Matthew Taylor, Patrick Field, Lawrence Susskind and William Tilleman**

Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices*

The popularity of alternate dispute resolution (ADR) has been growing for decades, particularly in the United States and now in Canada. Although ADR has become increasingly popular in the Canadian administrative context, it faces certain difficulties arising from the public interest mandate of many tribunals, in particular environmental tribunals. These difficulties include conventional and institutional problems, such as conflict assessment, communications with and between parties, selecting and training the mediator (tribunal member, staff, or third party?), and identification of the proper parties and competing interests. There are also concerns specific to Canadian environmental tribunals. How do they protect the public interest, handle complex technical and scientific issues, enforcement, confidentiality, and deal with the precedential value of mediated decisions?

La popularité des mécanismes de règlements des conflits (MRC) ne cessent de croître depuis plusieurs décennies, en particulier aux États-Unis et maintenant au Canada. Bien que les MCR jouissent d'une popularité croissante dans le contexte administratif canadien, elles font face à certaines difficultés découlant du mandat de protection de l'intérêt public de bon nombre de tribunaux, en particulier les tribunaux environnementaux. Ces difficultés relèvent tant des conventions que des institutions; citons entre autres l'évaluation de conflit, les communications avec les parties et entre elles, la sélection et la formation de médiateurs (membre du tribunal, membre du personnel ou tierce partie?), et l'identification des parties appropriées et des rivalités d'intérêt. Les tribunaux environnementaux canadiens sont aux prises avec des difficultés particulières. Comment peuvent-ils protéger l'intérêt public, trancher des questions scientifiques et techniques complexes, veiller au respect de la loi, assurer la confidentialité et enfin, dans quelle mesure doivent-ils accorder une valeur de précédent aux décisions résultant d'une médiation?

---

* This paper was commissioned by the Alberta Environmental Appeal Board following a two-day workshop conducted to train administrative tribunal members across Canada in mediation techniques and practices.

** Mr. Taylor, B.A., LL.B., B.C.L., LL. M., M. Phil., is a Policy Analyst for the Privy Council Office, Government of Canada. Mr. Field, B.A., M.C.P., is a Senior Associate at the Consensus Building Institute, Cambridge, MA. Dr. Susskind, B.A., M.C.P., Ph.D. is a Ford Professor of 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. Tilleman, B. Comm., LL.B., J.D., LL.M., JS.D., is the Chairman of the Alberta Environmental Appeal Board, Vice-Chair of the Council of Canadian Administrative Tribunals, and adjunct professor at the University of Calgary Faculty of Law.

Introduction

I. *The Canadian Administrative Environmental Context: A Brief Regulatory Overview*

II. *The Use of ADR Techniques by Canadian Administrative Tribunals*

1. *Who Should Mediate?*

   a. *Protecting the Public Interest*

   b. *Ensuring Qualified Mediators*

   c. *Sheltering Mediation from Formal Tribunal Proceedings*

2. *What Role Should Tribunal Members Play During Case In-Take?*

3. *How Should Tribunals Handle Complex Technical and Scientific Issues within the Context of Settlement Negotiations?*

4. *Should Confidentiality Be Protected?*

5. *Should ADR Proceedings be Mandatory?*

6. *Under What Standard Should Agreements Be Reviewed by Tribunals and Courts?*

7. *What Role Should Tribunals Play in Enforcing and Following Up on Agreements Reached during Mediation?*

8. *Should Mediated or Negotiated Agreements Have Precedent-Setting Value ?*

9. *What Statutory Basis, if any, is Needed to Conduct Mediation Within the Context of Administrative Hearings?*

Conclusion

Introduction

Enthusiasm for the expanded use of alternative dispute resolution (ADR) in Canadian environmental law has been growing.[1] The federal government and some provincial governments have enacted legislation implementing a variety of ADR methods and techniques in various administrative contexts.[2] In addition, environmental tribunals have been using ADR techniques, mostly on an *ad hoc* basis and, in a few tribunals, on a more formal basis.[3] It is clear that most of this activity has been shaped by the growing popularity of ADR in the context of Canadian civil litigation, and in several other areas of public law. It also appears that they

---

1. The phrase "alternative dispute resolution" generally refers to any type of procedure used to resolve disputes other than litigation; S. Goldberg et. al., *Dispute Resolution: Negotiation, Mediation and Other Processes* (Boston: Little Brown, 1992) at 3-5. In the environmental law field, this would include procedures used to resolve disputes other than formal administrative hearings. In Canada, such procedures can be found in pre-hearings, or preliminary meetings used by administrative tribunals.

2. In recent years, there has a been a great deal of discussion concerning ADR reform in the Canadian civil litigation system. Some of the recent and notable governmental task force reports advocating ADR reform include the Ontario Civil Justice Review, *Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996) [hereinafter *Supplemental and Final Report*], the Law Society of Upper Canada's Subcommittee on Dispute Resolution *Report Summary* (Toronto: Law Society of Upper Canada, 1993), the Canadian Bar Association's Task Force on ADR Report, *Alternative Dispute Resolution: A Canadian Perspective* (Ottawa: Canadian Bar Association, 1989), and the Alberta Law Reform Institute's *Dispute Resolution: A Directory of Methods, Programs, and Resources* (Edmonton: The Institute, 1990). The provincial Ontario government took a bold step in the direction of implementing some of the suggested reforms when, in 1997, it introduced mandatory court-annexed ADR in all civil cases, to be phased in during 1998. In addition, there has been an exponential increase in academic writing in the Canadian ADR field in recent years. See, generally, J. Goss, "An Introduction to Alternative Dispute Resolution" (1995) 34 Alta. L. Rev. 1 at 3.

3. For example, Andromache Karakatsanis, the former Vice-President of the Society of Ontario Adjudicators and Regulators, has stated that "[o]ver the last few years, Ontario tribunals have been re-thinking their mandates. We have seen a gradual shift from a rights-oriented legalistic model of adjudication to a more community accessible pragmatic approach to resolving disputes in a way that provides a better service to our customers." In a survey of 19 administrative tribunals in Ontario, she found that 15 of them used some form of ADR; 12 used pre-hearing and settlement conferences and 9 employed a mediation process. A. Karakatsanis; "Problem-Solving with ADR: The Tribunal Perspective" (1995) 9 Can. J. Admin. L. & Prac. 125 at 126, 129.

have been influenced by the writings of academics and practitioners claiming impressive cost and time savings through the use of ADR.[4]

Despite growing interest, ADR is still at an early stage of development in the Canadian administrative context. In contrast to the United States, where the use of ADR in environmental and other administrative settings is relatively well-established,[5] ADR does not currently play a central role in the administration of Canadian environmental law.[6] Even though reforms have been instituted in some jurisdictions, particularly on the provincial level, to date there has not been a systematic effort to catalogue ADR activities in each Canadian jurisdiction. The lack of such a study has

---

4. The advantages of ADR, both generally and in the environmental context, have been well-documented. Some of the reasons generally cited in favour of the implementation of ADR reform in the environmental field include the "high costs and delays involved with environmental litigation; the nature of certain environmental problems, such as cleanup orders, where obligations and shared liabilities can be settled before a final consent decree; the development of certain projects where there is room for discussion on how and where to build; and the regulatory and standard setting process, where there is a possibility that the standards can be agreed upon in advance"; W. Tilleman, "Environmental Appeal Boards: A Comparative Look at the United States, Canada and England" (1996) 21 Colum. J. Env. L. 1 at 69-70 [hereinafter "Environmental Appeal Boards."] Most of the relevant studies show that: 1) the parties tend to be more satisfied with the results of ADR as compared with litigation or administrative adjutication; 2) there are fewer joint gains left unclaimed; 3) relationships among the stakeholders are improved making implementation of agreements easier; and 4) ADR costs less and takes less time. L. Susskind, P. Levy, & J. Thomas-Larmer, *Negotiating Environmental Agreements*, (Thousand Oaks, California: Island Press, 1999), and L. Balow & M. Wheeler, *Environmental Dispute Resolution* (New York: Plenum Press, 1984).

5. Alternative dispute resolution, and specifically mediation, has been in use in the American environmental context for over twenty years; see generally A. Mehta, "Resolving Environmental Disputes in the Hush-Hush World of Mediation: A Guideline for Confidentiality" (1997) 10 Georgetown J. Legal Ethics 521 [hereinafter "Resolving Environmental Disputes"]. Frank Grad has observed that, in the United States, ADR—and ADR inspired approaches—are currently used in a variety of environmental law contexts, including negotiated rule-making, negotiation of consent decrees, civil enforcement actions, and in the negotiation of land use and public land and resources issues. F. Grad, *Treatise on Environmental Law*, looseleaf (New York: Matthew Bender, 1973) at para. 15.01-15.06.

6. Very little has been written on this topic in Canada, and there is clearly a need for more a systematic approach to policy-making. For example, Elizabeth Swanson has observed that the use of ADR techniques in the environmental context in Canada has been "an informal development; the result of governmental or private initiative rather than carefully structured law or policy"; E.J. Swanson, "Alternative Dispute Resolution and Environmental Conflict: The Case for Law Reform" (1995) 34 Alta. L. Rev. 267 at 268. However, there are increasing calls for greater institutionalization. Vanderburgh and Hope make the case for it in the following terms: "[a]dvocates of institutionalized environmental mediation believe that institutionalization makes the process of mediation more predictable, provides a clear mechanism for enforcing the agreement and protects the parties that elect to use it, thereby encouraging its use. Institutionalization should also contribute to more successful mediation, measured not only by the numbers of agreements reached but by an increase in community participation in those agreements." E. Vanderburgh & A. Hope, "Alternative Dispute Resolution" in C. Sandborn, ed., *Law Reform for Sustainable Development in British Columbia* (Vancouver: Canadian Bar Association, 1990) 16, cited in Swanson, *ibid.* at 272.

left legislators and tribunals without a clear sense of what their counterparts in other jurisdictions are doing. When Canadian tribunals have proceeded into the new territory of ADR, each tribunal has had to go it alone, proceeding "from scratch."

With its touted benefits and more widespread use in the U.S., there is a great deal of enthusiasm for proceeding quickly in order to capture the presumed benefits of ADR. Proponents have stated that ADR saves time, saves money, better meets the interests of the parties, produces better outcomes and ensures better compliance with agreements reached.[7] However, there are good reasons to proceed with caution. ADR, like litigation, can be practised well or practised poorly. In particular, prior to institutionalizing ADR, it is important to understand whether there are features of the Canadian administrative system that must be given special attention. As Alan Reid has observed:

> Bringing ADR into administrative law involves more than simply engrafting upon the mandate of an agency additional statutory powers authorizing mediation and arbitration. It requires thinking more deeply about regulation, government, law and public administration, in many ways that seem unconventional for lawyers who have been schooled in, and indoctrinated with, conventional thinking about the 'rule of law' and how courts enforce it though judicial review.[8]

In their book *Designing Conflict Management Systems*, Costantino and Merchant make the critical point that, in designing and improving conflict management systems, the idea of ADR as "alternative" dispute resolution is perhaps less useful than the concept of ADR as "appropriate" dispute resolution.[9] There are, in fact, many ADR options available

---

7. See the following. T. Melling, "Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card" (1995) 30 Land and Water L. Rev. 57 at 85 [hereinafter "The Use of ADR Methods"]. B.C. Mank, "The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?" (1991) 19 Boston Coll. Env. Affairs L. Rev. 239 at 281 [hereinafter "The Two-Headed Dragon"]. D. Singer, "The Use of ADR Methods in Environmental Disputes" (1992) 47 Arbitration J. 55 at 58 [hereinafter "The Use of ADR Methods"]. J.G. Smith, "Alternative Dispute Resolution and the Wetlands Manual Debate: Could Negotiated Rulemaking Have Avoided the Impasse?" (1994) 9 Ohio St. J. on Disp. Res. 415 at 417. L. Susskind, A. Chayes, P. Field & D.S. McKearnan, "Partnering, Consensus Building, and Alternative Dispute Resolution: Current Uses and Opportunities in the U.S. Army Corps of Engineers" (Cambridge, Mass.: The Consensus Building Institute, 1995), section 5 at 13. E. Netter, "Mediation in a Land Use Context" [1995] Institute on Planning, Zoning and Eminent Domain 31. J.C. Sassaman, Jr., "Siting Without Fighting: The Role of Mediation in Enhancing Public Participation in Siting Radioactive Waste Facilities" (1992) 2 Alb. L.J. Sci.& Tech. 207 at 234.

8. A. Reid, "Seeing Regulation Differently: An ADR Model of Policy Formulation, Implementation and Enforcement" (1995) 9 Can. J. Admin. L. & Prac. 101 at 102.

9. C. Costantino & C. Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass Publishers, 1996) at 41.

ranging from those that are modestly invasive and allow the parties to retain the most control over the process (such as mediation) to those that are much more invasive and allow the parties less control over the process and outcome (such as arbitration). The rules governing the use of various dispute resolution procedures need to be legislated and implemented very carefully.

In this regard, it is important to keep in mind, as Dianne Saxe has observed, that environmental disputes are public, and not private.[10] 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.[11] In public disputes, determination of the "affected" parties is not simple. In environmental disputes, more specifically, who precisely is affected and ought to have a place at the table becomes even more difficult. In addition to human beings and organizations that have legal standing, there are ecological receptors (flora and fauna) often directly affected by environmental decisions. They are presumably "represented" by a government agency under the banner of the public interest.[12] But in an ever increasing circle of affected parties, because ecosystems rarely match up tidily with political and legal boundaries, one provincial agency may not have jurisdiction over the breadth of the ecosystem in question. Furthermore, environmental advocacy groups may be better suited to this role. These groups often take on the mantle of champion of and spokesperson for the environment, unencumbered by the need to balance economic and environmental concerns. To make matters even more complicated, in environmental disputes there are future generations who will inherit the irreparable destruction wrought by today's actions (the extinction of endangered species, for instance, or impacting "sustainable development" which is the basis for Canadian environmental legislation[13]). Who will represent them?

---

10. D. Saxe, "Environmental ADR" in A. Stitt, ed., *Alternative Dispute Resolution Practice Manual* (North York: CCH Canadian Limited, 1996) 1451 at 4272 [hereinafter "Environmental ADR"].
11. *Ibid.* at 4276.
12. In fact, this presumption is not always true, at least not in Canada. In *Oldman River Society v. Canada (Minister of Transport)* (1992), 7 C.E.L.R. (N.S.) 1 (S.C.C.), the federal Minister of Environment was found to have not adequately represented the public interest in this seminal environmental decision at the Supreme Court of Canada, with costs distributed back to the environmental group.
13. See, e.g., the Preamble to the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

Given these policy considerations, some ADR techniques may simply be inappropriate and/or inadequate in a public dispute context. For example, when the primary question is whether or not a party's legal rights have been abridged, adjudication rather than mediation could be more appropriate. When there is a need to set a legal precedent, mediation is not appropriate. Finally, when a key party is unwilling to "come to the table" because no agreement is a good outcome as far as they are concerned, mediation cannot proceed.

The legislators responsible for designing ADR systems and the administrative agencies and tribunals responsible for implementing them must move carefully to balance the public interest with the rights and needs of the parties involved. This paper seeks to consider this concern along with nine key issues, particularly from the standpoint of provincial level environmental tribunals. While environmental mediation can be used in a wide variety of administrative, legislative, and judicial contexts, our focus is its role in the work of environmental tribunals. The nine key issues are:

(1) Should tribunal members rely on inside or outside mediators and how can skilled mediators best be identified by the tribunals who decide to use them?
(2) What role, if any, should tribunal Board members themselves play during case in-take (i.e., pre-mediation interviews) if a tribunal decides to use mediation?
(3) How should tribunals handle complex technical and scientific issues within the context of settlement negotiations?
(4) Should confidentiality be protected in ADR proceedings?
(5) Should ADR processes be mandatory?
(6) What role should tribunals or courts play in the procedural and substantive review of negotiated settlements of docketed cases?
(7) What role, if any, should tribunals play in enforcing and ensuring compliance with agreements reached during mediation?
(8) Should mediated or negotiated agreements have precedent-setting value?
(9) What statutory basis, if any, is needed to conduct mediation within the context of administrative hearings?

In this paper, we provide answers to these questions based, in part, on a series of telephone interviews completed in the spring of 1998 with the heads of key environmental tribunals across Canada.[14] The interview

14. The identities of the interviewees have been omitted for reasons of confidentiality.

protocol is attached (Appendix IV). We also codify our conclusions by proposing a Model Law (Appendix III). As will be made clear in the paper and Model Law, the answers to these questions must be understood contextually, with a view to the specific administrative functions of the tribunals in question. The idea behind the Model Law is to provide a general framework for ADR administration, subject to the circumstances in question.

I. *The Canadian Administrative Environmental Context: A Brief Regulatory Overview*

In Canada, jurisdiction over environmental management is shared by federal and provincial entities[15] and, at present, a substantial portion of the management and enforcement of environmental statutes is undertaken by both. To understand the use of ADR in environmental administrative disputes, it is important to recognize that the Canadian administrative framework encompasses several overlapping regulatory regimes and a spectrum of administrative agencies and tribunals. One example is the federal-provincial harmonization strategy for environmental assessment. With respect to environmental regulatory regimes, the Canadian legislative framework can be broken down into three broad categories: standards enforcement, environmental approvals, and sectoral regulation.[16]

---

15. See, generally, P. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough.: Carswell, 1997) at 29-19 - 29-22.
16. M. Jeffrey, *Environmental Approvals in Canada*, looseleaf (Toronto: Butterworths, 1989) at 1.1.

Standards enforcement legislation aims at regulating deleterious impacts by means of enforcement of environmental standards.[17] As Jeffery notes, this approach is "curative" rather than "preventative" in the sense that it is applicable only where a person or company has already impaired the environment. By contrast, environmental approvals legislation is "preventative." It is meant as a planning tool to provide a governmental decision-maker with an objective standard, building on environmental assessment methods, to grant or deny project approval.[18] Sectoral regu-

---

17. *Ibid.* Although there is no uniformity between the various federal and provincial enactments in this regard, there are, as Kernaghan Webb has observed, enough common elements to suggest a basic cross-jurisdictional legislative model. Typically, under such a basic legislative model, a regime for licensing and controlling contaminant discharges is established. Branches of either licensing requirements or of terms and conditions of licenses are established as quasi-criminal offences. In addition, the Minister in question is generally given an array of powers to issue administrative orders in the event of an unapproved discharge of contaminants. K. Webb, "Pollution Control in Canada: The Regulatory Approach in the 1980s" Law Reform Commission of Canada, Admin. Law Series (1988) at 14-15, in E. Hughes, A. Lucas & W. Tilleman, *Environmental Law And Policy* (Toronto: Emond Montgomery Publications, 1998) [hereinafter *Environmental Law and Policy*]. A good example of such an approach is found in the *Canadian Environmental Protection Act*, R.S.C. 1985 (4th supp.), c. 16 which gives the federal Minister of the Environment the authority to set environmental quality guidelines, and which proscribes the unlawful discharge of contaminants into the water, land or any part of the environment. Similar legislation exists in each of the ten provinces. For example, in Ontario, the *Environmental Protection Act*, R.S.O. 1990, c. E.19, contains general prohibitions against the discharge of contaminants into the environment which would cause an adverse effect, and empowers the Minister of the Environment, and Ministry officials ("Directors"), to establish specific discharge limits through regulation, and to issue administrative orders, and vests provincial officers with a wide array of investigative and enforcement powers with respect to environmental offences. Other examples include the Alberta *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3; the Nova Scotia *Environment Act*, S.N.S. 1994-95, c.1, the British Columbia *Waste Management Act*, R.S.B.C. 1996, c. 482; and the Manitoba *Environment Act*, S.M. 1987-88, c.26.

18. Environmental assessment legislation varies from one jurisdiction to another but, in general terms, it is a public mechanism or process for assessing the potential environmental impacts of a proposed activity or undertaking. An environmental assessment is made up of a number of steps, ranging from the pre-screening of proposed activities or undertakings to determining whether they should be subject to a detailed assessment of potential impacts, to a decision or recommendation from a hearing body. P. Emond & W. Tilleman "Environmental Impact Assessment" in *Environmental Law and Policy*, *supra* note 17 at 211. A good example is the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, which requires federal authorities and private parties which are the proponents of certain works or projects (such as dams, roads and the like) falling within a list or class of works projects specified in accompanying regulations, to undergo an environmental assessment process. The purpose is to determine whether the project is likely to result in significant adverse environmental effects. Similarly, under the *Ontario Environmental Assessment Act*, R.S.O. 1990, c. E.18, as am. by S.O. 1996, c. 27, s. 3, a proponent to whom the Act applies must prepare terms of reference for an environmental assessment and submit them to the Minister of the Environment and Energy for approval. Once the terms of reference have been approved, an assessment must be submitted for review by either the Minister or, where the Minister refers it to the Environmental Assessment Board, by the Board.

lation cuts across both and includes all statutes which establish administrative agencies to regulate with respect to one particular aspect of the environment, or with respect to a sector of the economy in which environmental considerations come into play.[19]

Apart from these three legislative regimes, there are numerous administrative processes established under both federal and provincial legislation. Agencies can function in one of three (sometimes overlapping) modes[20]: (1) judicial or quasi-judicial[21]; (2) administrative[22]; and (3) rule-making. In each mode, environmental agencies are expected to undertake specific tasks, such as investigations, reporting to and advising the Minister, adjudication and appeals,[23] and setting standards and making rules. Often these overlap, and many agencies employ more than one at a time. There are important distinctions among the different types of environmental agencies in Canada and the methods they employ.

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 broader rule-making.) For instance, the Ontario Environmental Appeal Board's mandate "is to provide an independent and impartial review of the Director's actions and to consider

---

19. Good examples are the National Energy Board (which regulates interprovincial pipeline construction and oil/gas/electricity exports, and which must often conduct an environmental assessment as part of its regulatory mandate under the *National Energy Board Act*, R.S.C. 1985, c. N-7), and the Ontario Energy Board (which regulates the natural gas industry within Ontario and has jurisdiction to take environmental considerations into account under the *Ontario Energy Board Act*, R.S.O. 1990, c. O-13). Other relevant federal legislation includes such statutes as the *Forestry Development and Research Act*, R.S.C. 1985, c. F-30, the *Canada Wildlife Act*, R.S.C. 1985, c. W-9, and the *Fisheries Act*, R.S.C. 1985, c. F-14, all of which establish some form of administrative agency to administer the provisions of the legislation. The various provinces each have sectoral legislation along these lines.

20. See generally R.W. MacAuley, *Practice and Procedure Before Administrative Tribunals*, looseleaf (Toronto: Carswell, 1998) at 2-7 [hereinafter *Practice and Procedure*].

21. R. Reid & H. David, *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978) at 126, have described this expression as a "term coined to denote the existence of court-like characteristics in extra-judicial tribunals." An agency will be generally be considered to be acting in a quasi-judicial capacity where it holds a formal hearing and conducts proceedings in a manner analogous to a trial.

22. This refers to cases where the agency is concerned primarily with the management and administration of a particular statutory regime. Where an agency is acting in administrative mode, any public hearings will generally be conducted in a more informal and open-ended manner than when acting in a quasi-judicial mode.

23. Where an agency is acting in the adjudicative mode, it will be making decisions or carrying out acts affecting the rights and obligations of citizens, such as granting permits and settling disputes. In this regard, it must be distinguished from agencies which only make a non-binding report to the Minister responsible. See generally, R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, 2d ed. (Toronto: Carswell, 1990) at 122-123.

whether the Director has acted fairly, in a manner that protects the environment, and in accordance with law."[24] However, just like the administrative agencies with which they are affiliated, tribunals may serve in an administrative, quasi-judicial, or even legislative function, with jurisdiction over enforcement, approval, or sectoral regulation.

As an illustration of the differences across tribunals, consider the mandates and processes employed by the Ontario Energy Board, the Quebec Bureau d'audiences publiques sur l'environnement (BAPE), and the Alberta Environmental Appeal Board. The Ontario Energy Board was created to regulate natural gas utilities and to advise the Minister of Environment and Energy on energy matters.[25] In this regard, it is a tribunal that falls within the category of "sectoral regulation," and primarily fulfills a rule-making or regulatory function. Despite the fact that it carries out what might be considered policy-oriented functions, it operates, nonetheless, in a quasi-judicial mode. The Board carries out its regulatory function in contested public hearings pursuant to a detailed and formal set of *Rules of Practice and Procedure*. Its hearings are "trial-like" and the Board renders a final decision at the end of each hearing which has the force of law. Thus, although it acts in some respects in an "administrative" mode, it acts in others in a "quasi-judicial" mode.

The BAPE, which is Quebec's environmental hearings board, operates under a very different mandate and, for that reason, employs different administrative procedures. Unlike the Ontario Energy Board, the BAPE carries out neither an adjudicatory function nor a regulatory function; it has no independent decision-making power. Rather, it operates primarily as a governmental advisory body, reporting directly to the Minister of the Environment and Wildlife.[26] Its role is to inform and confer with the public on environmental issues or projects, subject to environmental

---

24. *Ontario Environmental Appeal Board Annual Report*, April 1, 1996 to March 31, 1997 at 4.

25. The Ontario Energy Board is established pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O-13 and regulates the natural gas industry in Ontario. It sets rates, approves the construction of infrastructure, approves franchise agreements between utilities and municipalities and licenses gas storage facilities. The Board is a quasi-judicial board, protected by a privative clause with a final power of decision.

26. In *Bellefleur* v. *Quebec (P.G.)*, [1993] R.J.Q. 2320 (C.A.), the Quebec Court of Appeal confirmed that the BAPE has the power only to gather information and make recommendations to the Minister. The Minister is not bound by BAPE's opinions or suggestions. P. Renaud, "The Environmental Assessment Process and Public Participation in Quebec: Concrete Elements for Sustainable Development" (1996) 27 R.G.D. 375 at 378-79 [hereinafter "The Environmental Assessment Process"].

impact and review procedures. It submits a report of its findings to the Minister. BAPE's mandate falls quite clearly within the category of "preventative" legislation. As with the Ontario Energy Board, the BAPE has a mandate to conduct public hearings, and these hearings are adversarial in nature. However, these hearings are not conducted in a quasi-judicial mode. Although the BAPE relies on elaborate and systematic procedures for the conduct of these hearings, it does not employ the same strict evidentiary rules as the Ontario Energy Board, and has a more open-ended style of operation. For this reason, it is more accurately described as working in an "administrative" rather than a "quasi-judicial" mode.[27]

The Alberta Environmental Appeal Board (EAB) falls somewhere between the Ontario Energy Board and the BAPE in terms of the mandate it exercises and the processes it employs.[28] The EAB offers an appeal process for appellants dissatisfied with decisions made by environmental regulators on a wide range of environmental issues.[29] In this respect, it exercises what is clearly a "quasi-judicial" function. The Alberta EAB makes final decisions on administrative penalties, and under the new *Water Act* for other appeals as well.[30] However, in most other cases, the Alberta EAB does not have final decision-making authority. The Minister of the Environment renders final decisions in appeals dealing with approvals, licenses, and other matters. In addition, in carrying out its functions, the Alberta EAB has all the powers of a Commissioner under public inquiries legislation, including the ability to retain experts and to compel persons or evidence to be brought before the Board. Thus, unlike the Ontario Energy Board, the Alberta Environmental Appeal Board

---

27. First, it has the mandate to hold public information and consultation sessions on various types of projects, including road construction, dams, power lines, construction of airports and the like, in addition to waste disposal sites. Second, the BAPE has the mandate, also at the Minister's request, to institute commissions to conduct general public inquiries and mediations. The BAPE may also be entrusted with special mandates such as the public review of government policy or programs. These types of projects are subject to the environmental impact and assessment review procedure under s. 2 of the *Regulation Respecting Environmental Impact Assessment and Review*, R.R.Q. 1981, c. Q-2, r. 9. See generally "The Environmental Assessment Process," *ibid.* at 378, 380.

28. The Alberta Environmental Appeal Board was created under the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 and handles the following types of appeals: appeals from approvals required under the Act for a broad range of activities; appeals from decisions made by a Director including the issuance of environmental protection orders; the assessment of environmental issues and cases involving adverse environmental impact on air, water and soil; and hearing appeals related to control orders concerning hazardous wastes and contaminated sites.

29. "Environmental Appeal Boards," *supra* note 4 at 3.

30. See, e.g., ss 114, 115 of the *Water Act*, S.A. 1996, c. W-3.5, proclaimed on January 1, 1999.

exercises fact-finding, decision-making, and reporting functions and operates, in some ways, in an "administrative" mode as well as in its "quasi-judicial" mode. As Tilleman explains, the Board is therefore, in some respects, a hybrid administrative body. He states:

> EABs give these appellants a chance to take a case to an independent appeal board that commands the stature and dignity commensurate with a quasi-judicial proceeding. In addition, EABs allow for a broad range of technical and scientific input and give all affected parties the right to be heard. Through the EAB process, appellants have the opportunity to question key policies and decisions affecting their environment and, ultimately, to increase the accountability of departmental officials by having their decisions reviewed by a Board comprised of administrative law judges. Moreover, EABs are *quasi*-judicial, which means hearings, when they are necessary, can be structured to handle the people, policies and issues raised by the appeal.[31]

Appendix I lists the key Canadian environmental tribunals, listing the broad functions they fulfill, and offering a concise view of both similarities and differences. In our view, while the differences need to be taken into account, the similarities in the way the three general modes of administrative responsibility are assigned and executed justify the need for the model law presented at the end of this paper.

II. *The Use of ADR Techniques by Canadian Administrative Tribunals*

ADR techniques have been used in the environmental administrative field by the federal government and by at least six tribunals in five provinces. At present, they are employed under the *Canadian Environmental Assessment Act*, and by the Alberta EAB, the Manitoba Clean Environment Commission, the Ontario Environmental Assessment and Appeal Board, the Ontario Energy Board, the Quebec Bureau d'audiences publiques sur l'environnement (BAPE), and the Nova Scotia Environmental Assessment Board. The nature of these activities varies considerably from one tribunal to another. They are summarized in Appendix II and will be addressed in more detail below.

There appears to be a consensus among tribunal members that ADR processes are more efficient than formal hearings and can result in considerable cost and time savings.[32] This is particularly the case with respect to environmental assessment hearings, which are often lengthy and involve a multiplicity of parties. In addition, tribunal members indicated to us that a further benefit of ADR is that it gives the parties more

---

31. "Environmental Appeal Boards," *supra* note 4 at 3.
32. Interviews with board members conducted by the authors, spring 1998.

input into final decisions, and thereby increases the legitimacy of the final outcome. Many of the tribunals in question, we should note, are either in the process of developing detailed ADR guidelines (such as Nova Scotia) or have only recently implemented such guidelines (such as the federal government, Alberta and Ontario).

In the discussion that follows, we will address the principal questions raised during our interviews and provide recommendations with respect to the "best practices" that environmental tribunals in Canada should follow if they intend to incorporate mediation into their administrations. Our advice draws on our experience with ADR in the U.S. as well as in Canada.

1. *Who Should Mediate?*

There is a great deal of variation in the Canadian environmental administrative context with respect to the appointment of mediators. At one end of the spectrum, the National Energy Board has adopted a policy of prohibiting Board members from conducting mediations or settlement conferences. Part II of its Rules of Practice states explicitly that "no member or employee of the Board will participate in any mediation process involving the applicant and parties or potential parties to a regulatory proceeding." The most the Board can do is to advise the parties that they may retain an independent mediator if they so choose.[33]

At the other end of the spectrum, there are some administrative bodies that have explicit statutory responsibility to conduct mediation themselves. The best example is the BAPE, which is empowered under section 6.3 of the *Environmental Quality Act* [34] to conduct inquiries and hold public hearings. Pursuant to its Rules of Procedure, it may appoint one of its members as mediator prior to a full public hearing. In direct contrast to the National Energy Board, the parties to a mediation before the BAPE are not permitted to retain their own mediator and must follow the detailed rules set forth in the BAPE Rules of Procedure.[35] Other jurisdictions have policies that fall somewhere in between. For example, as with the BAPE, the Alberta Environmental Appeal Board's Rules of Practice

33. The Board does maintain a list of recommended mediators, but the parties are not bound to use the list and may select their own mediator.

34. R.S.Q., c. Q-2.

35. The BAPE has adopted explicit Rules of Procedure relating to the conduct of environmental mediation (the "Règles de procédure relatives au déroulement des médiations" (1995)). All BAPE commissioners are under oath and bound by the BAPE Code of Ethics. The Code stipulates that each Commissioner must avoid conflicts of interest, act with impartiality, encourage the public to express their opinions openly and foster mutual respect among the participants.

contemplate a pre-hearing facilitation process conducted by the Board.[36] These rules give the Board the discretion either to conduct the mediation itself or to appoint a neutral party. Finally, some jurisdictions have adopted appointment procedures which can best be described as *ad hoc*. For example, in Manitoba, the *Environment Act* empowers the Minister to appoint an environmental mediator at their discretion.[37] There are no explicit Rules of Practice specifying the procedure for making such appointments or listing the sources of possible mediators, and the Minister has never used this discretion to formally appoint a mediator. However, the Clean Environment Commission, which has the jurisdiction to hold public hearings concerning environmental licensing and assessments, often conducts mediations on an informal basis.[38]

Although the approach to the appointment of mediators adopted in each jurisdiction must relate, in part, to the particular circumstances and legislative mandates in each case, there are three general concerns that inform these respective choices. These concerns are: (a) how should the public interest be included and protected? (b) how can the participants be assured that mediations are conducted by "qualified" practitioners? and, (c) how can the participants be assured that mediation is, in some way, "sheltered" during whatever formal proceedings may follow, if the parties fail to reach a settlement?

---

36. Where the parties to an appeal have been determined, the Rules of Practice stipulate that the Board may, on its own initiative or at the request of the parties, schedule one or more pre-hearing meetings prior to the date set for the appeal. The purpose of the pre-hearing meeting, according to the Rules of Practice, is "to facilitate the resolution of the appeal or to determine any of the procedural matters". The Board members have mediation training and, where possible, will attempt to facilitate a resolution of the appeal at the pre-hearing meeting. Alternatively, if it appears that it would be productive, the Board may adjourn its hearing for a reasonable time to allow for professional mediation. The Ontario Environmental Assessment and Appeal and the Ontario Energy Board have adopted the same approach. Under their respective Rules of Practice, settlement conferences are conducted by persons who are members of the Board, but not on the panel, or by another person appointed by the Board.

37. In Manitoba, the Minister has permissive authority to appoint a mediator under section 3 of the *Environment Act*, S.M. 1987-88, c. 26, which states:

3(3) The minister may, where the minister deems it advisable, and where the conflicting parties concur, appoint an environmental mediator acceptable to the parties to mediate between person involved in an environmental conflict, and the mediator so appointed shall, within six weeks after completion of the mediation, report to the minister the results of the mediation.

In Nova Scotia, the Minister has a similar discretion under section 14 of the *Environment Act*, S.N.S. 1994-95, c. 1, and it is generally the Environmental Assessment Board that conducts the mediations on the Minister's behalf.

38. A Clean Environment Commission interviewee stated in an interview that, although the organization has no formal mandate to conduct mediation, the Minister often entrusts the Clean Environment Commission with the responsibility for conducting mediations where there is a lack of consensus concerning a licensing question, as part of its broader mandate to conduct public hearings. The mediations are conducted on an *ad hoc* basis, and may involve simply working through process concerns with the parties prior to the hearing or sending the parties off to caucus concerning individual issues.

a. *Protecting the Public Interest*

In most ADR contexts, mediator neutrality is emphasized as a central element of ADR practice. It is well accepted that, to properly facilitate negotiations between parties to a dispute, a mediator must be neutral.[39] As Susskind and Weinstein explain it:

> The perception of the mediator's neutrality is critical—it allows a bond of trust to develop between the mediator and the parties involved. This bond of trust enables the mediator to receive confidential messages from the stakeholders; these in turn, provide clues about the direction that bargaining must take in order to achieve a settlement.[40]

According to Hamilton, there are two essential characteristics of mediator neutrality.[41] 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 or a particular version of disputed facts on the parties. As Susskind and Weinstein state:

> The mediator operates without the benefit of any higher authority that can force the parties to keep meeting or that can impose sanctions on one of the parties if agreements are breached.[42]

While there is little debate that mediator impartiality is critical to encouraging settlement, particularly in terms of giving the parties the ultimate control over the substantive outcome, the problem in an environmental context is that such neutrality may come into direct conflict with the requirements of environmental protection and the public interest mandate of many of the administrative agencies involved. Indeed, it is very likely that a public interest mandate can interfere with an agency's ability to act as a true "neutral" because many agencies have a specific mandate to ensure that a mediated settlement adequately protects the environment. Where a particular compromise might involve the infringe-

---

39. Feerick, for example, has observed that the concept of mediator impartiality is "central to the mediation process"; J. Feerick, "Toward Uniform Standards of Conduct for Mediators" (1997) 38 S. Tex. L. Rev. 455 at 461. Indeed, the idea of impartiality seems to form part of the very definition of mediation as a "consensual process in which a neutral third party, without any power to impose a resolution, works with the disputing parties to help them reach a mutually acceptable resolution of some or all of the issues in dispute." J. Folberg & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (San Francisco: Jossey-Bass, 1984) at 7-8. See also K. Liepmann "Confidentiality in Environmental Mediation: Should Independent Professionals Have Access to the Process?" (1986) 14 B.C. Env. Aff. L.J. 93 at 98 [hereinafter "Confidentiality"].

40. L. Susskind & A. Weinstein, "Towards a Theory of Environmental Mediation" (1980-81) 9 Boston Coll. Env. Affairs L. Rev. 311 at 347 [hereinafter "Towards a Theory"].

41. M. Hamilton, "Environmental Mediation: Requirements for Successful Institutionalization" in M. Mills, ed., *Alternative Dispute Resolution in the Public Sector* (Chicago: Nelson-Hall Publisher, 1991) 164 at 170-171.

42. "Towards a Theory," *supra* note 40 at 347.

ment of a statutory standard, where it might harm parties not represented,[43] or where it might set an inappropriate precedent for future decisions, the relevant agency must intervene.[44] As noted by Susskind:

> Environmental mediators ought to be concerned about: 1) the impacts of negotiated agreements on underrepresented or unrepresentable groups in the community; 2) the possibility that joint net gains have not been maximized; 3) the long-term or spillover effects of the settlements they help to reach; and 4) the precedents that they set and the precedents upon which agreements are based.... Environmental mediators should also be concerned that the agreements they help to reach are just and stable.[45]

Of course, as Hamilton notes, each modification of the mediator's role proposed by Susskind undercuts the mediator's non-partisanship. In fact, requiring a mediator to accept more responsibility for protecting the public interest can have the effect of converting mediation to a process closer to arbitration.[46] Thus, what should mediators in tribunal processes do or, for that matter, not do?

A good example of this problem can be found in the *Guidelines for Board-Appointed Facilitators and Mediators* promulgated by the Ontario Environmental Assessment and Appeal Board.[47] On the one hand, the *Guidelines* state that the mandate of the mediator includes "assisting the parties in an impartial manner to conduct constructive negotiations and pursue creative problem-solving." On the other hand, the *Guidelines* go on to state that:

> To the extent that it is imperative that the Board's adjudicative role not be compromised by the appointment of a mediator, the guidelines may represent a departure from mediation principles.

In effect, the *Guidelines* require the mediator to ensure that "negotiations and agreements reflect the primary importance of environmental conservation and protection" and "inform the parties of pertinent Board policy" and "identify relevant environmental information or other concerns which have not been addressed or adequately resolved by the parties." It is apparent in this context that the mediator's neutrality at the Ontario

---

43. J. Blackburn, "Environmental Mediation as an Alternative to Litigation: The Emerging Practice and Limitations" in *Alternative Dispute Resolution in the Public Sector*, supra note 40, 123 at 126.

44. See generally R. Baruch Bush, "Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation" (1989) 41 U. Fla. L. Rev. 253 at 260; and L. Susskind, "Environmental Mediation and the Accountability Problem" (1981) 6 Vermont L. Rev. 1 at 42-47 [hereinafter "Environmental Mediation"].

45. "Environmental Mediation," *ibid.* at 46-47.

46. J. Stulberg, "The Theory and Practice of Mediation: A Reply to Professor Susskind" (1981) 6 Vermont L. Rev. 85 at 107-112.

47. On file with author.

Environmental Assessment and Appeal Board could be compromised. The mediator working in this setting does not have a mandate merely to encourage the parties to reach an agreement that satisfies their interests. Instead, 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 the 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.

The environmental mediator's dual role, as illustrated by the above *Guidelines*, raises a difficult challenge. There is no question that many tribunals want to, and should, encourage a greater number of environmental settlements through mediation. Voluntary settlements permit tribunals to reduce costs,[48] make more efficient use of their time, and find solutions that may better satisfy the needs of the parties involved. On the other hand, there is a risk that, by relying on mediation, tribunal members will undercut their role as guardians of the public interest. This very concern was of primary importance in the National Energy Board's decision not to conduct its own mediations. Indeed, one Board interviewee reported that the key reason the Board does not conduct mediations is that it does not want to compromise its statutory obligation as a public guardian of the environment.[49] In other words, members of the National Energy Board do not believe they can be both neutral mediators and effective Board members.

How, then, should administrative bodies strike a balance between the need for mediators to be impartial and the need for tribunal-sponsored proceedings to adequately protect the public interest? In our view, the answer to this question depends on: (1) whether the tribunal has a specific public interest mandate; (2) whether the public is adequately represented at the table as one of the parties; (3) whether the Board is expected to act as a final decision-maker, a quasi-judicial body, or a public inquirer; and, (4) whether the Board's authority is likely to be compromised by taking on mediating functions.

---

48. Although this has certainly not been the primary motivation in the Canadian environmental administrative context, there is no question that efficiency considerations have come into play in the design of ADR programs. For example, in an average public inquiry, the BAPE will spend $250,000 on its costs alone (not taking into account the costs of the parties). A successful mediation, by contrast, will cost a fraction of that price, and will achieve a satisfactory result for the parties involved.

49. Interviews with board members conducted by the authors, spring 1998.

If a tribunal has a specific public interest mandate, then ADR techniques must be used in a way that ensures this mandate is met. How it is met can vary depending on the Board's structure and responsibilities. For instance, if all the various representatives of stakeholding priorities are already at the table, then the "public interest" is more likely to be served. This suggests that one of the most important ways that a tribunal can ensure that the public interest is met in a mediation is to work very hard at the outset to bring appropriate representation of all stakeholder groups to the table. This might entail going well beyond merely publicizing the fact that mediation is about to proceed, to making explicit efforts (through Board staff) to reach out to public interest groups and invite them to become involved. Boards may also want to consider less formal and more inclusive rules of standing, if possible, for participation in mediation versus more formal processes.

In an environmental appeal in Alberta, a lawyer from the Justice Department represents the Department of Environment in any mediation. If an emerging agreement appears to be headed beyond the bounds of the law or the Ministry's sense of the public interest, then it would be incumbent upon, and in the interest of, the Justice disputant to oppose it. In that case, the burden of defining the public interest is at least somewhat removed from the tribunal. It is not the mediator who ensures that the public interest is served, but rather the relevant parties. The tribunal can worry more about the relative merits of the claims of all the groups involved and the extent to which the mediator has proceeded in a fair manner.

If representatives of various stakeholding publics are not at the table, the mandate of the tribunal and the other participants diverge significantly, and/or the Board has some "oversight" responsibility for the broader public interest, then representation "at the table" is not sufficient. What then?

We suggest that tribunal board members can, under the right conditions, shift from a purely mediative role to a quasi-judicial, albeit narrowly constrained, role. The line where the two meet is not bright in practice and does not have to be as long as certain constraints are respected. During the settlement conference in which a tribunal member mediates, the member will play a mediative role and should remain "utterly" non-partisan toward the outcome. Later in the mediation, however, if the mediation has reached an impasse, or appears to be moving toward an agreement that the tribunal is highly unlikely to accept due to its public interest mandate, then the tribunal mediator has a responsibility to intervene beyond what is typically required by an independent and purely facilitative mediator.

If the parties have reached an impasse because one party is holding out for an agreement that the tribunal member knows is highly unlikely to be agreed to by the tribunal, the mediator may choose to step out of the mediative role to inform the parties of the likely limits on any agreement that may be presented before the formally convened tribunal. If one party clearly and substantially lacks sufficient technical advice to make informed decisions, then the mediator may choose to request that the parties obtain that advice, stepping out of his or her mediative role. If the parties have agreed that no agreement appears likely, the mediator may move into the quasi-judicial role of helping the parties narrow and refine the issues to be brought before the tribunal in a formal hearing (or might refer the parties to a pre-hearing conference conducted by one or more members of the formal panel to narrow or "scope" the issues).

However, when a tribunal member steps outside of the mediative role, several limiting conditions must necessarily be met: (1) the parties must be informed that the tribunal member as mediator may step out of the mediative role, and under what conditions, before mediation begins; (2) the tribunal member must remain true to the rules of confidentiality (nothing said in mediation that goes beyond that required in formal discovery processes, such as settlement offers, will be used in later formal proceedings and the mediator is bound to not pass on information revealed in meditation to the tribunal, formally or informally); (3) the tribunal member must not later serve as a formal panel member[50]; (4) the mediator must be clear when he or she is moving out of the impartial role to provide substantive advice to the parties; (5) that advice must be clearly stated as non-binding advice which does not preclude the parties from terminating the mediation and going before the tribunal in formal proceedings; (6) the mediator should work with the parties in a non-partisan matter to flesh out all issues and interests, explore options for settlement, and seek agreement first, with good faith and fair effort, before moving into a quasi-judicial role; and, (7) the mediator should be protected from acting as final arbiter of an agreement by being able to withdraw from the mediation if necessary, and by having the tribunal (or the Minister) review agreements after they are reached in mediation.

The decision-making authority of the tribunal should also influence whether or not its members mediate. When the tribunal serves primarily as a final decision-maker (the National Energy Board, for example), and

---

50. For instance, in the case of the EAB, the Board member who participated as the mediator in a case is not allowed to sit on a subsequent merits hearing.

not as an arbiter or fact finder, then members should probably not mediate. In its decision-making role, the tribunal is functioning the way that an environmental agency does when it promulgates rules and regulations and makes decisions regarding compliance. As statutorily appointed decision-makers, tribunal members cannot fulfill their responsibility as "neutrals" and ensure that all statutes and regulations are properly met.

When a tribunal serves more in a quasi-judicial capacity (an appeal board, for example), there is probably less concern about Board members mediating. Since an appeal board's mandate is mostly to settle disputes rather than render project or policy decisions (a decision by the Ministry of Environment has already been made, and it has been appealed to the board), then mediation in the form of a settlement conference with a board member involved is well within the board's mandate. When tribunals act in a fact-finding or policy recommending role (such as the BAPE or many assessment boards), taking on the roll of neutral coincides with their public interest responsibilities because part of their mandate is to encourage public dialogue, uncover all relevant technical facts, and investigate all views. In a broad sense, such boards are already playing a mediating role whether or not they formally adopt mediation procedures. Lastly, 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.

From our standpoint, this is primarily a question of perceptions. In some cultures and contexts, the board's overall reputation could well be hurt by adopting the informality of mediation some of the time. In other settings, the parties are likely to be indifferent or even oblivious to the board's multiple roles as long as the board is clear about when it is acting in which role, and what the rules of the game are. For example, if a board member is mediating, he or she must be clear that they are *not* serving in a decision-making capacity. A particular tribunal member may make this distinction clear by holding mediation sessions outside the formal hearing room and wearing more informal clothing.[51] If a board member is serving in a decision-making or arbitrating role, then it must be clear that they are operating under more constrained evidentiary rules and protocols.

---

51. For instance, in the case of the Alberta EAB, mediations are typically conducted in small boardrooms while formal hearings are often held in provincial or federal courtrooms.

We also want to offer a counter-intuitive argument. It may be that a board's authority and stature enhance its effectiveness as a mediator and thus, the respect it wins from the public-at-large. A board member's stature could suggest to disputants that mediation is board-supported and ought to be taken seriously. In addition, as discussed above, since a board member holds extensive experience in the workings of the board, they may actually better be able to serve the disputants. They can remind the parties, when necessary, of any public interests mandated by the board, help to ensure fairness if one or more parties lacks minimum technical support, and remind the parties, if necessary, of the bounds of agreement seeking as constrained by the board. One should view this argument with a degree of caution, however. If exercised with too much direction and authority in mediation, a board member's authority could, in fact, substantially hinder mediation. If the tribunal mediator acts primarily as a judge or behaves in a "judge-like" fashion, that could add inappropriately to the formality of the proceedings, hinder the free flow of conversation necessary to reach agreement, and restrict the principle of self-determination.

b. *Ensuring Qualified Mediators*

Whether board members or others mediate, it is incumbent upon boards utilizing mediation that their mediators be properly skilled. Mediation capabilities can broadly be classified in terms of process skills and substantive knowledge of the issue(s) in dispute. Thus, an outside mediator with a great deal of experience may bring a superior set of "process" skills to the mediation. Board members, generally appointed for their technical or legal expertise, may lack these skills. On the other hand, an outside mediator may know little or nothing about the legal context or the technical issues before the tribunal and may lack a fully developed understanding of the board's mandate to protect the public interest and what this means in practice. Thus, in the long run, tribunal members may be far better placed to conduct mediations because of their "substantive" knowledge. Tribunal members with the requisite environmental expertise are often well-acquainted with the parties and the interests involved in disputes that come before them.[52] In addition, as a BAPE interviewee observed, the problem with appointing outside mediators is that they are not trained in the specific mandate of the administra-

52. An interviewee from the Ontario Energy Board stated that the Board has found the mediator appointment process to be difficult. On the one hand, they want to appoint someone with substantive knowledge of the field. On the other hand, they want to appoint an experienced mediator. Often, it is difficult to find persons who satisfy both criteria and are not themselves board members.

tive agency in question. The same interviewee observed that there is a greater risk that outside mediators will place their own mandate (i.e., achieving a settlement or enhancing their own reputation) ahead of the tribunal's interest.[53] In short, administrative tribunals must weigh each advantage and disadvantage of relying on internal versus external mediators in setting standards of practice.

Whoever mediates, all tribunals are faced with the challenge of ensuring quality mediation. If outside mediators are used, the tribunal might develop a screening program for prospective mediators to ensure they have the requisite training, experience, and expertise. Indeed, a board might offer the appropriate training in the substance of its disputes (i.e., legal and technical issues) to potential outside mediators and only choose those who perform acceptably. If board members decide to mediate themselves, the board should consider providing on-going process training to build and enhance the skills of its members.[54] There is no correlation between effectiveness as a regulator, or litigator, or judge and the skills of mediation. These must be learned. In addition, 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. Ultimately, each board must develop a thoughtful process for selecting and training mediators.

c. *Sheltering Mediation from Formal Tribunal Proceedings*

Boards must always ensure that they protect the neutrality of the mediation process. This means, at the very least, that if a board member mediates, he or she will not subsequently sit on the panel that hears the case if it is not settled. For example, the board members of the Alberta Environmental Appeal Board mediate cases. However, if the parties fail to settle, the case goes before the full, formal Board (three of its total of eight members), without the individual member who served as mediator.

It may be tempting to the board members hearing the case, if it fails to reach settlement in mediation, to "quiz" the mediator on what happened. That, however, would be wholly inappropriate. If the parties suspect that

---

53. An interviewee from the Alberta Environmental Appeal Board made a similar observation. The interviewee observed that the Board has been reluctant to appoint outside mediators because the Board is concerned that they will not adequately protect the public interest (i.e., there is too much of a perceived danger of dealmaking behind closed doors and "horse trading"). The Board also feels that it needs to keep abreast of the process. However, if outside mediators could be properly trained concerning the purposes and role of the Board, it is possible that they could be used in the future, due to the ever-increasing workload of the Board.

54. Given that many boards are appointed by Cabinets, they are not necessarily long-term appointments. Thus, on-going training, especially for new members, is essential.

the mediator will also play an evaluative role if settlement negotiations break down, they will not be able to share certain information and rely on the neutral in ways that they should. Confidentiality, trust, and the parties' knowledge that their mediator will not be their arbitrator are key to the effectiveness of any mediator.

2. *What Role Should Tribunal Members Play During Case In-Take?*

At present, there are three different approaches used by Canadian environmental tribunals at the case in-take stage: the pre-hearing conference, the settlement conference, and proceeding directly to a formal hearing.

The technique most commonly employed is the pre-hearing conference, the purpose of which is either to facilitate the negotiated resolution of a dispute (or one or more issues forming part of the dispute) or to clarify procedural matters prior to the hearing (e.g., narrow or "scope" the issues to be addressed, ascertain which parties have standing and must be present at the hearing, set timetables, and clarify which materials must be submitted at the hearing). Pre-hearing conferences are employed by the Alberta EAB,[55] the Manitoba Clean Environment Commission,[56] and the

---

55. The Alberta EAB's Rules of Practice state that "the purpose of a pre-hearing meeting is to facilitate the resolution of the appeal or to determine . . . procedural matters. . . . Parties shall come to the pre-hearing fully prepared for a useful discussion of all issues involved in the appeal, both procedural and substantive, and authorized to negotiate and make decisions with respect thereto."
In addition the Rules of Practice state that "one purpose of a pre-hearing is to facilitate the resolution of the appeal." The Rules contemplate mediation during the pre-hearing by either a Board member of a third party. Where an agreement is reached, the Board must prepare a report and recommendations, signed by the parties, to be submitted to the Minister. Where the parties do not reach a resolution, the EAB may nonetheless address the following issues at the pre-hearing, among others: determine any matter of procedure, determine the issues for the hearing, set a schedule, admit facts or evidence, have the parties exchange submissions, determine the day-to-day conduct of the hearing.

56. An interviewee from the Clean Environment Commission, which has a mandate to conduct environmental assessment public hearings under the *Environment Act,* stated that the mediations conducted by the Commission are informal, although the legislation provides for mediation in the formal sense. Often, mediation forms one part of the more extensive public hearing process. At the outset of the hearing, the Commission will get the parties together and try to work through as many process concerns as possible, and to focus the issues. This will often involve something as simple as asking two people in a public hearing to go off together, have coffee and resolve particular issues.

Ontario Environmental Assessment and Appeal Board.[57] Generally, pre-hearing conferences are conducted by members of the tribunal who form part of the panel designated to hear the dispute. These conferences are analogous to the pre-trial conferences held by judges in civil cases. Although tribunal members sometimes employ mediation techniques during these pre-hearing conferences, the conferences are not held strictly for the purposes of settlement, and ADR methods are employed on an *ad hoc* basis.

A second technique is to hold formal settlement conferences where mediation is employed as a first step prior to a hearing. At present, formal mediation is one of the significant options used under the *Canadian*

57. Recently, the Environmental Assessment and Appeal Board has introduced two types of ADR techniques under their Rules of Practice: the "preliminary hearing" and the "settlement conference." A preliminary hearing is considered to be part of the formal hearing process (but at which evidence is not taken) and is conducted in public by a Board member who may or may not be a member of the panel hearing the evidence. Participation in the hearing may be required by the Board. Its purpose is to identify the parties and witnesses, identify, simplify and scope issues, establish agreed facts, set a schedule for the hearing and deal with preliminary motions, among other things. By contrast, a settlement conference, which is held for the purpose of simplification or settlement of issues, is not part of the hearing and is conducted by a member of the Board who is not on the panel conducting the hearing or by another person appointed by the Board. The settlement conference requires the consent of all the participating parties, and is held in private. All documents submitted and all statements made at the settlement conference are confidential and without prejudice and will not be communicated at any time by the mediator to non-parties, the public or the panel except with consent of the parties. Confidential documents are not accessible by the public and do not form part of the record. The Boards have drawn up extensive "Guidelines for Board-Appointed Facilitators and Mediators" as a means to standardize the process.

Environmental Assessment Act,[58] and by the Quebec BAPE,[59] the Ontario

---

58. As explained by Saxe, "Environmental ADR," *supra* note 10 at 4278-81, the CEAA provides two main options for resolving disputes which arise in the course of environmental assessments: (1) mediation and (2) public hearings before a review panel. The responsible authority may ask the Minister of the Environment to refer all, or part, of any environmental assessment disputes to a mediator, if the proposed project could cause significant adverse effects on the environment. The Minister may also refer a dispute to mediation on his or her own initiative. The mediation proceeds as follows. Once the decision to conduct a mediation has been made, all "interested parties" (i.e., any person having an interest in the outcome of the assessment for a purpose that is neither frivolous nor vexatious), must be identified. The Minister appoints the mediator after consultation with the proponent, the relevant provincial government and the interested parties. The mediator must be "unbiased and free from any conflict of interest" and must have "knowledge or experience in acting as a mediator." The Minister also fixes the terms of reference of the mediation. Anything said by the mediator or an interested party during the mediation is privileged, although not necessarily confidential. At the conclusion of the mediation, the mediator must submit a report to the Minister and the responsible authority. The responsible authority makes the final decision, but has the obligation to consider, and if the federal cabinet approves, respond to the mediator's report. If the mediation fails to resolve the dispute and the matter goes to a full public hearing, the remaining unresolved issues will be determined without reference to the mediation.

59. As an alternative to the public hearing process, BAPE will mediate an environmental assessment in lieu of a public hearing. Mediation before the BAPE is a voluntary process and the parties retain their right during that process to request a full public hearing. Instead of the four-month period required for a public hearing, the mediation process takes place over a 2-month period. If the mediation results in an agreement, the agreement is submitted by the BAPE to the Minister and, if approved, becomes a full part of the permit issued by the Minister.
As noted by Saxe, "Environmental ADR," *supra* note 10 at 4289-90, the BAPE's mediations have five main stages:

1. The Minister of the Environment instructs BAPE to attempt mediation. This is announced by press release.
2. BAPE meets separately with the proponent and the objectors to explain its role and the procedure for the mediation. During this phase, the parties decide whether the transcript will be made public immediately, or only when the mediation is concluded. BAPE also discusses the issues with each party and each side's position. The mediation will not proceed unless the objectors agree that the project is justified, and wish only to have its implementation modified. However, BAPE may proceed with a mediation even if some parties refuse to participate.
3. BAPE meets with the parties together and attempts to bring about agreement. The role of the mediator is to encourage information exchange and the generation of new options. The mediator may also terminate the mediation at any time. Transcripts are kept of all meetings.
4. If an agreement is reached, the proponent confirms its commitments in writing to all parties and to the Minister (the approving authority). The objectors then withdraw their request for a public hearing.
5. BAPE makes a public report to the Minister on the progress of the mediation and all transcripts and documents from the mediation are now made available to the public, if disclosure was deferred earlier.

If the mediation does not result in an agreement, or if the BAPE decides that the mediated agreement does not adequately protect the environment, BAPE reports to the Minister that a public hearing should take place. The mediation transcripts are made public during the hearing, but cannot be used as evidence.

Energy Board, the Nova Scotia Environmental Assessment Board,[60] and the Alberta EAB.[61] These processes provide for the appointment of either a board member as mediator or an independent mediator, and are generally not conducted by the tribunal members designated to sit at the subsequent hearing. In contrast to pre-hearing conferences, which are designed to facilitate decision-making in the formal hearing, the above processes are designed primarily to prevent a full formal hearing, and instead to reach an acceptable settlement among the parties. Finally, some tribunals do not employ pre-hearing or intake conferences at all. Two examples are the British Columbia Environmental Appeal Board and the National Energy Board. Cases proceed directly to the formal administrative processes.

If a Board chooses to use a more formalized ADR process, such as mediation—prior to a full scale hearing—we recommend an intervention even prior to the mediated settlement conference. We recommend undertaking what is called a conflict assessment at the earliest stages of case intake. Our discussions with tribunal members, as well as our experience as mediators, strongly indicate that a conflict assessment can dramatically increase the chances of settlement.

A conflict assessment is typically carried out via phone or in-person interviews with each of the parties prior to mediation or a settlement conference. In the conflict assessment, the person undertaking it helps each stakeholder group: (1) understand what mediation is; (2) clarify its interest, and the likely costs associated with trying to reach a settlement; (3) formulate the agenda of issues that will need to be considered at a pre-conference hearing or in a more extended mediation; (4) review ground rules that would apply in any *ad hoc* settlement effort; (5) consider whether there are other parties (including technical experts) who should be involved in some way; and (6) think through the steps involved in mediation and what it would take to prepare adequately for a settlement effort.

---

60. Under the new *Environment Act*, S.N.S. 1994-95, c. 1 provision is expressly made for the use of "alternative dispute resolution" in any environmental dispute (s. 14). To date, alternative dispute resolution is used principally in the environmental assessment context. Under the Act, once a proponent for a project has registered the project with the Minister and published a notice of the undertaking, the Minister has the discretion, under section 14 of the Act, to refer the undertaking to "alternative dispute resolution" (the provisions of the Act for alternative dispute resolution are mirrored in the *Environmental Assessment Regulations* and the *Environmental Assessment Board Regulations*, Regs. 26/95, 27/95). Where the Minister decides to use ADR, the Minister, in consultation with the affected parties, decides which forum is most appropriate. Generally it is the Nova Scotia Environmental Assessment Board that conducts the alternative dispute resolution process.

61. The *Environmental Appeal Board Regulation* explicitly allows for mediation under A.25.6:11.

The first objective of the conflict assessment—explaining the ADR process—is often neglected. One Ontario Environmental Assessment and Appeal Board interviewee observed that many parties who appear before administrative tribunals are private citizens who have no experience with formal board hearings and do not understand the process. An interviewee from the Nova Scotia Environmental Assessment Board reiterated this point and observed that, although ADR is often beneficial for individual citizens because it allows for more meaningful and direct input into the process, when the public does not understand the ADR process they often assume that it is "simply more bureaucratic decision-making." Or, if the parties do not understand the process but participate anyway, they may waste the opportunity because they are unprepared. It is important for each tribunal to educate the parties about the process it proposes to use by explaining: (1) the differences between mediation and a regular hearing; (2) the advantages of mediation (including reduced costs and time commitment for the parties involved and a stronger likelihood that they will be "heard"); (3) that the parties have not and do not forgo their right to a full formal board hearing in the event the parties cannot reach agreement; (4) the role the board member will play in mediation, if any; and, (5) confidentiality rules surrounding mediation. The parties should understand, before they commence mediation, exactly what they are getting into.[62] Conflict assessment provides this important educational opportunity prior to participation.

A conflict assessment also allows a tribunal to properly determine which parties should be involved in mediation. If there is a key party missing from an upcoming mediation, the conflict assessment can be a means of ascertaining that others should be brought in. On the other hand, through assessment and discussion, some parties may find that they are comfortable with others representing them, or, once they have a better understanding of what is at stake, they may feel that it is not worth it to them to commit the time and resources required to participate.

While mediation allows for a more flexible and *ad hoc* approach to questions of standing, it is not yet clear whether board members should seek to narrow the number of parties as much as possible or to be as inclusive as possible. Certainly, as noted earlier, it may be necessary to add parties to ensure that the public interest is adequately addressed. Some tribunal members believe that when there are too many parties

62. It should be noted that some boards do an equally dismal job of explaining precisely how the formal administrative process works and what is expected of the parties in those processes.

involved, it is very difficult to reach a successful result. The BAPE, for example, rarely attempts mediation with more than five parties. There are, however, professional mediators used to working with much larger numbers of parties and who believe that increasing the array of stakeholders involved in mediation can enhance, rather than hinder, the prospects for agreement.[63]

A conflict assessment can also be an opportunity for a tribunal to narrow the range of issues that need to be addressed, clarify the interests and concerns of the parties, and with this information in hand, develop a focused agenda and ground rules that will improve the efficiency of the face-to-face mediation once it is underway. The conflict assessment is also a time for the tribunal to build trust and credibility with the parties, and to assure the parties that their concerns have been heard by the tribunal. While a more personal relationship between a tribunal member and the parties in a formal proceeding is not only unnecessary but probably inappropriate, in mediation, developing one-on-one rapport can be essential. The conflict assessment provides an opportunity to develop this rapport.

Assessment prior to mediation or settlement conferences can also help a tribunal determine if a case is appropriate for mediation. There is a growing consensus among tribunal members that mediation techniques work best when fundamental issues of principle are not at stake. Where fundamental disagreements concerning "rights" are involved and it is apparent that a settlement will not be reached, a great deal of unnecessary time and expense can be saved. For example, the Quebec BAPE will only proceed with a mediation if there is agreement that the project in question should proceed (i.e., they have found that mediation works best when it addresses methods for implementing a project in an environmentally and community-friendly manner, as opposed to addressing the more deeply-rooted matter of community opposition to the project). Furthermore, even if fundamental principles are not at stake, an assessment may reveal that one or more parties is so entrenched in her or his position and viewpoint that mediation is likely to lead to more, not less, frustration and discontent.

A conflict assessment, as part of a tribunal's intake process, should preferably be conducted one-on-one. Parties are more likely to speak candidly and the tribunal can ask more detailed and probing questions when all parties are not present. Many mediators prefer to do these

63. See L. Susskind & J. Cruikshank, *Breaking the Impasse* (New York: Basic Books, 1987) [hereinafter *Breaking the Impasse*].

interviews themselves as a way of establishing rapport with parties whom they may later serve. However, it is possible that a well-trained tribunal staff member could conduct all conflict assessment interviews because the staff person could develop specialized skills at doing this over time, bring consistency across cases, and relieve Board members of the time commitment involved in undertaking such interviews.[64]

Some boards may think that undertaking a conflict assessment as part of intake violates *ex parte* communication rules. If this is the case, then the pre-mediation discussion may have to take place with all the parties present (either in-person or via teleconference). Or, to further avoid any discomfort with such pre-settlement conversations and to avoid the perception of any "back room" dealing, the Board should be clear about the purpose of these interviews and request the consent of all parties before conducting pre-settlement confidential conferences. Or, the tribunal may enlist a staff member or an outside mediator, rather than an administrative tribunal member, to prepare the conflict assessment interviews.

3. *How Should Tribunals Handle Complex Technical and Scientific Issues within the Context of Settlement Negotiations?*

Environmental mediators are often asked to handle cases which raise complex technical and scientific issues. In many of these situations, the parties will be sophisticated enough to handle these issues, or to ensure that the necessary experts are retained. However, in some cases, no such expertise is available either through the parties or through outside assistance. This is a particular problem when average citizens are involved because many of them have insufficient technical or scientific knowledge, and lack access to qualified experts. For example, appeals to issuance of reclamation certificates on former gas and oil leases often come before the Alberta Environmental Appeal Board. Both the Environmental Ministry and the gas and oil companies have at their disposal the financial resources to hire technical experts in reclamation (not to mention the fact that these parties have the experience of involvement in multiple cases). Individual land owners may not have such resources or even realize they need such expertise. Should a board or a mediator intervene to address this problem? And if so, how?

---

64. This is the preferred practice of the Alberta EAB.

At present, Canadian environmental tribunals are seeking to address this problem in two ways.[65] First, the Nova Scotia Environmental Assessment Board is attempting to create a trust fund to provide parties with legal and technical advice during the course of ADR proceedings.[66] This fund would be of particular benefit to lay persons who do not have the resources or knowledge to address technical issues on their own. Second, some other tribunals (such as the BAPE and the Ontario Energy Board) will make their own expertise or the expertise of their staff available to the parties on an *ad hoc* basis during the course of a mediation.[67]

In addition to the above options, there are other techniques that can be employed to protect against power imbalances and ensure that technical and scientific issues are properly explored. First, a mediator can explore with the parties if both want more time to gather additional information. All parties may agree to a continuance in order for one or more to gather additional information. Of course, one party may see that they have an advantage in the other's lack of knowledge or skill, and seek to exploit it. Thus, the mediator may risk compromising his or her neutrality by suggesting a continuance. Second, tribunals can help ill-prepared parties through the intake process. The intake process might include questions about the party's access to and use of technical and legal resources, remind them of their rights under applicable laws, and encourage them to seek the requisite expert advice. Third, tribunals can provide parties at the time of intake with a list of technical and legal experts to whom the parties

---

65. Another option is fee shifting or awarding costs. For instance, s. 88 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 states:
88 The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid.

66. This trust fund does not exist at present and, since the board's draft mediation guidelines have not been completed, they have not yet fully determined the mechanics of how the trust fund would work. However, an interviewee from the Board stated that such funds or expertise would likely be made available to all parties on an equal basis. At present, the Board has the discretion to allocate budgetary funds for the purposes of retaining experts during the course of public hearings. However, the Board has not yet exercised this discretion during the course of a mediation.

67. For example, the Ontario Energy Board "Settlement Conference Guidelines" state: "Board staff will attend the settlement conference to ensure that all relevant information is brought forward and considered in negotiations. They will present options for the consideration of the parties and will offer advice on the strengths and weaknesses of the parties' proposals. Staff will endeavor to help the parties to reach a settlement. . . ." As noted by an interviewee from the Energy Board, staff are bound by confidentiality obligations and, upon the completion of the Settlement Conference, their participation in any subsequent hearing is circumscribed by these obligations.

can turn, including possible low-cost or subsidized assistance. Lastly, the parties may agree as part of the final settlement that they undertake joint fact finding on particular issues, and if the later data suggests the agreement should be modified, then the parties can reconvene.

Board members with particular technical expertise may be tempted to be helpful by offering substantive technical advice to the parties during mediation. While understandably tempting, we believe the above options can offer fair protection of all parties while avoiding the problems inherent with board members acting as technical experts. First, we imagine that it may be impossible to offer such advice without seriously offending one party or the other. The mediator is likely to aid the parties more by asking focused, informed questions and encouraging the parties to explore key technical issues, than by rendering authoritative technical opinions. Second, by offering such substantive technical advice, the mediator opens up the possibility of counter-arguments and challenges, quickly turning the mediation into a technical dispute, with the once-mediator now one of the warring experts. Lastly, by moving into the realm of substantive technical merits, the helm of process management—the key role of the mediator—is likely to be left untended as the parties, including the mediator, turn to technical claims, arguments, and counter-arguments.

4. *Should Confidentiality Be Protected?*

An important issue raised in the context of designing environmental ADR systems is whether, and to what extent, the confidentiality of the parties must be protected. In Canada, at present, there is considerable variation with regard to the level of confidentiality considered appropriate in the environmental ADR context. At one end of the spectrum, some tribunals have no explicit protections regarding confidentiality in their ADR processes.[68] A good example of such a tribunal is the BAPE in Quebec, which has made an explicit choice not to protect the confidentiality of

68. In Manitoba, for example, there are no formal confidentiality protections in the Clean Environment Commission's mediations. According to an interviewee from the Commission, it prefers openness (which is part of its mandate) and would be very cautious about introducing confidentiality protections. In British Columbia, no protections for confidentiality are included in the Environmental Appeal Board's processes, although this is largely because it does not generally use ADR techniques.

evidence or documents in mediation.[69] At the other end of the spectrum, there are tribunals, such as the Canadian Environmental Assessment Agency (CEAA)[70] and the Ontario Environmental and Appeal Board,[71] that provide extensive confidentiality protection. Even among the tribunals that offer these guarantees, there is variation with respect to the nature and breadth of the protections accorded.

Consider the contrast between the rules adopted by the CEAA and the Ontario Environmental Assessment and Appeal Board. Under the CEAA procedure, anything said by the mediator or an interested party during the mediation is privileged, although not necessarily confidential.[72] By contrast, the Ontario Environmental Assessment and Appeal Board's confidentiality protection is much broader, and stipulates that the content of discussions during the mediation process (and documents prepared as part of the mediation process) are not only privileged, but also will not be communicated at any time by the mediator to non-parties, the public, the media or the panel without the consent of all parties. Finally, some tribunals in other Canadian jurisdictions have taken an intermediate position with respect to the protection of confidentiality in ADR proceed-

---

69. At the BAPE, the meetings between the parties during mediation are recorded by a stenographer and the BAPE makes a practice of releasing transcripts of the mediation to the public. In addition, since the BAPE has all the power incidental to a public inquiry, it can actually compel the production of confidential documents which may also be released to the public at the discretion of the BAPE. *Environmental Quality Act*, R.S.Q. c. Q-2, art. 6.7; see also P. Renaud, "Comparison entre la médiation administrative et publique appliquée dans le domaine de l'environnement et la médiation privée" (1994-1995) 25 R.D.U.S. 345 at 350.

70. For example, under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, explicit provision is made for the protection of evidence introduced or statements made during the course of a mediation. Section 32(2) reads as follows:

No evidence of or relating to a statement made by a mediator or a participant to the mediation during the course of and for the purposes of the mediation is admissible without the consent of the mediator or participant, in any proceeding before a review panel, court, tribunal, body or person with jurisdiction to compel the production of evidence.

71. In the Ontario Environmental and Appeal Board's Rules of Practice regarding settlement conferences, it is stipulated that the Board may exclude everyone but the parties from the settlement conference, that all documents submitted and all statements made at the settlement conference are confidential and without prejudice, and that no confidential documents are accessible to the public. In addition, the Ontario Environmental and Appeal Board's Guidelines for Board-Appointed Facilitators and Mediators state that the content of discussions during the mediation process (and documents prepared as part of the mediation process) are privileged, and will not be communicated at any time by the mediator to non-parties, the public, the media or the panel without the consent of all parties. The Ontario Energy Board has similar Guidelines with regard to confidentiality. Their Settlement Guidelines impose a duty of confidentiality on Board staff and mediators who participate. They can only disclose factual information revealed at the hearing. In addition, any admissions or confessions on the part of the parties at the hearing are protected by privilege. The Alberta Environmental Appeal Board requires all the parties to sign a mediation agreement which obliges them to keep the contents of the mediation, and any documents used therein, confidential.

ings by promising to protect some statements and documents, but not others.[73]

The varying approaches to the protection of confidentiality[74] adopted by different administrative tribunals in Canada reflect an underlying tension between two competing policy considerations: promoting settlements and ensuring third-party access to the public policy making process.[75] It is well recognized in the academic literature that confidentiality forms an essential part of successful mediation because it fosters an atmosphere of trust.[76] As was stated by the New Jersey Supreme Court Task Force on Dispute Resolution:

> [s]uccess of the mediation process requires strict confidentiality so that the parties participating feel that they may be open and honest among themselves. In order to create a climate of trust, participants must be assured that revelations made during the mediation process will be held in strictest confidence by the mediator. Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.[77]

---

72. Thus, no evidence of such statements is admissible in any legal proceeding without the consent of the person who made the statement. However, the interested parties are free to disclose each other's statements to any person for any purpose outside a legal proceeding.

73. For example, at the Nova Scotia Environmental Assessment Board, a balance has been struck between the public interest in openness in all hearings and the interests of the parties in confidentiality. The *Environmental Assessment Regulation* N.S. Reg. 26/95 and *Environmental Assessment Board Regulation* N.S. Reg. 27/95 contain provisions for the protection of business information. However, this protection is defined to exclude the "environmental effects or associated mitigation measures of the undertaking," thus preventing them from being insulated from public scrutiny in all cases.

74. Of course, under the general umbrella of "protection of confidentiality," there are really many issues to be addressed, including: (1) whether communications between the parties and the mediator should be protected by a legal privilege or some other form of confidentiality protection; (2) whether communications between the parties themselves should be protected by a privilege or some other form of confidentiality protection; (3) whether the protection of confidentiality should extend to both documents and statements; (4) whether confidentiality extends to all forms of communication or simply communication concerning those issues in dispute; (5) whether there should be public policy exceptions to the protection of confidentiality; (6) who can enforce the confidentiality protections (i.e., the parties themselves, independent professionals, tribunals, courts); and (7) who the confidentiality protections can be enforced against. See generally E.D. Green, "A Heretical View of the Mediation Privilege" (1986) 2 Ohio St. J. Dis. Res. 1 at 5-11 [hereinafter "A Heretical View"].

75. "Resolving Environmental Disputes," *supra* note 5 at 522.

76. See "Protecting Confidentiality in Mediation" note (1984) 98 Harv. L. Rev. 441 at 441 [hereinafter "Harvard Note"]; J.P. McCrory, "Environmental Mediation - Another Piece for the Puzzle" (1981) 6 Vt. L. Rev. 49 at 56.

77. New Jersey State Supreme Court Task Force On Dispute Resolution Final Report 23 (1990), cited in E.R. Max, "Confidentiality in Environmental Mediation" (1993) 2 N.Y.U. Envtl. L.J. 210 at 210-211 [hereinafter "Confidentiality in Environmental Mediation"].

Parties entering into mediation may be concerned about several types of disclosure, including: papers or documents generated during the mediation becoming evidence at a subsequent hearing or trial; an administrative panel or trial judge learning the content of discussions or admissions made during the mediation; outside parties gaining confidential information; and disclosure of the settlement agreement itself.[78] If there are no assurances of protection with respect to some or all of these forms of disclosure, the risk is that many parties may be deterred from consenting to mediation, thereby rendering the process ineffective.[79]

Although properly addressing confidentiality concerns is clearly an important prerequisite to promoting effective mediation practices generally, in the environmental administrative context these concerns must be balanced against important countervailing public policy considerations. The administrative process is designed, in part, to protect the public interest and to highlight societal norms intended to guide future conduct.[80] In this regard, it is important to recognize that, where settlements are reached in environmental mediation, these settlements affect not only the parties involved but also affect societal norms and many people who are not directly involved. As Eric Max has observed, some of the indirect effects of environmental settlements include: (1) health concerns resulting from damage to the environment; (2) financial costs associated with clean-up and monitoring; and (3) lower property values and other indirect effects.[81] Given the widespread impact of many environmental settlements, there is a strong argument that the public has a right to know the justification and informational basis for such settlements (particularly when governmental agencies are involved in the settlement discussions) and to be informed of specific commitments, if any, that were made in the process. In the absence of such publicly available information, there is a

---

78. "Resolving Environmental Disputes," *supra* note 5 at 527.

79. This is because effective mediation is based upon the principle of consent. As stated in the "Harvard Note" *supra* note 76 at 443-45, "mediation is essentially a form of negotiation: the parties reach agreement voluntarily and thus retain the power to shape both the agenda for discussion and the ultimate agreement. The mediator, unlike a judge, acts primarily as a catalyst for this process; he cannot compel the production of information, and he does not render judgment. . . . The mediator's inability to coerce the parties, however, makes it essential that he be able to make a simple and credible promise of confidentiality. To assess the possibilities of settlement fully, however, the mediator . . . must be apprised of the parties' real positions and interests. The efficacy of this factfinding process depends on the mediator's ability to ensure the confidentiality of communications made to him." [footnotes omitted].

80. P. Harter, "Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989) 41 Ad. L.Rev. 315 at 317 [hereinafter "Neither Cop Nor Collection Agent"].

81. "Confidentiality in Environmental Mediation," *supra* note 77 at 211.

reasonable concern that mediation behind closed doors may undermine the public's confidence in the resulting agreement.[82]

How, then, should the balance between these two competing policy considerations be struck? There are several different views on this matter. Many commentators have suggested that mediation requires a level of protection comparable to a very strong attorney-client privilege.[83] Other commentators have recommended making the process open so that outside parties can have greater access.[84] Still others have recommended that a privilege or protection of some sort should be accorded, but that exceptions should be created to prevent against abuse[85] and damage to the public interest.[86] In our view, it is simply too difficult to state one rule that will cover all environmental mediation. A contextual approach may suggest a differing level of confidentiality depending upon the nature of the tribunal and the mandate involved. Specifically, the more the tribunal approximates a quasi-judicial setting (i.e., where a specific dispute concerning the rights of the parties is being resolved), the more attention should be paid to the need to protect confidentiality.[87] The parties may

---

82. "Neither Cop Nor Collection Agent," *supra* note 80 at 341.

83. Liepmann in "Confidentiality," *supra* note 39 at 123-24, for example, suggests a mediation privilege modelled along the lines of the Wigmore test. According to the Wigmore balancing test, the following four conditions must be met in order to establish a privilege against disclosure of communications between persons standing in a given relationship: (1) communications must originate in confidence that they will not be disclosed to others (2) the preservation of secrecy must be essential to the success of the relationship; (3) the relationship is one which the public ought to foster and protect; (4) the injury from disclosure must be greater than the benefit to be gained by the public from non-disclosure. See also "Resolving Environmental Disputes," *supra* note 5 at 537, and L.R. Freedman & M.L. Prigoff, "Confidentiality in Mediation: The Need for Protection" (1986) 2 Ohio St. J. Dis. Res. 37 at 37.

84. See "A Heretical View," *supra* note 74 at 2, claiming that "the current campaign to obtain a blanket mediation privilege rests on faulty logic, inadequate data and short-sighted professional self-interest."

85. "Confidentiality," *supra* note 39 at 123-24. For example, suggests one risk of an overly broad privilege is that unscrupulous parties could choose to mediate precisely because they want to escape public disclosure of certain facts and information, and thereby use the mediation process as a shield.

86. For example, one question raised with respect to the creation of a legal privilege is what should happen if a tribunal learns of a serious contravention of the legislation during a confidential mediation. Can the privilege be used to protect against the disclosure of such important information? The *Administrative Dispute Resolution Act of 1990*, 5 U.S.C. § 574 [hereinafter the "ADR Act"] deals with this issue by creating an exception to confidentiality where a court determines that disclosure is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or safety.

87. That being said, it is also our view that a blanket privilege would be inappropriate in almost any administrative context, given the public interest responsibilities of most agencies. At the very least, we believe that any privilege accorded should be subject to public policy exceptions along the lines adopted in the "ADR Act," *ibid.*

fear that anything they say during mediation could later be held against them in formal proceedings, and thus, offer little information. Without the necessary confidentiality protections, the parties will most likely rely on their lawyers, trained to handle such "dangers," to make all representations before the tribunal. A classic example is an apology. A "wronged" party may want, among other things, a simple "sorry" for the harm done to them. In an informal, private setting such an apology may be easy to offer. However, if the apology is viewed as a legal representation of an admission of fault or guilt in a formal proceeding, then the very thing that might help settle the case is simply not possible.

The more a proceeding approximates a wide-ranging administrative or public hearing-style investigation, the less justification there is for confidentiality. In short, the more the tribunals' general practices are conducted fully in the public eye, the less confidentiality the board can grant parties in a mediation. In the case of the BAPE, for example, the tribunal has a wide mandate to conduct a public inquiry and can, at any moment, exercise its discretion to terminate the mediation and compel all parties to participate in a public hearing with full disclosure. In such cases, there is less incentive for the parties to forego mediation and proceed to the hearing because, even in that context, they could be required to make full disclosure at the hearing anyway.[88]

How settlement conversations are structured should be carefully considered. The agreement, and at least some broad summary of the proceedings, can be produced for public scrutiny while the actual mediation takes place in an informal, less public setting. Administrative tribunals must consider ways they can successfully balance the need for some measure of privacy (to encourage full disclosure and frank talk) while allowing for full public disclosure and scrutiny.

5. *Should ADR Proceedings be Mandatory?*

At present, a substantial majority of Canadian environmental administrative bodies have chosen voluntary, as opposed to mandatory, ADR processes. Indeed, at present, there are no examples of truly mandatory ADR processes in the environmental administrative context.[89] However, several of the administrative boards are currently employing mandatory pre-hearing conferences. For example, the Ontario Environmental As-

---

88. However, the BAPE also recognizes that its chances of promoting settlements are reduced because it insists upon the complete transparency of its proceedings. This is a tradeoff that its mandate requires it to make, and that it has consciously made.

89. The closest that any board in Canada comes to mandatory mediation is the Ontario Energy Board's "Settlement Conference," which is technically voluntary but which is de facto obligatory to the extent that the Board expects it, and that the conference may continue without the parties if they refuse to attend.

sessment and Appeal Board has the discretion to order the parties to attend a mandatory "preliminary hearing," the purpose of which is to identify parties and simplify and narrow issues, among other things. The Alberta Environmental Appeal Board has adopted a similar practice with its "pre-hearing meetings," the purpose of which is to facilitate the resolution of the appeal or to clarify procedural matters and scope jurisdictional issues.

Despite the lack of mandatory ADR in the Canadian administrative environmental context, the question of mandatory mediation has recently become a live issue in Canadian law. This is because the Ontario provincial government recently introduced a major reform instituting mandatory court-annexed ADR in the civil justice system, to be phased in during 1998. Following the results of a two-year pilot project which showed that approximately half the cases sent to ADR settled and that disputants were less likely to opt into the settlement process if it remained voluntary,[90] an Ontario government-appointed Civil Justice Task Force recommended the implementation of mandatory ADR in the civil justice system.[91] In addition, there has been a ground swell of Canadian academic legal commentary in support of mandatory ADR. McLaren and Sanderson, for example, argue mandatory mediation may be a positive development for the following reasons:

> The annexation of alternative dispute resolution techniques to the litigation process will have positive effects for each mechanism of resolution. For example, in Ontario the fact that mediation is a mandatory stage following the close of pleadings may have the positive effect of educating a broader range of disputants to the existence and benefits of alternative dispute resolution. Furthermore, even where resolution at the annexed mediation stage is not successful, the session may help to narrow the issues and clarify the facts, thus helping to streamline the remaining stages of the litigation process. Finally, the costs to the individual associated with bringing an action may be substantially reduced if the matter can be resolved at the mediation stage.[92]

In the American literature, there has been similar praise for mandatory mediation. McEwan and Milburn, for example, have argued that one of the paradoxes of mandatory mediation is that "reluctant parties often use mediation effectively and evaluate their mediation experiences positively."[93] As noted by Sherman:

---

90. J. Macfarlane, "Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre" (Toronto, 1995).

91. *Supplemental and Final Report*, *supra* note 2 at 52-57.

92. R. McLaren & J.P. Sanderson, *Innovative Dispute Resolution: The Alternative* (Toronto, 1998) at CAP 2-3.

93. C.A. McEwan & T.W. Milburn, "Explaining a Paradox of Mediation" (1993) 9 Neg. J. 23. See also E. Sherman, "Court-Mandated Alternative Dispute Resolution: What Form of

> Most mediators have encountered the situation where parties announce at the beginning of the process that they are only there because they were ordered to participate by the court or other authority and that they will not compromise their positions in any way. Many of these situations still result in settlements, indicating that freedom of control over the content and presentation of their cases is often more important to the satisfactory operation of ADR than whether the parties were forced initially to participate.[94]

Along similar lines, Silberman and Schepard have also found that court-ordered mediation may be helpful in convincing initially resistant parties that compromises and cooperation are useful in resolving differences.[95]

There are also many commentators who have expressed grave concerns about the use of mandatory mediation.[96] The primary concern with mandatory mediation is that it creates a risk that parties will be coerced into settling their dispute. Since one of the fundamental principles of mediation (and other ADR processes) is self-determination, which is closely tied to voluntary choice, the potential for such coercion is problematic, particularly where there is a power differential among the parties.[97] Such power differentials often arise in the environmental context, where disputes frequently pit individual citizens or environmental interest groups against industry or government. A secondary concern with mandatory mediation relates to cost. While there is little question that a successful result in an ADR process will reduce overall costs for the administrative body and the parties involved, if the mediation is not successful and a full hearing is necessary, costs will increase commensurately.[98] Lastly, if all tribunals require mediation prior to formal proceed-

---

Participation Should be Required?" (1993) 46 S.M.U. L. Rev. 2079 at 2088 [hereinafter "Court-Mandated ADR"].

94. "Court-Mandated ADR," *ibid.* at 2088-89.

95. L. Silberman & A. Schepard (1986) "Court-Ordered Mediation in Family Disputes: The New York Proposal"14 N.Y.U. Rev. L. & Soc. Change 741 at 746, cited in S. Lubet, "Some Early Observations on an Experiment with Mandatory Mediation" (1989) 4 Ohio St. J. Disp. Res. 235 at 237. See also C.A. McEwen & R.J. Maiman, "Mediation in Small Claims Court: Achieving Compliance Through Consent" (1984) 18 Law & Soc. Rev. 11, where the authors reported relatively high satisfaction and compliance with agreements reached following court-ordered participation in mediation.

96. This includes the Society of Professionals in Dispute Resolution who, in *Mandated Participation and Settlement Coercion: Dispute Resolution As It Relates to the Courts* (1991) (cited in L. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two Headed Monster or Two Sides of the Coin?" (1993) 1 J. Disp. Res. 1 at 52 [hereinafter "Compulsory ADR"], recommended caution in implementing mandatory mediation. See also G. Ferrick "Three Crucial Questions" (1986) 13 Mediation Q. 61, posing the question whether mandatory mediation provisions violate the cooperative spirit of mediation.

97. See A. Nelle, "Making Mediation Mandatory: A Proposed Framework" (1992) 7 J. Disp. Res. 287 at 287. See also "Compulsory ADR," *ibid.* at 13-16.

98. "Environmental Appeal Boards," *supra* note 4 at 76.

ings, mediation could become little more than a *pro forma* exercise where the parties participate only reluctantly and with little active interest. In turn, this perception would diminish the effectiveness of mediation overall, even in cases where it was quite appropriate and useful. This has already happened in some collective bargaining contexts where grievance mediation is a mandatory step that the parties tolerate while they wait for arbitration to "kick in."

Despite the above concerns, there is support among some administrative tribunal members for the implementation of some form of mandatory ADR in the environmental context. In our view, this would be a mistake. If mediation truly saves time, saves money, and really produces wiser and more effective agreements, it will sell itself. If it does not, making it mandatory will only create an unnecessary additional administrative burden on tribunals and likely result in a general backlash against ADR in general.

A common concern expressed by tribunal members during the interview process was that ADR is not sufficiently understood by the public and that many citizens are not aware of its advantages. As discussed by McLaren and Sanderson, one of the more compelling justifications for mandatory mediation is that it serves an important educative function.[99] However, we argue that there are alternatives to mandatory mediation for informing and educating consumers about mediation, such as providing conflict assessment and consumer-oriented fact sheets and brochures prior to pre-hearing settlement conferences. Arguments for a greater investment in public education are well founded, but we do not think mandatory mediation is the necessary response.

To address the concerns raised by proponents of mandatory mediation, we recommend that the case intake process could become a "mandatory" part of all cases, informing parties of their dispute resolution options (hearings versus mediation, for instance, or a simple pre-hearing conference) and providing enough information so that the Board can wisely refer and/or encourage cases to go on to mediation or directly to formal hearings. This, we feel, would increase education and awareness of mediation while still preserving the essential value of a voluntary and consensual process entered into freely.

---

99. This point was made by an interviewee from the Alberta Environmental Appeal Board, among others.

6. *Under What Standard Should Agreements Be Reviewed by Tribunals and Courts?*

Once settlement is reached among the parties in a mediation, to what extent should administrative tribunals review the content of their agreement? This is a difficult question and there are, in fact, a range of approaches that have been adopted by tribunals in the Canadian context. At one extreme are the administrative boards that review agreements only broadly, if at all. These include the Alberta Environmental Appeal Board and the National Energy Board.[100] At the other extreme are the Boards that adopt an active approach to reviewing all agreements reached in docketed cases.[101] The Ontario Environmental Assessment and Appeal Board has the most detailed guidelines with regard to the review of settlements.[102] The Ontario Energy Board also takes a similar approach.[103] Finally, there are several Boards which do not review agree-

---

100. The National Energy Board does not review mediated settlements. However, the National Energy Board also does not generally employ mediation as part of its hearing process, and only permits the parties to reach an agreement in certain limited post-hearing circumstances (such as compensation of use of private land for pipelines).

101. The Board does not review settlement agreements although, until the present day, a Board member has always participated in mediations and therefore been able to monitor the settlement process. One Board member stated in an interview that it is not certain that the Board in fact has jurisdiction to review many agreements. In many appeals, it is the Department of the Environment that is bringing the appeal. In cases where the Department is prepared to consent to an agreement with an individual and has chosen not to proceed with the appeal, it is not apparent that this matter is any longer "before the Board." It should be noted that the Alberta EAB member who mediates must also sign the agreement in a report to the Minister. *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, s. 12.

102. Pursuant to its "Protocol for Consideration of Agreements," the Board states that it will not accept settlement agreements at face value. Prior to approving a settlement it must be satisfied that it represents the "combined interests" of the proponent, the regulatory agency, those affected (i.e., citizens groups and individuals) and affected governments. In addition, it must be satisfied that the agreement is consistent with the purpose and provisions of the relevant legislation and is in the public interest. The Board panel will hold a hearing (often an oral hearing) to determine whether there is "logical and traceable" documentation and a rationale to support each aspect of the agreement.

103. The Ontario Energy Board's Settlement Guidelines provide that the Board must approve any agreement reached between the parties prior to making it part of a Board Order. Although the Guidelines specify that the Board is supposed to either approve the agreement in its entirety or send the parties back to negotiations, in practice the Board has been more activist in "tinkering" with the substance of the deals.

ments upon completion, but instead take an active role in supervising and facilitating the negotiation process, such as the BAPE.[104] In some jurisdictions, of course, final approval of agreements rests with the Minister, who conducts the final review.[105]

The review, or non-review, of settlement agreements raises a difficult policy question relating to what in the United States has been called the "delegation doctrine." As Perritt has observed, a central precept of democratic theory is that governmental decisions ought to be made by politically accountable officials. The delegation doctrine prohibits officials from delegating their policy-making authority to persons or institutions that are not democratically accountable.[106] For this reason, delegation concerns are raised every time an administrative tribunal adopts a mediated agreement reached between private parties concerning a matter that falls within the tribunal's rule-making or regulatory responsibilities. Accordingly, courts in the United States have scrutinized quite carefully the delegation of regulation-making power to private citizens.[107] For example, in *Carter* v. *Carter Coal Co.*,[108] the Supreme Court struck down Congress' attempt to authorize a majority of coal producers and miners to set industry-wide wages and hours, calling legislative delegation to private groups "legislative delegation in its most obnoxious form; for it is not even delegation to an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of the others in the business." In Canada, a similar doctrine exists

---

104. According to a member of the BAPE, the BAPE plays a directive role in the negotiations and ensures during the process that the parties are complying with relevant legislation and regulations and the public interest. The Nova Scotia Environmental Assessment Board also adopts an active role in the mediation process, including providing the parties with technical and legal expertise and submitting a detailed report to the Minister at the conclusion of the mediation concerning the process that was employed, the specific disagreements between the parties, the issues canvassed and the offers and counteroffers made. In this way the Minister has all the information to make a final determination whether to approve or disapprove the agreement.

105. This is the case, for example, with the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, mediation process, which is conducted by an independent mediator who makes a final report to the Minister. The same is true with respect to Manitoba's environmental assessment process under its *Environment Act*.

106. H.H. Perritt, "Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States" (1986) 74 Geo. L.J. 1625 at 1693 [hereinafter "Negotiated Rulemaking"].

107. See generally "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking" note (1981) 94 Harv. L. Rev. 1871 at 1881-82.

108. 298 U.S. 238 at 311 (1936).

and is expressed in terms of the principle of "*delegatus non potest delegare.*"[109] Essentially, this doctrine prohibits the sub-delegation of administrative power absent an express or implied grant of statutory authority. Willis has explained the doctrine in the following terms:

> The maxim *delegatus non potest delegare* enunciates a rule of construction for interpreting statutes which confer upon governmental authorities the power to decide questions affecting the rights of the public; it applies to all types of authority, central, local or professional, and all types of discretion, legislative, judicial, quasi-judicial and administrative. The rule of construction prescribes that to any statute which confers a discretion upon a named authority, the word "personally" should be added after the name of the authority.[110]

As noted by Holland and McGowan, the Canadian courts have specifically applied the rule against sub-delegation where a body authorized to make regulations has acted solely on the basis of advice of a third party (and thereby failed to exercise its discretion) in making a regulation. They note that such cases "offend our expectation that rule makers have some notion of why they are making the rules."[111]

The problem raised in the environmental context is that many of the administrative tribunals in question have a specific mandate to protect the environment or the public interest, and to promulgate rules that have an impact on both the environment and the public interest. When parties reach an agreement on their own, there is a serious risk that the public interest will not be properly served unless that agreement involves or is at least reviewed by an accountable administrative official. Such a problem was raised in an interview with an Ontario Energy Board interviewee, who noted that the Board's Settlement Guidelines have produced some concern among Board members with respect to a potential delegation of its statutory mandate.[112] Section 19 of the *Ontario Energy Board Act* requires the Board to make a decision based upon "evidence adduced at the hearing." However, if a settlement is reached prior to the hearing, there is as yet no "evidence adduced" and the Board

---

109. J. Willis, "Delegatus Non Potest Delegare" (1943) 21 Can. Bar Rev. 257.
110. *Ibid.* at 263-64.
111. D.C. Holland & J.P. McGowan, *Delegated Legislation in Canada* (Toronto: Carswell, 1989) at 133 [hereinafter *Delegated Legislation*].
112. A similar concern was discussed by an interviewee from the Alberta Environmental Appeal Board. The interviewee noted that the Board has been reluctant to appoint outside mediators precisely because they are not trained concerning the EAB's specific mandate and there is a concern that they will not adequately protect the public interest (i.e., there is danger of at least the perception of deals made behind closed doors).

risks being reduced to a "rubber stamp."[113] This is a problem because the Board is a rule-making authority, and its decisions with regard to natural gas rates and pipeline infrastructure have precedential value and a substantial impact upon the public interest in Ontario.

A further problem raised by the non-review of settlements by administrative tribunals relates to the standard of judicial review to be applied by the courts. It is now well established in Canadian law that, where a tribunal is acting within its jurisdiction and has expertise in its particular field, a decision by the tribunal will be entitled to a significant degree of deference by the courts on judicial review unless that decision is "patently unreasonable."[114] In Alberta, for instance, the courts have, at least up to the present, deferred to the expertise of the Environmental Appeal Board.[115] Generally, although there have been no cases as yet expressly addressing the question of the standard of review to be applied to decisions by some environmental tribunals,[116] it is reasonable to question

---

113. An interviewee from Ontario Energy Board noted that one solution to this problem adopted by the Board has been the development of a practice whereby the Settlement Agreements between the parties will refer back to pre-filed evidence. This satisfies the requirement (at least technically) that the agreement be based upon "evidence adduced at the hearing."

114. *Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *National Corn Growers Assn.* v. *Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; see also S. Blake, *Administrative Law in Canada* (Toronto: Butterworths, 1992) at 176-77. To the extent that expertise is an issue, the courts have recognized a "hierarchy" of tribunals in Canada determined according to their statutory qualifications and the status of their members. According to this hierarchy, *ad hoc* tribunals appointed on a case-by-case basis have less claim to deference than permanently established bodies with specified terms and expert members such as Labour Boards or the Canadian Radio-Television and Telecommunication Commission. See generally D. Mullan, "Administrative Law" (1997) C.E.D. (Ontario) (3d) at 375-76.

115. *Kostuch* v. *Environmental Appeal Board, et al.*, [1996] 21 C.E.L.R. (N.S.), *Graham* v. *Alberta (Director, Chemical Assessment and Management, Alberta Environmental Protection)* [1996], 22 C.E.L.R. (N.S.), and *425167 Alberta Limited, operating as Bottle Bin Bottle Depot et al* v. *Environmental Appeal Board* (Action No. 9803 10403) (June 18, 1998).

116. In *Reese* v. *Alberta (Ministry of Forestry, Lands and Wildlife)* (1992), 7 C.E.L.R. (N.S.) 89 (Alta.Q.B.), McDonald J. considered whether the "patent unreasonableness" standard applied to a decision by the Alberta Minister to enter into a forest management agreement authorized by the *Alberta Forests Act*, R.S.A. 1980, c. F-16. He concluded that it did not because there was no privative clause and because the patent unreasonableness standard does not apply to a discretionary ministerial decision. He stated, at 116, that "[a] Minister of the Crown is not given such a discretion because he is likely to possess expertise in the subject for which the legislature has given him the power to act. The traditions of responsible government do not imply that a Minister is likely to have expertise in that area of responsibility." However, this decision left open the question whether the patent unreasonableness standard would apply to the decision of an expert body such as the National Energy Board or the Alberta Environmental Appeal Board, for example. See A.R. Lucas, "Judicial Review of Environmental Assessment: Has the Federal Process Been Judicialized?" in S. Kennett, ed., *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993) 170 at 190.

whether judicial deference would apply in the same manner where an "expert" tribunal has merely approved a settlement, as it would where the Board has actually made a decision within its expertise based upon a review of all the evidence. Would the courts feel compelled to step in where the Board had not? The problem in such cases is that the tribunal is not bringing its expertise to bear on the administrative problem in question and is instead relying upon a consensus reached among others. On the other hand, because mediation is touted as a voluntary, *ad hoc* process where the parties "own" the solution, parties themselves may resent, or even oppose, any undue "tinkering" by the tribunal, even if they do not challenge the tribunal in court.[117] To the parties, their agreements often represent a "seamless whole" in which each party has made delicate tradeoffs in order to reach an agreement.[118] For the tribunal to change the deal in any way, the parties generally argue, would upset that delicate balance, not to mention undermine their decision-making and accountability. Having an outside party review and "judge" the agreement post-settlement may also be seen as akin to second-guessing the parties' collective judgment, leading the parties to conclude, "Why bother mediating if the case is going to be judged anyway? Let's not waste our time. We can go before the judges instead."

The foregoing issues illustrate, once again, the need for a contextual analysis, and the on-going challenge of balancing the public interest with the requirements of successful mediation. A key consideration with regard to both the delegation doctrine and the appropriate standard of judicial review is the specific nature of the statutory mandate of the administrative agency in question. Holland and McGowan note, for example, that the *delegatus non potest delegare* rule is applied with varying degrees of rigour depending upon the nature of the power being exercised. Where the power is of an incidental, administrative nature, the courts are less likely to be concerned than with sub-delegation where the power is characterized as legislative or judicial.[119] Thus, where an administrative tribunal is acting in merely an advisory capacity, such as the BAPE, there would seem to be less concern with sub-delegation and less of a need for careful review of agreements by the administrative agency in question. In such cases, the Minister retains full decision-making authority, and the principle of democratic accountability is

117. It should be noted that mediated decisions (settlements) have rarely, if ever, gone to court. In Alberta, no settlement mediated and reviewed by the EAB has ever been challenged in court.

118. An interviewee from the Ontario Energy Board made this observation in the interview.

119. *Delegated Legislation*, *supra* note 111 at 122-123.

maintained.[120] By contrast, where a Board such as the Ontario Environmental Assessment and Appeal Board exercises a power of decision with potentially substantial rule-making ramifications, far greater concerns are raised with respect to sub-delegation. For this reason, rigorous guidelines may be advisable.

More broadly, however, perhaps the courts themselves need to develop a more flexible standard of judicial review to account for the unique administrative dynamic raised by the application of ADR techniques. Rather than looking merely to the administrative tribunal's expertise concerning the substantive issues, the courts might instead look more carefully at the extent to which the tribunals take an active role in ensuring the fairness of the settlement process. Such a revised standard of review has also been proposed in the American administrative rule-making context by Philip Harter[121] and by Susan Sturm.[122] In that context, Harter suggests a deferential attitude according to which the courts "should sustain a rule developed under a consensual process to the extent that the rule is within the authority of the agency and does reflect a consensus

120. "Negotiated Rulemaking," *supra* note 106 at 1693.

121. Harter suggests that a negotiated rule should be sustained by the courts to the extent that it is within the agency's jurisdiction and actually reflects a consensus among the interested parties. This standard of review has several major components, which include determinations of standing, a rule's conformity with applicable statutes and adequacy of interest representation. He notes that this standard is designed to impose the appropriate incentives on the various players. The incentives include encouraging the relevant interests to come forward and participate (since they may not if they know the result might be overturned in the courts); encouraging the agency to refrain from unjustified modifications of the negotiated proposal; and encouraging all interests concerned with a proposed rule to make their concerns know to the agency so that appropriate action can be taken, P.J. Harter, "Negotiating Regulations: A Cure for Malaise" (1982) 71 Geo. L.J. 1 at 102-07.

122. S.P. Sturm, "A Normative Theory of Public Law Remedies" (1991) 79 Geo. L.J. 1355 [hereinafter "Normative Theory"].

among the interests significantly affected."[123] A.R. Reid has suggested a similar approach in the Canadian administrative context. He states:

> It has been conventional wisdom for many years that regulatory agencies are the guardians of the public interest. The acceptance of ADR as a regulatory approach does not force agencies to abdicate this role. Instead ADR invites regulators to protect the public interest in a different way. Rather than assuming that the public interest can only be served by having an agency make decisions in an adjudicative hearing after listening to interested parties lead evidence and advance submissions in an adversarial mode, regulatory agencies are invited to see themselves as impartial guardians of a collaborative decision-making process. Agencies can do this by convening a process and keeping the playing field level, i.e. by addressing power imbalances and preventing conflicts of interest. They nurture and secure the public interest by enabling the interested parties to express it themselves, in the policies in which they concur.[124]

Taking these considerations into account, it would be quite possible to adapt the above reviewed judicial review standard in a functional manner to the environmental context. Such a standard would have to take into account the specific statutory mandate of the board in question, and the nature and extent of its participation in the settlement process. Thus, in reviewing administrative approval of settlement agreements, courts could look at the following factors, among others: whether the mediator was adequately qualified; whether representatives of key stakeholders were at the table; whether the board ensured that all interested parties had an opportunity to participate in a fair manner; whether the board ensured that underrepresented or underfunded parties received sufficient technical or financial support from the board to be able to make effective representations; the extent to which the board directed the process and monitored compliance with relevant statutes and regulations (or reviewed the agreement subsequently to ensure compliance); and the extent of the consensus among the parties. As Susan Sturm argues: "Under this model [the deliberative model of public remedial decision-making] the court's role is to structure a deliberative process whereby the stakeholders in the public dispute develop a consensual remedial solution using reasoned dialogue, and to evaluate the adequacy of this process and the remedy that it produces."[125]

---

123. P.J. Harter, "The Political Legitimacy and Judicial Review of Consensual Rules" (1983) 32 Am. U. L. Rev. 471 at 485.

124. A.D. Reid, "Seeing Regulation Differently: An ADR Model of Policy Formulation, Implementation and Enforcement" (1995-96) 9 C.J.A.L.P. 101 at 118.

125. "Normative Theory," *supra* note 122 at 1427.

7. *What Role Should Tribunals Play in Enforcing and Following Up on Agreements Reached during Mediation?*

At present, there are no tribunals in Canada that play an active role in enforcing or monitoring agreements reached during mediation. Generally, when a settlement or agreement is given approval by a tribunal, it is formally adopted by the tribunal as an order. Such orders are generally enforceable in court in the same manner as court judgments.[126] When settlements are not adopted by a tribunal as a formal Order, the tribunal generally has no jurisdiction to enforce the agreement (for instance, parties in a mediation may come to agreement, or parts of an agreement, that are quite legal, but outside the jurisdiction of the tribunal—compensatory payments between companies and private land owners in reclamation certificate disputes are an example). If the tribunal serves as a recommending body to the minister, then the minister's final decision is enforceable under the powers granted to that minister and his or her ministry (but not to the tribunal).

In light of the above jurisdictional restriction, do tribunals have a role to play in enforcing agreements reached using ADR processes? In our view, while they do not have a formal and elaborate role, they do have a limited but important role in ensuring "follow-up" and exercising influence, as necessary. Influence can be exercised in at least four ways. First, boards can ensure that their rules of practice contain specific provisions concerning procedures for rehearing or reopening cases that have previously been settled by board-approved agreements, but where one party or more argues that the terms have not been met and returns to the tribunal for help.[127] Second, a board can hold some influence over compliance by leaving a case open for some specified length of time so that any party can easily re-enter the formal board process if another fails to comply with an agreement reached during mediation. Third, boards can also act in an

---

126. For example, section 153 of the Ontario *Environmental Protection Act*, R.S.O. 1990, c. E. 19, states that an order of the Environmental Appeal Board may be enforced as a judgment of the Ontario Court (General Division) in court. In addition, section 19 of the Ontario *Statutory Powers Procedure Act* R.S.O. 1990, c. s. 22 stipulates that, where any Order of a statutory tribunal is filed with the Ontario Court (General Division), it is enforceable in the same manner as a judgment of the court. In Alberta, section 93.1 of the *Environmental Protection and Enhancement Act* states, S.A. 1992, c. E-13.3:

> An order of the Board under section 88 or 89, a decision of the Board under section 90 and a decision of the Minister under section 92 may be filed with the clerk of the Court of Queen's Bench and, on filing, are enforceable as if they were judgments of the Court.

127. For example, rule 20 of the Ontario Environmental Assessment and Appeal Board's Rules of Practice gives it a wide discretion to review a prior order or decision, and may consider "any relevant circumstance," including the fact that "the public interest in finality of decisions is outweighed by the prejudice to the applicant."

informal way by seeking to persuade parties both during and after a mediation of the necessity and advantages of adhering to their promises. This may involve little more than a reminder phone call to one party, as requested by another, regarding implementation. Fourth, mediators may make themselves accessible to the parties to help with conflicts that arise over implementation of agreements.[128] Generally, mediators offer to help resolve future disputes during implementation and these provisions can be written into agreements.

8. *Should Mediated or Negotiated Agreements Have Precedent-Setting Value ?*

Under Canadian law, administrative tribunals are not bound by the doctrine of *stare decisis* (i.e., they are not required to follow prior decisions, which are not technically binding as precedent).[129] As noted by Blake:

> The principle of *stare decisis* does not apply to tribunals. A tribunal may consider previous decisions on point to assist it in deciding the appropriate order to make in the case at hand. If circumstances are similar, it may find an earlier decision persuasive. However, it should not treat the earlier decision as binding upon it, and should be open to argument as to why that case ought not to be followed . . . .[130]

For the same reason, environmental tribunals are not bound by prior mediated or negotiated agreements, which have no formal value as precedent under Canadian law. It is, therefore, not surprising to find that, at present, no Canadian tribunals look to prior mediated agreements or negotiated settlements as having formal precedent-setting value.[131]

However, this is not to say that agreements or settlements should have no future value whatsoever, with each new decision by the tribunal completely blind to past practice and experience. As noted by Blake above, although administrative tribunals are not bound by the doctrine of

---

128. Though this offer may extend Board member's responsibilities beyond that formally granted to the Board, not to mention increase the burden of time on the mediator. Thus, when and if Boards offer such services, it may be most appropriate when outside mediators have been used rather than Board members themselves.

129. *Practice and Procedure, supra* note 20 at 6-7; *Domtar Inc.* v. *Que*, [1993] 2 S.C.R. 756.

130. S. Blake, *Administrative Law in Canada*, 2d ed., (Markham: Butterworths, 1997) at 113. This is reiterated in the Alberta Environmental Appeal Board's Rules of Practice, which state:

> 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 . . . 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.

131. This question was asked during interviews with tribunal members from every Canadian jurisdiction, and each responded in the negative.

stare decisis, they can look to prior decisions, on a discretionary basis, for general guidance or as persuasive authority. In our view, the same approach is justified with regard to prior agreements or settlements. While a tribunal cannot be bound by the content of previous negotiated agreements, a tribunal may find it helpful to keep a database of prior settlements and to examine them in analogous cases. In fact, independent law reporters are now beginning to publish mediated settlements.[132]

We also argue that the degree of persuasiveness of prior agreements in subsequent cases should vary according to the degree that settlements were reviewed by the relevant tribunal. Thus, where a board has extensive guidelines for the formal review of settlements (or formal review of the process of settlement, as we have discussed above), as in the case of the Ontario Environmental Assessment and Appeal discussed above, a board-approved settlement would carry considerable weight. By contrast, where a settlement has not been reviewed, or where a board member did not at least play a role in mediating the agreement, that agreement should probably have less weight.

At the very least, a review of past cases can serve as a basis for improving future mediations. Past cases can serve as valuable teaching materials to help board members improve their decision-making and mediation skills.[133]

9. *What Statutory Basis, if any, is Needed to Conduct Mediation within the Context of Administrative Hearings?*

At present, express statutory or regulatory provisions with regard to the use of ADR in environmental administrative settings have been implemented in five Canadian jurisdictions. However, the nature and specificity of these provisions vary markedly. The most comprehensive statutory

---

132. For example, the mediated settlement in the case of Oyen was reported in the C.E.L.R. Re Bitz, 23 C.E.L.R. (N.S.) 266 (Alta. Environmental App. Bd).

133. For instance, cases from the Alberta Environmental Appeal Board have been used as the basic fact patterns for two mediation simulations. The simulations are used to train new Board members in various aspects of mediation.

provisions have been adopted under the *Canadian Environmental Assessment Act,* which sets out a detailed procedure for the use of mediation.[134] In Ontario, Alberta, Manitoba and Nova Scotia, statutory provisions have also been implemented, although these are presented in more general terms giving either the Minister or the tribunal the discretion to implement ADR processes without setting out the specific nature or

134. Sections 29-32 of the *Canadian Environmental Assessment Act*, R.S.C. 1985 (4th Supp.), c. 16, set out a procedure for mediation. Once the decision to conduct a mediation has been made, all "interested parties" (i.e. any person having an interest in the outcome of the assessment for a purpose that is neither frivolous nor vexatious), must be identified. The Minister appoints the mediator after consultation with the proponent, the relevant provincial government and the interested parties. The mediator must be "unbiased and free from any conflict of interest" and must have "knowledge or experience in acting as a mediator." The Minister also fixes the terms of reference of the mediation. Anything said by the mediator or an interested party during the mediation is privileged, although not necessarily confidential. Thus, no evidence of such statements is admissible in any legal proceeding without the consent of the person who made the statement. However, the interested parties are free to disclose each other's statements to any person for any purpose outside a legal proceeding, unless a confidentiality agreement is signed at the commencement of the mediation. At the conclusion of the mediation, the mediator must submit a report to the Minister and the responsible authority. The responsible authority makes the final decision, but has the obligation to consider, and if the federal cabinet approves, respond to the mediator's report. If the mediation fails to resolve the dispute and the matter goes to a full public hearing, the remaining unresolved issues will be determined without reference to the mediation. The formal CEAA mediation process was introduced by legislation in 1993. Since that time, the CEAA has not had the opportunity to employ the mediation process in practice.

modalities of the processes to be implemented.[135] In the latter four jurisdictions, specific details concerning the nature and modalities of ADR processes are found in the Rules of Practice or Guidelines of the relevant tribunals.[136] Finally, there are no specific statutory or regulatory

---

135. For example, section 11 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93, stipulates that the Board "may, prior to conducting the hearing of the appeal, on its own initiative or at the request of any of the parties, convene a meeting of the parties and any interested persons the Board considers should attend, for the purpose of . . . mediating a resolution of the subject matter of the notice of objection. . . ." Similarly, section 8 of the *Ontario Environmental Assessment Act*, R.S.O. 1990, c. E. 18, stipulates that the Minister "may" appoint one or more persons to act as mediators "who shall endeavour to resolve such matters as may be identified by the Minister as being in disputes or of concern in connection with the undertaking". Along similar lines, section 34 of the Ontario *Environmental Bill of Rights* , S.O. 1993, c.28, reads as follows:

> 34 (1) A minister may appoint a mediator to assist in the resolution of issues related to a proposal for an instrument of which notice has been given . . . .
>
> (2) A minister shall not make an appointment under subsection (1) without the consent of the person applying for the instrument or the person who would be subject to the instrument, as the case may be.
>
> 121(1) The Lieutenant Governor in Council may make regulations,
>
> (o) respecting mediation under section 34, including but not limited to regulations respecting the costs of mediation, the confidentiality of representations made during mediation and the procedures to be followed in mediation.

Section 14 of the Nova Scotia *Environment Act*, S.N.S. 1994-95, c. 1, stipulates that the Minister has the discretion to "refer a matter to a form of alternative dispute resolution, including but not limited to, conciliation, negotiation, mediation or arbitration" and that the Minister may appoint "an independent party or neutral third party" to "facilitate, mediate or arbitrate."

Finally, section 3(3) of the Manitoba *Environment Act*, S.M. 1987-88, c. 26, reads as follows:

> The minister may, where the minister deems it advisable, and where the conflicting parties concur, appoint an environmental mediator acceptable to the parties to mediate between persons involved in an environmental conflict, and the mediator so appointed shall, within six weeks after completion of the mediation, report to the minister the results of the mediation.

The recently enacted Manitoba *Contaminated Sites Remediation Act* S.M. 1996, c.40 contains similar provisions.

136. For example, the Ontario Environmental Assessment and Appeal Board, in its Rules of Practice, has drawn up extensive rules of procedures with respect to settlement conferences, including detailed "Guidelines for Board-Appointed Facilitators and Mediators" and a "Protocol for Consideration of Agreements". The Alberta Environmental Appeal Board has similarly detailed provisions with respect to "pre-hearing meetings" in its Rules of Practice. To date, no such formal Rules of Practice have been adopted in either Nova Scotia or Manitoba, where ADR processes have been implemented largely on an *ad hoc* basis.

provisions authorizing ADR in Quebec. However, pursuant to section 6.3 of the *Environmental Quality Act*, which states that the BAPE has a mandate to "inquire into any question relating to the quality of the environment submitted to it by the Minister," and section 6.6, which gives the BAPE wide discretion to design its own procedures,[137] the BAPE has designed and adopted detailed rules for environmental mediation.[138]

Conclusion

From our survey, the statutory basis for ADR in the administration of environmental law, particularly in regard to tribunals, is still undeveloped. In this light, the question arises whether more detailed statutory changes should be adopted with respect to the use of mediation and other forms of ADR. In our view, this would be desirable for two reasons. First, under Canadian law, administrative tribunals derive their powers solely from statute or regulation. If a tribunal is not properly empowered by statute or regulation to implement ADR, it runs the risk of acting outside its jurisdiction by implementing such reforms unilaterally.[139] Second, detailed statutory or regulatory provisions lend legitimacy to ADR and have the effect of encouraging a more consistent, presumably fairer, and certainly better informed approach across tribunals.[140]

---

137. Section 6.6 stipulates that the BAPE has an obligation to adopt "rules of procedure relating to the conduct of public hearings." According to Joanne Gelinas of the BAPE, it was the BAPE (pursuant to this power), and not the Minister, which has been the principal system design architect for its own mediation procedure.

138. These are found in the *Règles de procédure relatives au déroulement des médiations en environnement*. Pursuant to these rules, the BAPE's mediations have five main stages as described in note 59, *supra*.

139. We refer to this as merely a "risk" because it is also well-established under Canadian law that an administrative agency is the "master of its own procedure." See generally *Practice and Procedure*, *supra* note 20 at 9-1, *Prassad* v. *Canada*, [1989] 1 S.C.R. 560. In many jurisdictions, the government has given statutory weight to this legal principle by enacting provisions which explicitly delegate to administrative tribunals the power to make rules with regard to their own practice and procedure. A good example is section 25.1 of the Ontario *Statutory Powers Procedures Act*, R.S.O. 1990, c. S.22. In addition, even if some tribunals have not been given the explicit power to implement ADR processes, their statutory mandates are often sufficiently broad to encompass such processes. For example, both the Alberta Environmental Appeal Board and the Quebec BAPE have all the powers of a commissioner under the public inquiries statutes in their respective provinces (which powers are very broad).

140. As noted by an interviewee from the Nova Scotia Environmental Assessment Board, where ADR reforms are implemented on an *ad hoc* basis, and where the public is not properly informed in advance concerning the nature of the process and the applicable rules, it tends to be skeptical.

As an objection to the above position, it may be argued that the implementation of overly detailed statutory provisions "ties the hands" of administrative tribunals with respect to the design of their own practices and procedures.[141] In particular, it might be argued that administrative tribunals are better placed than legislators to design and implement the terms under which they use ADR because they have more experience with their own procedures and better understand the practical problems and challenges they face. Furthermore, given that one of the purported advantages of mediation is the opportunity to tailor its application in each dispute, legislating and regulating mediation could seem counterproductive.

However, we propose that both tribunals and legislators have a unique opportunity, given the relative infancy of mediation in the Canadian environmental administrative context, to carefully balance statutory versus regulatory requirements. We propose a Model Law (Appendix III) that would provide a starting point for the implementation of ADR in each jurisdiction. In making the policy choices required to transform the Model Law into more appropriate legislation, regulation, or simply guidance, legislators and tribunal members should consult, discuss, and work together with those they serve. Such a process has already been successful in Quebec and Alberta, where government bodies have been receptive to ADR proposals suggested by administrative tribunals, and have worked with these tribunals to help institutionalize appropriate reforms.

---

141. Although administrative tribunals are "masters" of their own procedure under Canadian law, it is also well-established that "to the extent that Parliament [or a legislature] has set out procedure in legislation, an agency is bound by that procedure. It cannot impose procedures that conflict with that legislative direction unless the legislation gives it authority to do so." *Practical Procedure*, *supra* note 20 at 9-13.

APPENDIX I: ADMINISTRATIVE FUNCTIONS EXERCISED BY CANADIAN ENVIRONMENTAL TRIBUNALS

Administrative Agencies	quasi - judicial (inc. adjudication/ appeals)	final power of decision (including penalties)	administrative (inc. fact-finding)	rulemaking (inc. standard-setting)	no tribunal (i.e. Ministerial discretion)
Canadian Environmental Assessment Agency			•		
National Energy Board	•	•		•	
Ontario Env. Assessment & Appeal Board	•	•	•		
Ontario Energy Board	•	•		•	
British Columbia Environmental Appeal Board	•	•			
Nova Scotia Environmental Assessment Board			•		
P.E.I. Department of Environmental Management					•
Saskatchewan Dep. of Environmental Protection					•
New Brunswick Ministry of the Environment					•
Newfoundland Department of Environment					•
Quebec BAPE			•		
Manitoba Clean Environment Commission			•		
Alberta Environmental Appeal Board	•	•	•		

Mediation in Canadian Environmental Tribunals
Appendix I

APPENDIX II: ADR TECHNIQUES CURRENTLY USED BY CANADIAN ENVIRONMENTAL ADMINISTRATIVE TRIBUNALS

Administrative Agencies	partnering	negotiation	facilitation	mediation	fact finding	settlement conference	med/arb	arbitration	board hearing
Canadian Environmental Assessment Agency				•	•				•
National Energy Board		•		•		•		•	•
Ontario Env. Assessment & Appeal Board				•	•	•			•
Ontario Energy Board				•		•			•
British Columbia Environmental Appeal Board		•				•			•
Nova Scotia Environmental Assessment Board			•	•	•				•
P.E.I. Department of Environmental Management		•							
Saskatchewan Dep. of Environmental Protection		•							
New Brunswick Ministry of the Environment		•							
Newfoundland Department of Environment		•							
Quebec BAPE				•	•				•
Manitoba Clean Environment Commission		•	•	•	•	•			•
Alberta Environmental Appeal Board			•	•		•			•

Mediation in Canadian Environmental Tribunals
Appendix II

APPENDIX III: DRAFT MODEL LEGISLATION

GENERAL PROVISIONS

POLICY

(a) It is the policy of this government that disputes before environmental administrative boards be resolved as fairly and as efficiently as possible, and that these boards increase their responsiveness to the needs and interests of the parties involved.

(b) This government also recognizes that the burdens and responsibilities of environmental administrative boards are increasing and that their available budgets and resources are decreasing.

[COMMENTARY: Many board members interviewed expressed concerns with regard to government cutbacks and shrinking budgets. Many board hearings are lengthy and expensive for both the board and the parties involved, and boards are actively looking for alternatives at present.]

(c) It is the policy of this government that maximum efficiency and responsiveness in the resolution of environmental administrative disputes will be achieved by developing and using alternative dispute resolution procedures in appropriate aspects of the operations and processes of administrative boards.

(d) The advantages of alternative dispute resolution are well-documented, and include reduced administrative and legal costs, more efficient use of board resources, reduction in the length of hearing times, greater responsiveness to the interests of the parties involved, and the more effective promotion of consensus.

[COMMENTARY: There was virtually unanimous agreement among the board members interviewed that, in this climate of governmental austerity, alternative dispute resolution reforms are desirable because they reduce costs and save time for both boards and parties. In addition, many board members expressed the view that alternative dispute resolution processes increase the responsiveness of boards to the interests of the parties and thereby increase the overall legitimacy of the administrative process. Many parties who appear before these boards are laypersons and are not experienced with formal board procedures. They generally prefer the informality and flexibility of alternative dispute resolution procedures.]

(e) This government recognizes that alternative dispute resolution procedures are notappropriate in all cases and, in particular, where fundamental matters of legislative policy and principle, or the public interest are at issue.

[COMMENTARY: Most board members interviewed agreed that alternative dispute resolution processes are not effective in resolving disputes with fundamental matters of principle at stake. In addition, as discussed in the text of the paper, many boards have a statutory mandate to protect the environment and/or the public interest. Where a negotiated settlement comes into conflict with the public interest, these boards have a duty to intervene and ensure that the public interest is adequately protected.

DEFINITIONS

"alternative dispute resolution" - refers to any procedure used to resolve administrative environmental disputes other than a formal board hearing, including negotiation, facilitation, mediation, fact finding and arbitration.

"board"- refers to any administrative board, tribunal, bureau, commission or agency with a legislative mandate to resolve environmental disputes, or to advise the government or conduct public hearings concerning environmental disputes or questions of policy with regard to the environment.

[COMMENTARY: There are a spectrum of administrative boards and processes established under both federal and provincial environmental legislation. Generally, boards function in one of three (sometimes overlapping) modes: (1) judicial or quasi-judicial (2) administrative and (3) legislative. When functioning in one mode or the other, environmental agencies will also be expected to undertake very different tasks, including investigations reporting to and advising the Minister, adjudication and appeals, and rule-making and standard-setting, among others. Alternative dispute resolution processes must be designed with the specific legislative mandate of the board in mind.]

ALTERNATIVE DISPUTE RESOLUTION

(1) Each board may develop and use its own alternative dispute resolution procedures, rules and guidelines.

(2) Alternative dispute resolution procedures, rules and guidelines developed and used under this Act supplement and do not limit other alternative dispute resolution procedures, rules and guidelines made available by administrative boards.

[COMMENTARY: At present, most of the alternative dispute resolution reforms implemented in the Canadian environmental administrative context have been developed and introduced by the boards directly, as opposed to the legislatures. It is our view that statutory reform is important to ensure that boards are properly authorized to implement alternative dispute resolution reforms, and also to ensure a degree of standardization. However, it must also be recognized that the boards themselves have an important system design role to play by virtue of their day-to-day exposure to their particular problems and challenges. Ideally, governments and boards will work together to ensure that reforms which are mutually satisfactory are implemented in both legislative form and in the form of board rules of practice and guidelines.]

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

(1) Alternative dispute resolution procedures should be employed by every board as the first stage in its dispute resolution process. Where such procedures are not employed as the first stage, they should be employed as early as possible in the dispute resolution process.

[COMMENTARY: There are many advantages to the early use of alternative dispute resolution, including: the opportunity to avoid a formal hearing process, the opportunity to focus on interests instead of positions, the opportunity to streamline the process by reducing the number of parties and scoping issues, and the opportunity to commence an early dialogue among the parties. In interviews with board members, they informed us that the early use of the alternative dispute resolution process also increases public legitimacy. Many members of the public have no experience with the administrative process and do not feel comfortable with a formal hearing. They prefer the relative informality of alternative dispute resolution.]

(2) Alternative dispute resolution procedures should be offered and encouraged by Boards, but the power of decision to utilize alternative dispute resolution should be left with the parties.

[COMMENTARY: There are advantages to mandatory mediation. First, there is evidence that mandatory mediation may be helpful in convincing initially resistant parties that compromises and cooperation are useful in resolving differences. Second, mandatory mediation may have the positive effect of educating a broader range of disputants concerning the existence and benefits of alternative dispute resolution. However, Boards risk undermining the fundamental principles of alternative dispute reso-

lution, particularly mediation, if they require participation as a matter of course. ADR is underpinned by the principles of voluntary participation and self-determination. Weaker parties may feel coerced to settle, unintentionally foregoing their right to a fair and balanced hearing. In many cases where the parties either have fundamental principles at stake or are too entrenched to jointly craft a resolution, alternative dispute resolution would simply become another needless, frustrating and expensive step on the way to a formal Board hearing.]

(3) Alternative dispute resolution procedures at four different stages of board proceedings are typically available:

(a) Informal Ex Parte Meeting - the person designated by the board to resolve the dispute or another board staff designated to conduct case intake, can hold ex parte meetings with individual parties or groups of individual parties, prior to the formal commencement of the ADR or formal proceeding, to discuss their claims, interests and resources, and to discuss their willingness to resolve the dispute pursuant to alternative dispute resolution processes.

[COMMENTARY: The advantages of this procedure include the opportunity for parties to discuss their interests openly and on a without prejudice basis, and for mediators/facilitators to scope issues and employ "shuttle diplomacy," if appropriate, to produce an early resolution. The success of mediation, especially in complex substantive disputes, is highly dependent on the ability of the mediator to work with parties individually prior to the mediation to identify, scope, frame, and narrow issues. Although these advantages must be balanced against the disadvantages of employing an ex parte process, which may create a perception of bias or unfairness on the part of the board, boards will significantly hinder their ability to mediate successfully without pre-mediation efforts. As long as the board member serving as mediator does not sit on the formal hearing panel and is prohibited from speaking about the case to those Board members hearing the case, the protections granted by ex parte prohibitions should be retained. Only when a board fulfills a highly quasi-judicial role and exercises a final power of decision, should it perhaps avoid such ex parte processes.].

(b) Informal All Parties Meeting - the person designated by the board to resolve the dispute can hold meetings with all interested parties, as opposed to ex parte, individual conversations, prior to the commencement of either a settlement conference of formal proceedings, to discuss their claims, interests, resources,

and to discuss their willingness to resolve the dispute pursuant to alternative dispute resolution processes.

[COMMENTARY: The advantages of this procedure include the opportunity for parties to discuss their interests more openly than in a formal setting and on a without prejudice basis, the opportunity to focus on interests instead of positions, the opportunity to streamline the process by reducing the number of parties and scoping issues, and the opportunity to commence an early dialogue among the parties. At this time, the board may conclude from the information presented that ADR is appropriate, and encourage the parties to take part. However, the disadvantage of employing such a process, as compared to an ex parte process, is that the parties may feel less comfortable discussing their interests candidly in front of one another.]

(c) **Assisted Settlement Conference - the person designated by the board to resolve the dispute can hold a settlement conference where the parties are provided a mediator to help them settle the dispute The settlement conference is considered part of board proceedings, but is a step before and separate from the hearing, and may be conducted in private.**

[COMMENTARY: The settlement conference assisted by a mediator can be employed in addition, and as a subsequent step, to an ex parte or all parties meeting. In contrast to the latter two processes, the primary focus of this process is to help the parties reach a negotiated settlement. However, in furtherance of this objective, it is our view that informal preliminary meetings held prior to a formal mediation are highly advisable. These preliminary meetings allow the mediator/facilitator to properly inform the parties concerning alternative dispute resolution process options, to focus and clarify issues, and to develop an agenda for the mediation. In addition, at either the preliminary meeting or the settlement conference/mediation itself, it should be made very clear to the parties that this process is distinct from the formal hearing process, and that it will be conducted on a without prejudice basis with the requisite privacy and confidentiality protections. During these assisted settlement conferences, it may be very useful for the mediator to hold individual "caucuses" with the parties in order to advance settlement.]

(d) **Preliminary Hearing - the person designated by the board to resolve the dispute can hold a preliminary hearing, which is considered part of the formal hearing process and is conducted in public by a member or members of the hearing panel. The purpose of the preliminary hearing is either to achieve a**

settlement of the dispute or one or more of the issues pertaining to the dispute, or to further one or more procedural objectives including, among others, identifying the parties and participants, and the scope of their participation in the hearing, identifying, defining, simplifying and scoping issues, resolving procedural and scheduling issues concerning the hearing, and hearing preliminary motions. A mediator is not employed in this preliminary hearing. Rather, the board member(s) acts in their full and formal capacity.

[COMMENTARY: The advantages of this procedure are that, even if the parties are unable to reach a settlement, the board will nonetheless have the opportunity to increase the efficiency of the hearing process by reducing the number. During preliminary ex parte or all party meeting conversations, the Board ought to be able to determine if a settlement conference with mediation, a preliminary hearing, or some combination of the two is most appropriate.]

(4) Alternative dispute resolution processes should be employed in the following order:

(i) ex parte and all party informal meetings, (ii) assisted settlement conferences (mediation) and, if necessary, (iii) preliminary hearing.

(5) With respect to all alternative dispute resolution processes, the board must fully and properly inform the parties from the outset concerning the nature of the alternative dispute resolution process and its advantages, and the procedural steps involved.

[COMMENTARY: A common concern expressed by tribunal members during the interview process was that alternative dispute resolution is not sufficiently understood by the public. Many parties who appear before administrative tribunals are private citizens who have no experience with formal Board hearings and do not understand the process. Alternative dispute resolution is still "foreign" to them and, when the public does not understand the process, they often assume that it is "simply more bureaucratic decisionmaking." In order to ensure the success of alternative dispute resolution reforms, it is necessary to educate the public concerning the advantages of alternative dispute resolution, and make the administrative process more "user friendly" for citizens].

(6) To the extent possible, the board should permit the parties to participate in the design of the alternative dispute resolution process in their particular case.

[COMMENTARY: During interviews, board members generally expressed the view that alternative dispute resolution processes are more effective where the mediators/facilitators meet with the parties at the outset to discuss and plan the process together. However, this is not always necessary or possible. The mediation process designed by the BAPE in Quebec, which has been very successful, is set out in its rules of practice and cannot be changed by the parties.]

(7) To the extent possible, the board should seek to bring representatives of all appropriate stakeholding interests into alternative dispute resolution processes to ensure that the public interest is adequately represented.

[COMMENTARY: If all key stakeholder interests are represented at the table, then the "public interest" is more likely to be served. In addition to serving the public interest, inclusion of all key stakeholding groups is likely to increase the durability and enforceability of any agreement reached. Parties left out of such alternative dispute resolution processes may be more likely to challenge and undermine agreements reached without their consent. This suggests that one of the most important ways that a tribunal can ensure that the public interest is met in a mediation is to work very hard at the outset to bring appropriate representation of all stakeholder groups to the table. This might entail going well beyond merely publicizing the fact that mediation is about to proceed and in addition, to make explicit efforts (through Board staff) to reach out to public interest groups and invite them to become involved. Boards may also want to consider less formal and more inclusive rules of standing, if possible, for participation in mediation versus more formal processes.]

APPOINTMENT OF MEDIATORS/FACILITATORS

APPOINTMENT AND TRAINING

(1) Alternative dispute resolution processes can be conducted by four different classes of persons:
(a) board members on the designated hearing panel;
(b) board members not on the designated hearing panel;

[COMMENTARY: In our view, if mediations are to be conducted by board members, it is necessary for them to be conducted by board members who are not on the designated hearing panel. Mediations are

more effective where the mediator is neutral and has no effective power of decision. Thus, only preliminary hearings as part and parcel of full board hearings should be conducted by board members on the designated hearing panel.

(c) board staff members; and

[COMMENTARY: At present, no Canadian boards use staff members as mediators, although several boards are considering this option. The advantage of using staff members in this manner is that they often have a great deal of expertise concerning the board's mandate, and board processes. Where they are properly trained, they can accordingly be very effective. The disadvantage of using staff is that they do not have either the perceived authority of a board member or the perceived independence of a neutral. At the least, board staff members may be most effective in conducting ex parte or all party meetings to scope issues and develop focused agendas prior to mediator-assisted settlement conferences.]

(d) independent professionals.

[COMMENTARY: At present, independent professionals are used on a limited basis by some boards in Canada. Nonetheless, due to the limited staff and resources of many boards, it is apparent that the use of neutral mediators will become increasingly necessary in the future. However, many board members expressed concern about controlling the quality and the actions of independent professionals. Even where independent professionals have training as mediators, many do not have expertise concerning the board's mandate, public interest responsibilities and board processes. In addition, some board members expressed concern that independent mediators may be too directive in style in order to achieve settlement and protect/enhance their reputation.]

(2) No person should be appointed to conduct an alternative dispute resolution process unless that person is trained or has experience concerning:
(a) mediation or facilitation techniques;
(b) substantive issues raised in a given dispute; and,
(c) the statutory mandate and public interest responsibilities of the board.

[COMMENTARY: During interviews, many board members expressed the concern that it is difficult to find mediators who are knowledgeable concerning mediation techniques, the statutory mandate and public interest responsibilities of the board, and the substantive issues raised in a given dispute. Ideally mediators will have all three of these qualities.

However, if it is necessary to choose, it is in our view essential that mediators at least be properly trained concerning mediation techniques.]

(3) **All boards must implement policies or programs to ensure that board members, board staff members and independent professionals involved in conducting alternative dispute resolution processes are fully and properly trained as mediators or facilitators.**

NEUTRALITY OF MEDIATORS

(1) **All mediators and facilitators will remain non-partisan in regard to substantive outcomes in alternative dispute resolution proceedings. The mandate of the mediator is to assist the parties in an impartial manner to conduct constructive negotiations and pursue creative problem-solving.**

[COMMENTARY: It has been our experience that mediations are successful only where the mediator/facilitator adopts a neutral role. However, where the statutory mandate of a particular board dictates, it may be necessary for the board to require the mediator to narrow his or her neutrality in order to protect the public interest. In Ontario, for example, the Environmental Assessment and Appeal Board requires mediators to ensure that "negotiations and agreements will reflect the primary importance of environmental conservation and protection," to "inform the parties of pertinent Board policy" and to "identify relevant environmental information or other concerns which have not been addressed or adequately resolved by the parties."]

(2) **When board members serve as mediators, they may step outside of the non-partisan, facilitative role, when, and only if necessary, to protect the public interest and/or to narrow the scope of issues for hearing if the parties agree an impasse has arisen and settlement cannot be reached in mediation.**

[COMMENTARY: If a board has an explicit public interest mandate, the board member as mediator may have to step outside of his/her purely non-partisan, facilitative role. When a tribunal member steps outside of the mediative role, several limiting conditions must necessarily be met: (1) the parties must be informed that the tribunal member as mediator may step out of the mediative role, and under what conditions, before mediation begins; (2) the tribunal member must remain true to the rules of confidentiality (nothing said in mediation that goes beyond that required in formal discovery processes, such as settlement offers, will be used in

later formal proceedings and the mediator is bound to not pass on information revealed in meditation to the tribunal, formally or informally); (3) the tribunal member must not later serve as a formal panel member; (4) the mediator must be clear when he or she is moving out of the impartial role to provide substantive advice to the parties; (5) that advice must be clearly stated as non-binding advice which does not preclude the parties from terminating the mediation and going before the tribunal in formal proceedings; (6) the mediator should work with the parties in a non-partisan matter to flesh out all issues and interests, explore options for settlement, and seek agreement first, with good faith and fair effort, before moving into a quasi-judicial role; and, (7) the mediator should be protected from acting as final arbiter of an agreement by one, being able to remove her or himself from the mediation if necessary, and two, having the tribunal (or the Minister) review agreements after they are reached in mediation.

SETTLEMENT CONFERENCES/ MEDIATIONS

(1) Where a settlement conference assisted by mediation is employed, the process should not be conducted or supervised by a board member on the designated hearing panel.

[COMMENTARY: In our view, if mediations are to be conducted by board members, it is necessary for them to be conducted by board members who are not on the designated hearing panel.]

(2) The role of a mediator in a Settlement Conference is facilitative, not directive. The mediator must fully explain to the parties from the outset that his or her role is to help them negotiate a settlement to the dispute, and not to resolve the dispute for them.

[COMMENTARY: It has been our experience that facilitative mediation techniques are more effective in the environmental field than directive mediation techniques. However, where individual boards have statutory mandates to protect the public interest or the environment, mediators may have to remind the parties of the limits to and parameters constraining agreements reached.]

(3) Where a settlement conference/mediation does not result in a negotiated settlement of the dispute, the mediator or facilitator cannot participate in the subsequent formal board hearing.

[COMMENTARY: This is essential for the purposes of preserving both mediator neutrality and board neutrality].

(4) Where board staff participate in a settlement conference/ mediation by providing procedural or informational support, they should not participate in the subsequent formal board hearing.

[COMMENTARY: This is essential for the purposes of preserving board neutrality and neutralizing any concerns with regard to confidentiality. However, this rule must be interpreted reasonably. Due to limited board staff and resources, it is clear that staff involved in mediations/settlement conferences will periodically have to play some role in subsequent hearing proceedings. If so, they can protect the confidentiality of the parties by ensuring, in subsequent hearing proceedings, that they play a purely procedural role. In addition, they should undertake not to divulge confidential information obtained at the mediation/settlement conference during the hearing.]

PRELIMINARY HEARINGS

(1) Where a Preliminary Hearing is employed, the process must be supervised by a board member. It is also preferable that the board member also be a member of the designated hearing panel.

[COMMENTARY: Since a preliminary hearing is designed not only to facilitate a settlement, but also to streamline the board hearing process, it is preferable to have a member of the panel present during the preliminary hearing. However, this is not strictly necessary, and the preliminary hearing can be conducted by a board member who will not sit on the panel.]

CONFIDENTIALITY

(1) Where a board's statutory mandate permits, confidentiality should be protected during the course of alternative dispute resolution processes.

[COMMENTARY: In some cases, the statutory mandate of a board does not permit the protection of confidentiality. For example, the BAPE in Quebec has a statutory obligation to conduct open hearings with full public disclosure. The inability to protect confidentiality may undermine the effectiveness of alternative dispute resolution processes by discouraging the parties from openly discussing their interests. However, this is a tradeoff that may be necessary under a given statutory regime. If informal, ex parte, individual communications are allowed, the board should, at the least, protect the confidentiality of these communications].

(2) Where a board's statutory mandate permits, the following confidentiality protections should form part of the relevant board rules or guidelines:

(a) papers or documents produced during alternative dispute resolution processes concerning the issues in dispute should be confidential and inadmissible before a board, review panel, court or tribunal without the consent of the participant or mediator;

[COMMENTARY: In some cases, a balance may have to be struck between the public interest in disclosure and the private interests of the parties in protecting confidentiality. In Nova Scotia, for example, the Environmental Assessment Regulations and Environmental Board Regulations protect the confidentiality of business documents and information, but contain an exception where these documents or information relate to the "environmental effects or associated mitigation measures of the undertaking." Whether confidentiality protections should include such an exception should depend upon the specific statutory mandate of the board in question.]

(b) no statement made by a participant or the mediator during alternative dispute resolution processes concerning the issues in dispute should be admissible before a board, review panel, court or tribunal without the consent of the participant or mediator.

[COMMENTARY: Preferably, the agreement is the only written outcome of the mediation. However, where the Board has a mandate to conduct public hearings, as in Quebec, it will be necessary for a transcript of the proceedings to be prepared, and to be disclosed to the public. Although this will diminish the effectiveness of the mediation, it may be necessary for the purpose of satisfying the board's statutory mandate.]

(3) A board or court has the power to waive the protection of confidentiality where it determines that disclosure is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or safety.

[COMMENTARY: This exception to the confidentiality protection protects against two potential problems: (1) parties who choose to use mediation precisely because they want a blanket confidentiality protection in subsequent hearing or court proceedings and (2) serious breaches of law or public policy. The breadth of this exception should vary depending upon the nature of the board's statutory mandate.]

LEGAL AND TECHNICAL ISSUES

(1) Board members and board staff should employ best efforts at the outset of alternative dispute resolution processes to determine whether the parties have adequate legal and technical expertise to properly address the issues raised in the dispute. Where one or all parties do not have adequate legal and technical expertise, board members and staff should employ best efforts to provide them with such expertise.

[COMMENTARY: In implementing this provision, boards must balance their interest in ensuring that all the necessary information for a fair negotiation is available to the parties with their interest in protecting the public perception of neutrality on the part of mediators and the board.]

(2) Any scientific, legal or technical expertise provided by the board or board staff must be equally and openly available to all parties to the dispute. Parties may agree that only one or a few parties to the dispute require particular assistance because that party lacks sufficient resources.

(3) Where resources permit, boards should establish a trust fund to enable parties without sufficient resources to a dispute to obtain adequate legal and technical advice during alternative dispute resolution processes. Such funding and advice must be administered with fair, balanced, and clear procedures, such as access based on equal access for all, access based on financial-need, and so forth.

[COMMENTARY: During interviews, many board members expressed concerns with respect to power differentials in environmental disputes, which frequently pit individual citizens or environmental interest groups against industry or government. Often private citizens do not have sufficient access to technical, scientific and legal resources to properly represent their own interests in mediation or negotiation. This raises a difficult dilemma for the board, which must make a policy decision whether to have its mediators adopt a neutral stance, or whether to attempt to "level the playing field" by providing additional advice or funding. This choice will depend upon the nature of the board's statutory mandate, and the strength of its interest in maintaining a publicly neutral stance.]

REVIEW OF AGREEMENTS AND SETTLEMENTS

(1) Where a board has a legislative mandate to review agreements and settlements reached during alternative dispute resolution processes, it must ensure that they conform with the purposes and provisions of the relevant legislation and the public interest.

[COMMENTARY: In some cases, the board will not have the statutory mandate to review negotiated agreements. This may occur (1) with respect to cases where the parties enter into an agreement prior to the board acquiring jurisdiction over the matter, or (2) where the jurisdiction to review agreements lies with the Minister and not the board. Where a board holds a public interest mandate, this review will ensure agreements reached in settlement conferences protect that interest.

(2) In undertaking a full review of an agreement or settlement, the board should take into account both the substantive content of the agreement and the fairness of the alternative dispute resolution process.

[COMMENTARY: It is desirable for boards to implement guidelines concerning the proper practice and procedure to be followed in reviewing agreements. In determining the intensity of the review, the board must balance its interest in promoting settlements (which would necessitate a less stringent standard of review) and its statutory mandate. Where the board has a mandate to act in an administrative or advisory capacity and has no final power of decision at a hearing, a less stringent standard of review is appropriate. In such cases, the Minister retains full decision-making authority, and the principle of democratic accountability is maintained. By contrast, where the board exercises a final power of decision, a more rigorous level of review is advisable. However, at the same time, where such a rigorous standard is imposed, it must be recognized that this may undermine the effectiveness of the mediation process. Interjecting another administrative review and, at worst, forcing a formal board hearing to review a settlement, could essentially render the advantages of mediation moot.]

PRECEDENT

(1) Boards are not bound by the doctrine of stare decisis and have no legal obligation to adhere to prior settlements or agreements in subsequent alternative dispute resolution or hearing proceedings. However, it is a sound practice for boards to employ prior agreements and settlements as guidance with respect to both substance and procedure in subsequent alternative dispute resolution processes.

[COMMENTARY: Generally, the extent to which the substance of a negotiated agreement will have authority should vary according to the level of board review or input into that agreement. Where the board has fully reviewed the agreement, it should have persuasive authority close to or equal to that of a board decision. Where the board has not reviewed that agreement, its persuasive authority will generally be lower than that of a board decision reached in a formal hearing. In addition, it is a sound practice for board members and staff to meet periodically to discuss the alternative dispute resolution process, and to exchange information concerning effective techniques and possible improvements to the process.]

ENFORCEMENT OF AGREEMENTS AND SETTLEMENTS

(1) Where a board's statutory mandate permits, it should adopt settlements and agreements reached between the parties as a formal Order of the board.

[COMMENTARY: This grants the mediated agreement the full authority of the board. This will not be possible in cases where the board has no jurisdiction over particular types of settlement or where the board has no power to issue formal Orders.]

(2) Settlements and agreements reached between the parties, and adopted as a formal Order of the board, can be filed with any Superior Court of general jurisdiction and are enforceable in the manner of a court judgment.

[COMMENTARY: In many provinces, legislation already exists to permit the filing of administrative board Orders with the Superior Court.]

(3) Every board retains the discretion, upon the application of one or both parties to an agreement or settlement, to investigate an alleged breach of said agreement or settlement. Where one or both parties have breached an agreement, and where fairness

or the public interest requires, the board may revoke the agreement and hold a de novo hearing concerning the issues and facts in the original dispute.

[COMMENTARY: The scope of this power will vary depending upon the statutory mandate of the board in question. Where the board is acting in an advisory capacity, and where the final power of decision rests with the Minister, the board will generally have no jurisdiction to reopen an agreement. However, where the board is acting in a quasi-judicial capacity, and exercises a final power of decision, it should generally have jurisdiction.]

APPENDIX IV: PHONE INTERVIEW PROTOCOL (April 1998)

I. INTRODUCTION

We are the Consensus Building Institute, affiliated with the MIT-Harvard Public Disputes Program. We have been retained by the Alberta Environmental Appeal Board to prepare a White Paper concerning the best practices that administrative environmental tribunals in Canada should follow with regard to settlement, negotiation and mediation. We are very interested in speaking with you about the use of mediation, if any, in your tribunal's proceedings.

These interviews are confidential in the sense that we will not attribute name, position, or organization to comments and opinions you express to us. We would like to include any factual information on your program and use of mediation, if any, in our paper. We would make sure you have a chance to review this factual information in draft form.

Our conversation should take between 45 minutes and 1 hour of your time.

II. GENERAL QUESTIONS

1. Please briefly describe your organization–its purpose and place in provincial or federal government. Do you have any general information–an annual report for instance–you would be willing to send us?

2. Please briefly describe your position in this organization.

III. QUESTIONS ABOUT MEDIATED CASES

(a) Implementation

*1. Does your organization utilize mediation in any way in resolving cases or in fulfilling its rule-making or administrative responsibilities? If so, how? If not, why not?

*2. If so, is this mediation mandated by statute or regulation? Regardless, are there are any relevant statutes or regulations which prohibit or limit its use?

3. Who carries out the mediation (do you use your administrative law judges to mediate, your staff, outside mediators)?

4. What process does your organization employ for the appointment of mediators if they are outside your ALJs (i.e. with regard to qualifications, training and experience)?

(b) Record and Review

1. What kind of written materials are kept concerning these mediations or mediated settlements, if any? If recorded in some way, do these cases ever serve as precedent, either formally in the Board's activities, or more informally, informing later mediated settlements?

*2. Does the Board review the mediated cases? If so, how (procedural, substantive, etc.)? If so, who undertakes the review (Chairman of Board, other members)? Has any settlement been "thrown back" or "thrown out"?

3. Have any of your mediated agreements been subject to judicial review by the courts? If so, what standard of review have the courts employed? What was the outcome?

*4. What role does your organization play, if any, in enforcing mediated settlements? Has your organization developed any techniques to ensure ongoing monitoring and compliance?

(c) Evaluation

*1. Have the mediation techniques implemented by your organization been successful? How do you think that administrative bodies should evaluate the success of mediation efforts or settlements themselves?

2. How would you compare the investment of time (both for administrative officials/mediators and for participants) that is required in cases that are mediated as compared to cases that are heard before the formally convened Board?

(d) General Conclusions

*1. What concerns or worries do you have about mediation (whether you have used it or not)?

*2. What do you think are the major advantages and disadvantages of using mediation in cases that come before your Tribunal?

IV. OTHER QUESTIONS

1. Do you have any written materials on your program you could send us?

*2. Who else do you think it would be useful for us to speak with?

*3. Are you aware of any other administrative environmental tribunals within your province, or in other provinces, which are using or have tried to use mediation?

---

* Indicates questions asked of respondents whether or not they have current mediation programs.