal and potential environmental impacts. Sharing of information can defeat community fears which have grown from an assumption that development is bad.

### **50** *Ibid.*

In order to analyze development data, scientific expertise is often necessary. Administrative boards require a great deal of technical expertise and often keep scientists on staff. Where this is the case, the parties may agree to allow outside groups or government staff to analyze the data. Community groups could also seek technical support from universities and environmental organizations who were not included at the mediation but often have volunteer with suitable skills. Considering the wealth of resources, no under-funded group should be without technical support, providing that these options are built into the process at the beginning.

### Conclusion

Dispute resolution techniques are appropriate to use in environment conflicts because the hallmarks of environmental conflict such as multiple parties with valid claims to participate, highly technical information, and government involvement can be easily accommodated into the process. The mediation process is very flexible and designed to incorporate the changing needs of the parties. Litigation, in contrast, is a rigid process considering only rights and obligations and providing only money damages. Dissatisfaction was the reason why dispute resolution techniques were initially tried in the environmental area. Now, CEAA represents a federal effort to incorporate mediation into environmental decision making. CEAA offers mediation as a complimentary process to panel review. CEAA has attempted to deal with some of the current dispute resolution criticisms. CEAA mandates that all mediation reports are kept at a public registry and incorporated into panel reports. They are therefore part of the public record. The mediator's report only outlines the issues resolved and the agreed resolution. No discussion outside these two areas is included in the report. All conversation and offers between the parties remains confidential. The mediator cannot be called to testify at court or tribunal proceedings on the mediation. The participants are determined by the Minister in charge, but the mediator has discretion to allow parties to join after the mediation has begun. The environment is currently not represented by an independent body in the mediation. The mediator is required to be neutral and not in a conflict of interest regarding the dispute. Power imbalances have not been adequately addressed by the act. Most power imbalances can be corrected within the mediation process. Environmental conflicts take readily to dispute resolution techniques. The flexible process of mediation allows many criticisms of the system to be addressed and conquered.

Smith, E. "Danger - Inequality of resources present: Can the environmental mediation process provide the answer." (1996) 2 *Journal of Dispute Resolution* 379 at 394.

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## List of Works Cited

### Cases

*Carpenter Fishing Corp. v. Canada (Minister of Fisheries and Oceans)* 1 FC 874 (TD)

*Green v. The Queen in Right of the Province of Ontario et al.* (1973), 2 OR 396 (H.C.).

#### Articles

Benidickson, J. "Environmental Law Survey Part 111980-2" (1993) 25:1 *Ottawa Law Review* 123.

Bingham and Haygood "Environmental Dispute Resolution: The first 10 years." (1986) 41:4 *The Arbitration Journal* 3.

Cormick, G., N. Dale, P. Emond, S.G. Sigurdson and B. Stuart. "Building Consensus for a Sustainable Future: Putting Principles into Practice" (Ottawa: National Roundtable on the Environment and Economy, 1996) in Macfarlane, J, (ed) *Dispute Resolution* (Toronto: Emond Montgomery Publications Ltd, 1999) 386-393.

Doelle, M. "Regulating the Environment by Mediation and Contract Negotiation: A Case Study of the Dona Lake Agreement." (1993) 2 *JELP* 189.

Doelle, M. "The Canadian Environmental Assessment Act: New Uncertainties, but a Step in the Right Direction." (1994) 4 *JELP* 59.

Fiorino, D.J. "Regulatory Negotiation as a policy process" (1988) July/August *Public Administration Review* 764.

Grad, F.P. "Alternative Dispute Resolution in Environmental Law" (1989) 14 *Columbia Journal of Environmental Law* 157.

Macfarlane, J. "Mediation" in Macfarlane, J, (ed) *Dispute Resolution* (Toronto: Emond Montgomery Publications Ltd, 1999) 25 7-462.

Magnuson, Janis. Law 663: Dispute Resolution. Class Lecture. University of Calgary. Calgary, Alberta. February 9, 1999.

Mehta, A. "Resolving environmental disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality." (1997) 10(3) *Georgetown Journal of Legal Ethics* 52 1.

Robinson, M.P. "Mediation Roundtables: The Recent Northwest Territories and Hawaiian Experience" in Kennett, S. (ed) *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) 367 - 382.

Rounthwaite, H.I. "Alternative Dispute Resolution in Environmental Law: Uses, Limitations and

Potentials" in Hughes, E.L., A.R. Lucas, and W.A.Tilleman (eds) *Environmental Law and Policy* (Toronto: Emond Montgomery Publications Ltd., 1998).

Schoenbrod, D. "Limits and Dangers of Environmental Mediation: a Review Essay." (1983) 58 *New York Law Review* 1453.

Smith, E. "Danger - Inequality of resources present: Can the environmental mediation process provide the answer." (1996) 2 *Journal of Dispute Resolution* 379

Stephens, W.O., J.B. Stephens and F. Dukes. "The Ethics of Environmental Mediation" in

Blackburn, J.W. and W.M. Bruce (eds) *Mediating Environmental Conflicts: Theory and Practice* (Westport Connecticut: Quorum Books, 1995) 167.

Swanson, E.J. "Alternative Dispute Resolution and Environmental Conflict: The Case for Law Reform" (1995) 34(1) *Alberta Law Review* 267.

Talbot, A. *Settling Things* (Washington: The Conservation Foundation, 1983)

Tingley, D. "Consultative Mechanisms and the Law Reform Process" in Kennett, S. (eds) *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) 319 - 334.

Statute

Canadian Environmental Assessment Act, S.C. 1992 c.37.

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