Dispute Resolution – Mediation

The Fusion of Reason and Abstraction

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I. INTRODUCTION

Over the past 15 years, Alternate Dispute Resolution ("ADR") and specifically mediation, both private and judicial, have become a major component to our litigation process and the means by which an increasing number of cases get resolved. Concurrently, the more efficient processing of claims and disputes toward resolution prior to trial has been encouraged by both the Bench and profession as witnessed by our *Code of Professional Conduct* (for ex. Rule 2.02) and our relatively new *Rules of Court* (for ex. Rule 1.2). While the mandatory mediation provision of our *Rules* is currently suspended, its existence further confirms mediation as an entrenched component in our litigation process.

The field of mediation has struggled over the years with a major disconnect between theory and practice. This disconnect has stymied efforts to better understand and develop more effective practice. But with time and more experienced mediators and counsel alike, a more mature and sophisticated approach is emerging. So, for example, whereas in the past there was a pre-occupation by those studying and practicing mediation with one "correct" approach to the practice of mediation – interest-based, facilitative, transformative, evaluative etc. – increasingly one sees an acceptance and recognition that a fusion of all these techniques for possible deployment in any given mediation is the progressive and most helpful approach. Hopefully, with the passage of more time and experience with mediation, we have outgrown past debates over whether, for example, lawyers, by definition and training, are even capable of effectively discharging the role of mediator, whether Judges are better than lawyers in private practice at discharging the role of mediator and, as alluded to above, the past relentless search for the one correct process and approach to the conduct of a mediation.

This paper will start with a review of some fundamental concepts of mediation and thereafter offer ideas, observations and analysis aimed at advancing the mediation cause in a positive direction. This objective involves a fusion of theory and practice and necessitates an appreciation for the complexity of the human condition, particularly in the dispute context. Through quotes and associated footnotes, an effort is also made to introduce the more useful and progressive articles and books on the subject of mediation. The ideas, analysis and opinions to follow are provided largely from the mediator's perspective and for the potential benefit of mediators but hopefully is found to be somewhat relevant and helpful to counsel engaged in the mediation process as well. In the course of the paper, questions and issues will also be raised largely with a view to promoting further thought and dialogue.

II. BASIC PRINCIPLES

i. Definition of ADR

"ADR can mean different things to different people. Some suggest ADR is not an enormous concept but is simple common sense. If there is a disagreement on what is common sense, others portray ADR as mostly about saving time and money in dispute resolution – the achievement of economic efficiencies. Still others say that ADR stands for a range of formal and informal processes that exist as alternatives to litigation..." [1]

Three of the more common ADR mechanisms are mediation, med/arb and arbitration. This paper will be focused on mediation. Flexible and progressive definitions of mediation flow quite naturally from those applied to ADR. It is generally considered "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction". Even more simply, it has been described as "assisted negotiations". [2]

ii. Autonomy/Self-Determination

Fundamental to the theory and practice of mediation is the concept of party autonomy and self-determination. The standard definition of autonomy is that it reflects a circumstance where an individual has the capacity to make a choice amongst real alternatives and can make that choice using reasons with which he or she is comfortable. Fusing these two related concepts clearly establishes what distinguishes mediation from dispute adjudication – the parties themselves are responsible for making decisions affecting them, assisted by a neutral third party, and, concurrently, a process to that end.[3]

The concept of party autonomy will surface, from time to time in this paper, as a fundamental concept in the practice of mediation. In fact, in a broad sense, it has potential relevance to the provisions of our *Code of Conduct* and the *Rules of Court* which encourage and mandate attention if not a focus on the resolution of claims prior to trial. Query whether the civil justice pendulum has swung too far in the direction of resolution when considering circumstances where parties wish and have good reason and cause to pursue traditional litigation through trial and possible appeal? The concept is also of importance in the context of the solicitor-client relationship.

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[1] Pirie, A.J., *Alternate Dispute Resolution, Skills, Science and the Law* (Irwin Law: 2000) p. 18

[2] Morris, C. and Pirie, A., *Qualifications for Dispute Resolution – Perspectives on the Debate,* Uvic Institute for Dispute Resolutions, p. 167

[3] Matz, D.E., *Mediator Pressure and Party Autonomy,* Negotiation Journal (October 1994), p. 360

iii. Psychological Considerations in Dispute Context

One must acknowledge and appreciate significant psychological issues that will permeate most disputes and any process geared toward their resolution. This is a complex and multi-layered dynamic starting with the nature of the human condition without all of the additional layers triggered by disputes between parties. So, even without considering the extra layers of psychological considerations that apply when parties are engaged in disputes and their possible resolution, it must be understood that people, from a psychological perspective, are complicated, perspectives are often quite unique and not always seemingly rational and everyone comes from unique life and cultural backgrounds:

> *"Man is an over-complicated organism. If he is doomed to extinction he will die for want to simplicity..."*
>
> *Erza Pound* [4]

On this base layer of psychological considerations, one then adds a number of negative factors which often create potential for disputes and render solutions more complicated (greed, spite, competition, etc.). Self-interest and emotion are common variables in the evolution of a dispute and in efforts aimed at achieving a resolution. Parties, not to mention their counsel, will bring unique negotiating inclinations to any mediation and those inclinations will unfold in different ways even during the course of a mediation. All of these considerations combine to create a challenging scenario for parties engaged in mediations and the mediator retained to be of assistance, all as captured by some of the following quotes:

> *"Even the most destructive patterns, dysfunctional ruts, and painful routines seem safer than doing something different that could result in change. Every pattern repeats itself, whereas change could result in things becoming worse. The known, even when it is painful, is measurable and reassuring. There is a danger in the uncertainty of change..."* [5]
>
> *"We spend our time searching for security and hate it when we get it..."*
>
> *John Steinbeck* [6]

When one places parties with their disputes and associated psychological tendencies into a mediation context, one can expect other psychological patterns to emerge, as captured by the following observations:

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[4] Lederach. J.P., *The Moral Imagination* (Oxford University Press, 2005) p. 31
[5] Cole, K., *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey – Bass: 201), p.4
[6] Words of Art (Adams Media, 2013), p. 84

"Often both sides in a legal dispute honestly believe that they are likely to win in court. Mediators find that when parties put their predictions in terms of percentages, their forecasts often total 150% or more; that is, each side thinks that it has a much better than even chance of prevailing. Given these clashing predictions, it is not surprising that even good faith negotiations often reach impasse. The causes of such misjudgments are complex. Psychologists have demonstrated, for example, that people tend to form perceptions of situations quickly, then unconsciously ignore any information that contradicts their view, a phenomenon called selective perception. People's judgments are also influenced by their roles in litigation, an effect known as advocacy distortion..." [7]

"You see what you know"

Frank Stella [8]

"In most cases, the barriers that are frustrating agreement, such as procrastination, the need to vent arguments and emotions, poorly conducted positional bargaining, lack of information or hidden psychological issues, do not relate to the parties' view of the merits". [9]

iv. Corresponding Need for a Creative and Flexible Approach to Mediation

Against this backdrop, it is clear that any attempt to develop concrete criteria for successful mediation execution is futile and counterproductive. Rather, in keeping with some important attributes for mediators, that of being open minded, creative and flexible, is the need to approach the whole mediation process in a similar context, as observed in *Mediating Dangerously*:

"As mediators, we need to recognize that while people act in ways we call good or bad, these categories have no existence in nature. They are polarities, like up and down, hot and cold, forward and backward, that cannot exist or be thought of without their opposites. Human nature is not fixed or eternal, but changes with culture and conditions. No two parties are alike, no two conflicts are alike, no two mediators are alike and no one is the same from one moment to the next. What succeeds for one mediator with one party at one moment may fail for another mediator with a different party or at a different moment. What is needed is not proscription, but skill, intuition, flexibility and the ability to be dangerously honest and empathetic."[10]

ADR literature generally talks extensively about various approaches mediators may follow to execute a successful mediation. Regrettably there has been little consistency in the definitions applied to these various approaches/techniques (interest-based, evaluative etc.) and even more difficulty trying to rigidly apply them in practice. While in academia debate about definitions of these various techniques/approaches is an interesting exercise, applying such theory to practice is one of the best

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[7] Golann, D. and Aaron, M.C., *Using Evaluations in Mediation,* Dispute Resolution Journal, Spring, 1997, p. 2
[8] *Supra* fn 6, p. 27
[9] Golann, D. *supra* fn 6, p. 4
[10] Cole, K., *supra* fn 5, p. 12

examples of the continuing disconnect between theory and practice that exists in the ADR realm. This dysfunctional dynamic is well captured by Bernard Mayer in *Beyond Neutrality,* where he states as follows:

> *"...our whole tendency (as conflict resolution practitioners) to identify our work by whether we take an evaluative, facilitative, narrative or transformative approach is at best artificial and at worst rigid and even manipulative. Our work is as complex as the conflicts that we intervene in, and there is no single simple approach that is always appropriate or effective. Most conflicts require a multiplicity of different interventions, and most experienced conflict resolvers use these. An evaluative mediator without good facilitative skills is likely to be considered less effective at intervening in a complex conflict. Even dedicated facilitative mediators use evaluative techniques at times. They might not tell parties how strong their case is should they adjudicate it, but they may well evaluate the pros and cons of different approaches to communication, framing of issues or constructing a table... What disputants need from conflict resolvers is more than process: they need understanding, engagement, creativity, strength, wisdom, strategic thinking, confrontation, patience, encouragement, humour, courage, and a host of other qualities that are not only about process or substance. Each of us brings a different set of personal and professional characteristics and skills to the table that helps people work their way through conflict as best they can. ..."* [11]

People are complicated, the process of dispute resolution is complicated, and the world we live and work in is as well. While criticized in some circles as elitist, brief reference to the work of the Davos World Economic Forum in creating a comprehensive snapshot of our seemingly overwhelming global challenges is illustrative.

The stated objective for the 2014 Davos gathering was to explore the nature of systemic risks with regard to 30+ global risks (for ex. widespread economic, food, environmental, public safety crises), including their interconnections, while at the same time focusing on three constellations of global risk – centered on youth, cyberspace and geopolitics and recognizing, throughout, the declining trust in institutions, leadership, persisting gender inequalities and data mismanagement.[12] Clearly, whether we are talking about private disputes or global challenges, complexity rules and there are no easy solutions or processes that can meaningfully move us toward that objective.

v. Disconnect Between Theory and Practice Continued

As to why there exists an ongoing but lessening disconnect between theory and practice in the mediation realm, Dr. Brian Jarrett has offered this interesting observation:

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[11] Mayer,B.S., *Beyond Neutrality* (Jossy Bass: 2004) p. 145
[12] Insight Report, Global Risks 2014, 9th ed. – World Economic Forum

> *"Because mediation arose more as a practice than as a theoretically-derived discipline, its theoretical base has not developed in a consistent nor coherent fashion (Deutsch 2000). This is largely because practitioners have had little time to document and even less motivation to share their practices with academicians, with whom they have little in common (Deutsch 2000). Academicians, for their part, have often demonstrated a greater deference to theories generated in the hallowed halls of academe over folk-wisdoms, intuitions, and mediator narratives emerging directly from practice (Deutsch 2000). The net effect has been a continuing disconnect between theory and practice. ..."* [13]

Even within the ranks of practitioners, this ongoing disconnect is fueled, in part, by self-interest. An evaluative component is often sought and helpful in many mediations, but mediators without legal training are arguably handicapped in providing it. Thus perhaps a motivation to encourage more of an interest-based approach by mediators without legal training. Conversely, some have argued that lawyers, by virtue of their training and traditional practice, are ill-equipped to bring all necessary skills to the mediation table as mediators.

Getting to Yes is likely the most popular and influential book on the subject of mediation authored by two widely acknowledged authorities – Roger Fisher and William Ury. One of the major techniques advocated in the earlier editions of this book was a separation between people and their dispute. As time and experience unfolded, this approach has been found by many to be unrealistic and in the latest edition of *Getting to Yes*, some modification is expressed with respect to this technique.[14] With respect, any attempt to sever people from their dispute in a dispute resolution process handicaps the cause of resolution. The evolving process at most mediations must address the tight interconnections between people and their disputes.

Part of the motivation to this theory/technique advocated by Fisher and Ury was the challenge and disruption posed by the emotion most people have around their position in a dispute. An effective summary of evolving research in the neurosciences provides further support against any effort by a mediator to sever people from their dispute. Recent scientific and academic studies:

> *"have revealed that this previous perspective which viewed emotion as the enemy of negotiation and calm rationality as goal was limited in many respects. For example evidence from the neurosciences has shown that instead of being in opposition to reason, emotion is an integral part of reasoning and decision making. In fact an absence of emotion has been found to have the same disruptive effect on decision making as strong negative emotion. And suppressing an emotion has been found to result in impaired cognitive ability and recall. Ignored or suppressed emotions can*

[13] Jarrett, B., Integral Mediation, Canadian Arbitration and Mediation Journal (Spring/Summer 2012) p. 56
[14] Fisher, R. and Ury, W., Getting to Yes (Penquin Books, 2011), p. xv.

also be messy as they tend to surface and make themselves heard, usually at the most inopportune time..." [15]

Over and above the flexibility and creativity required with the fusion of various approaches and techniques in the execution of a mediation is the concept of the exercise of power by a mediator. One must not forget that conflict resolution is not easy. Parties come to mediators or avail themselves of traditional litigation because they have become stuck themselves in processing a dispute. Individuals and corporations who are engaged in disputes usually desire more from mediators than current theory typically endorses. Bernard Mayer observes on a regular basis in his book *Beyond Neutrality* that there is frequently a disconnect between what parties in conflict require and desire from a mediator and what the agenda or preferred method of practice of the mediator constitutes. In this regard, he observes:

> *"...but this disconnect can often lead to a situation where clients want something different from what we offer and are reluctant to use our services because they do not see these services as meeting their needs. Clients may want some of the following things, but many mediators do not feel they can accommodate them:*
>
> - *clients want to be told who is right and who is wrong.*
> - *they seek vindication.*
> - *they want to be told whether a solution being suggested is fair and reasonable, or whether they are being played for a fool.*
> - *they want help in convincing other parties of the merits of their case or the reasonableness of their proposal.*
> - *they want substantive information and advice.*
> - *they want to know how other people have solved the same problem.*
> - *they want the mediator to guide the process with a firm hand, making sure that they do not waste time and that they are not subject to attacks, dirty tricks, or a level of emotional engagement that they are not prepared for.*
> - *they want to get out of the room."* [16]

What this observation from Bernard Mayer highlights is the still too common disconnect between what parties expect and need from a mediator (party autonomy) and what mediation theory too often attempts to dictate.

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[15] Fromm, D. Emotional Awareness and Negotiation, Canadian Arbitration and Mediation Journal (Spring/Summer 2011) p. 5

[16] Mayer, *supra* fn 9, p. 107

Also, mediation theory from the past which advocated for a more passive, interest-based approach by a mediator stemmed in part from a preoccupation that one or all parties to disputes are vulnerable, weak and easily manipulated and thus their rights to make voluntary decisions would be seriously affected by a proactive, assertive and perhaps manipulative mediator. With respect, this is an increasingly insignificant consideration. To the extent one or more parties to a dispute that is in mediation can be viewed, realistically, as somewhat vulnerable and weak, with counsel involved, this consideration is often defused. Good counsel finds a way to level the playing field in negotiations both within and outside of the mediation room. Further, people are not as vulnerable as some academics suggest. The resilience and strength of people in the face of change, loss and adversity should not be underestimated" [17]

Finally, higher end commercial disputes, for example, do not typically involve any weak or vulnerable parties. While such disputes constitute a major component of mediation work, they attract very little attention from academics. The mediation of such disputes is typically very much a hard-nosed strategic negotiation where the mediator should consider giving the parties latitude to advocate and play out their strategy aimed at resolution without significant interference until necessary and requested.

In summary then, to this point in the paper, clearly people, their disputes and the circumstances in which they live and work is a complicated picture. Why then would some continue to chase and advocate for one or a few rigid approaches to the conduct of a mediation aimed at resolving disputes? This focus along with ideas advanced, for example, about separating people from their problem in the dispute resolution exercise, appealing for collaborative advocacy at mediations and to suppress emotion and corresponding venting at a mediation, are all, with respect, misguided efforts to make the dispute resolution process more manageable (and easier for the mediator) by injecting simplicity into circumstances of complexity. Layers of complexity in the dispute resolution process can lead to paralysis experienced by counsel and mediators in trying to find a path to resolution (the so-called "complexity trap"). The answer to this dilemma for a mediator is not to advocate for and inject artificial simplicity into the process but rather to find a way to get more comfortable and better functioning with the unique layers of complexity that each mediation presents.

[17] Lifton, R.J., The Protean Self (Basic Books 1993)

III. HUMAN CONDITION

i. Intuition – Its Magic and Shortcomings

It is little wonder that with the layers of complexity involved to both understand and address disputes, many have, in a simplistic fashion, dismissed an in-depth study of all factors involved preferring to rely on a general understanding and application of intuition in mediations. Without doubt, it is clear that experienced and successful mediators demonstrate a solid exercise of intuition in facilitating successful mediations.

Given the prominence of intuition in both theory and practice, a few dictionary extracts are a good starting point, as follows:

> *"immediate apprehension by the mind without reasoning; immediate apprehension by sense, insight".*[18]

> *"the power of understanding situations or people's feelings immediately, without the need for conscious reasoning or study".*[19]

This general subject area is well treated, particularly for individuals not well versed in the disciplines of psychology and psychiatry, in the book *Blink.* The general subject of intuition and its foundation is introduced with reference to the book *Strangers to Ourselves* by T.D. Wilson:

> *"The mind operates most efficiently by relegating a good deal of high-level, sophisticated thinking to the unconscious, just as a modern jetliner is able to fly on automatic pilot with little or no input from the human, 'conscious' pilot. The adaptive unconscious does an excellent job of sizing up the world, warning people of danger, setting goals and initiating action in a sophisticated and efficient manner".*[20]

Building on a general base of how our brains process information and trigger decisions, *Blink* initially highlights the power and magic of initial judgements and impressions formulated in our unconscious. However, the author goes on to correctly concede that while our unconscious is a powerful force, it is fallible. Our internal computer and our instinctive reactions can be distracted and disabled on account of competing interests, emotions and sentiments.[21] The influences and distractions to the exercise of our intuition, as illustrated in *Blink*, can be significant and alarming. For example, in the

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[18] Sykes, G.J.B., *The Concise Oxford Dictionary* (Oxford University Press, 1976)
[19] Barber, K. *The Canadian Oxford Dictionary* (Oxford University Press, 1998)
[20] Gladwell, M., *Blink*, (Little Brown and Co., 2005), p.12
[21] Gladwell, *supra* fn 20, p.15

ugly realm of racism, while we might on a conscious level not consider ourselves to be so inclined, on an unconscious level a different reality might exist.[22]

Fortunately, *Blink* goes on to compellingly argue that the exercise of our intuition can be educated and controlled, but only be immersing ourselves with experiences and environments that will broaden and enlighten our unconscious. In short, one can resort, by way of illustration, to a phrase popularized in recent times by former U.S. President Clinton upon touring the Oklahoma City blast site – "I feel your pain". What *Blink* maintains is that one cannot truly feel another person's pain without in some meaningful way experiencing it.

Linking intuition to imagination for a moment, Mark Twain, with his typical wit and insight observed:

> *"you can't depend on your eyes when your imagination is out of focus..."* [23]

The general message from *Blink* is not necessarily unique when it comes to matters of intuition, imagination and life experience. Going back to the 18th century, the Scottish philosopher David Hume opined, *inter alia*, that our existence, our feelings and our experience are the foundation for all our ideas. While imagination is powerful, it is no substitute for our natural impressions and instincts. [24] On similar issues, we have these words of Edvard Munch – "...without fear and illness I could never have accomplished all I have." [25]

In considering the need, particularly on the part of those practicing mediations, to understand their internal computer and database as discussed in *Blink*, the all-encompassing topic of culture deserves some mention. It is effectively captured and summarized in the following quotation:

> *"if we use the analogy that culture to people is like water to fish, we remember that culture is all around us. Cultural messages are shared by groups of people and give information about behaviors, communication, attitudes, values and ways of being in the world... Cultural influences include: age, geographic region, ability/disability, recency of immigration, generation, sexual orientation, socioeconomic class, profession or discipline, gender, religion, language, race, ethnicity and many others..."*[26]

In short, culture is broad in definition and injects far-reaching implications to disputes and their resolution. Its significance and influence provides one more indication that a progressive approach

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[22] Gladwell, *supra* fn *20*, p.84
[23] *Words of Art, supra* fn 6, p. 52
[24] Turok. N. *The Universe Within* (Harper Collins Canada Ltd., 2012) p. 12
[25] *Words of Art, supra* fn 6, p. 79
[26] LeBaron, M., *Dynamics of Culture and Conflict* (Course Materials – Culture, Diversity and Power in Dispute Resolution) (Osgoode LLM program 2005)

to dispute resolution cannot see an attempt to separate people with their unique cultural blueprint from disputes as suggested in *Getting to Yes*.

ii. Multi-Disciplinary Grounding to Better Understanding of Human Condition

"...everything you can imagine is real..."

Pablo Picasso [27]

Malcolm Gladwell, in books such as *Blink*, offers interesting and often counterintuitive observations concerning the human condition and behavior. Others, going back centuries, have offered interesting analysis on the human condition and have advocated a multi-disciplinary approach to the better understanding of it. With such a better understanding, guiding parties to disputes to resolution can only be enhanced. Starting with a focus on literature, the writing of Northrop Frye, a distinguished Canadian scholar on English literature is insightful and relevant. Early on in his book, *The Educated Imagination*, Dr. Frye offers a wonderful framework regarding the roots of and interconnections between science and the arts, their value and the insight they afford us about the human condition, as follows:

> *"...Science begins with the world we have to live in, accepting its data and trying to explain its laws. From there, it moves towards the imagination: it becomes a mental construct, a model of a possible way of interpreting experience. The further it goes in this direction, the more it tends to speak the language of mathematics, which is really one of the languages of the imagination, along with literature and music. Art, on the other hand, begins with the world we construct, not with the world we see. It starts with the imagination, and then works towards ordinary experience: that is, it tries to make itself as convincing and recognizable as it can. You can see why we tend to think of the sciences as intellectual and the arts as emotional: one starts with the world as it is, the other with the world we want to have..."* [28]

One of the beneficial aspects of literature opined by Dr. Frye is that it places abstract ideas found in religion, morality, science, philosophy into concrete images and situations.[29] Most creative writing consists of travel in the world of imagination where anything is possible and anything can be assumed. One of the many benefits to readers is the encouragement of tolerance, patience, creative thought, all unencumbered by bias or a multitude of assumptions. [30] Much of literature challenges conventional wisdom with the result that one's perspective and exercise of intuition is expanded thus, undoubtedly, assisting in the cause of understanding people, their perspectives and dispute

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[27] Words of Art, *supra* fn 6, p. 60
[28] Frye, N., *The Educated Imagination* (Harper Collins Canada Ltd., 2002) p. 9
[29] Frye, N., *supra* fn 28 p.37
[30] Frye, N., *supra* fn 29 p. 45

resolution possibilities. One final quote from *The Educated Imagination* before leaving the work of Dr. Frye:

> *"Literature, then, is not a dream world: it's two dreams, a wish-fulfillment dream and an anxiety dream, that are focused together, like a pair of glasses, and become a fully conscious vision. Art, according to Plato, is a dream for awakened minds, a work of imagination withdrawn from ordinary life, dominated by the same forces that dominate the dream, and yet giving us a perspective and dimension on reality that we don't get from any other approach to reality..."*[31]

Dr. Neil Turok is a leading theoretical physicist who resides in Waterloo, Ontario, where he currently serves as director of the Perimeter Institute for Theoretical Physics. In his book, *The Universe Within*, he connects progress over the centuries toward discovering the physical basis of reality with our character as human beings. Reference is made, for example, to Einstein's work in unifying space, time, mass, energy and gravity and how his work and that of other great scientists has involved imagination, a fusion of many disciplines, the deployment of intuition, all of which oftentimes lead to results and breakthroughs that were counterintuitive. [32] Once again, as with literature, Dr. Turok's book provides insight concerning the human condition that has application to a progressive approach to dispute resolution.

Alan Lightman, with a distinguished academic background in both theoretical physics and the humanities, is well positioned to present, in his latest book, *The Accidental Universe*, a compelling narrative on how the fusion of physics and humanities can lead to a better understanding of the human condition. It is a variation on a theme presented in his earlier book, well known to many, *Einstein's Dreams* – a poetic exploration of connections between life, science and the arts. [33]

As his observations and analysis unfolds in *The Accidental Universe*, Dr. Lightman offers this compelling summary of the human condition:

> *"...we strive for logic and pattern and quantification. We admire principles and laws. We embrace reasons and causes - some of the time. At other times, we value spontaneity, unpredictability, unlimited and unconstrained behavior, complete personal freedom. On the subject of rules and patterns, I think we are absolutely schizophrenic. We are drawn to the symmetry of a snowflake, and we are also drawn to the amorphous shape of a cloud floating high in the sky. We appreciate the regular features of animals of a pure breed, and we are also fascinated by hybrids and mongrels that do not fit into any classification scheme. We honor those people who have lived upright and sensible lives, and we also esteem the mavericks who have broken the mold. In some perplexing and ill-understood manner, we human*

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[31] Frye, N. *supra* fn 28 p. 62
[32] Turok, N. *supra* fn 24 p. 47
[33] Lightman, A., *Einstein's Dreams* (Random House Inc.: 1993)

beings with our oversized craniums seem to have a fondness both for the predictable and the unpredictable, the rational and the irrational, regularity and irregularity. Yes, we are certainly a difficult mess of self-contradictions..." [34]

The books referenced herein are but a small sampling of a plethora of books on this general subject. As with individuals pondering a career change into mediation, books on the human condition very much constitute the current flavour-of-the-month.

Enough of what some will view as irritatingly esoteric, "touchy-feely" mediation talk. How then to transition from all of the layers of complexity described thus far in this paper to effective mediating. Earlier in this paper, reference was made to the so-called "complexity trap" which sees some parties and mediators experience various degrees of paralysis in trying to advance a dispute resolution process at a mediation through multiple layers of complexity. In the end, complexity cannot be avoided but can be more easily managed and addressed through a better understanding of the human condition and by maximizing the points of connection that the mediator can create with the parties in the short time he or she has to work with them with the ambitious objective of reaching resolution.

Striving to be well read, amongst other benefits, also creates and facilitates opportunity for quicker relationship and trust building at a mediation. For example, understanding an industry that is involved in a business dispute one is retained to mediate, being equipped to talk about market conditions and challenges, progressive business theories (could also spawn resolution option brainstorming) art, politics, literature, sports, law, and the like, are all useful potential points of connection. This observation is not made with a view to assisting a mediator to manipulate the mediation process toward a forced resolution but rather to afford him or her an opportunity to quickly establish good rapport with the parties and their counsel. Good rapport between mediator and the parties along with their counsel facilitates trust and reassurance to the parties about the dispute resolution process being guided by the mediator.

Humour is an often forgotten tool to be considered by a mediator in many mediations. Amongst other possible benefits, it also helps to establish rapport between the mediator and the parties, can help reduce tension and broaden perspectives. But as with other techniques available to a mediator, it must be exercised with caution and in appropriate circumstances. [35]

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[34] Lightman, A., Random House: 2013 p. 104
[35] Nelson, R. M., Nelson on ADR (Thomas Carswell: 2003) p. 89

To be clear, trying to avoid paralysis in the mediation process on account of the so-called "complexity trap" is not, in most instances, easy. Solace in the face of this particular challenge can be realized from an observation from F. Scott Fitzgerald – "the test of a first rate intelligence is the ability to hold two opposed ideas in the mind at the same time and still retain the ability to function. [36] To make matters worse, a mediator needs to understand and work with parties in a dispute in the space of hours not typically days or weeks, and with pressure from the parties to achieve a satisfactory resolution efficiently and quickly. All the while, to ensure the ongoing confidence and respect of the parties as the mediation unfolds, the mediator must be as seamless as possible in the technique employed and the rapport developed as well described by Pablo Casals in the context of music – "the most perfect technique is that which is not noticed at all." [37]

Notwithstanding considerable emphasis in this paper on the complexities involved in the dispute resolution process, to be balanced it must be acknowledged that many mediation exercises are quite straightforward (largely on account of good preparation prior to and effective work at the mediation by counsel) necessitating grounding in only a small fraction of the considerations noted in this paper. That said, it behooves any mediator to be sensitive to the major responsibilities resting with him or her and to that end maximizing the grounding advocated in this paper.

IV. ACCESS TO JUSTICE

ADR is clearly part of the solution to the access to justice problem that is rightfully getting increased attention from the Bench, the public and the legal profession. For many, the cost and complexity of our judicial system dictates that a mediation, with or without legal representation, is as close to justice that many can realize. In Alberta, the Access to Justice Committee of the Alberta Branch of the CBA has been active in brainstorming ideas and proposals, particularly in the context of limited scope retainers. In its recent paper on that subject, Mr. Justice R.A. Jerke authored a piece entitled "Limited Scope Retainers – Perspective from the Bench". In it, he effectively describes underlying principles of justice in a democratic society as follows:

> *"a properly functioning justice system is a core value in our democratic society. The system is complex and citizens make contact with it in numerous ways. A big challenge is the ability of individuals to enforce or defend legal rights in an effective and meaningful way regardless of economic status. The problem is sometimes referred to as an 'access to justice' issue. Access to justice is critical to ensure public confidence in our justice system."*

[36] Turok, N. *supra* fn 24 p. 80
[37] Words of Art, *supra* fn 6, p. 106

Apart from this persuasive statement of principle, one message to be taken from growing efforts to facilitate access to justice for more in society, is a need on the part of mediators, whether judicial or private, to be sensitive to the rights of the parties and to achieving through a mediation not just a resolution but one which leaves the parties satisfied that justice has been served and promotes, as Justice Jerke puts it, "public confidence in our justice system".

On a related subject, it is worthwhile making reference to a recent Alberta decision, *Molten v. Attia,* 2013 ABQB 642, a decision of Madam Justice Moen in a solicitors' negligence case. In her decision she addresses the access to justice issue in the context of the need on the part of a claimant to call one or more, so called, standard of care experts when endeavouring to establish negligence on the part of a lawyer. Relying in part on access to justice considerations, she excused this need based on the cost of such experts and the impediment that such costs present to many claimants. With exclusive regard to the *Molten* decision and largely on account of Justice Moen's consideration of the access to justice issue, solicitors' negligence cases have now swung from a position where, with few exceptions, judges required and expected a standard of care expert to assist in the determination of possible negligence to a situation where a judge's discretion might be exercised in such a way as to eliminate the need altogether.

There is also the very recent decision of the Supreme Court of Canada, *Hryniak v. Mauldin*, [2014] SCJ No. 7, which, in the context of summary judgment procedure, speaks extensively of the access to justice issue and advocates "a necessary culture shift" in how litigation is conducted to address that issue. In this regard, the Court opined as follows, at paragraphs 27 and 28:

> *"There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial. This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure..."*

While attention to this problem from the Bench is laudable, it must also be recognized that in the absence of some guiding principles to judges, the profession and the public with respect to the

flexibility legal principles and case precedent can be given, there is a whole new level of risk introduced with disputes going to trial. ADR has grown in popularity and use in the past couple of decades in part because of the rising cost and risks associated with traditional litigation and trial outcomes. One more major layer of risk is posed by the sensitivity of our Courts to the access to justice issue.

V. COMMON IMPEDIMENTS TO ACHIEVING RESOLUTION AT MEDIATION

i. Shortcomings in Conduct of Mediation and Input from Mediator

The selection of mediator for a given dispute is critical. There are, with the passage of time, an increasing number of experienced private mediators in the marketplace with whom counsel are both familiar and comfortable. Unlike JDRs, there is complete freedom on the part of disputing parties to choose their private mediator. That said, even with such positive history with a mediator, judgement calls and input from him or her at a mediation can be, particularly with hindsight, deficient. Recognizing that no two disputes and the parties involved in them ever involve the same dynamics, generally speaking, an experienced mediator with a proven track record of flexibility and creativity in guiding the process is the safest choice. Respect for party autonomy and the input of counsel as the mediation process unfolds reduces the prospects for mediator error causing a collapse in the mediation process.

Viewpoints concerning attributes and strengths to look for in a mediator once again highlight the disconnect, to some extent, between theory and practice. Desirable characteristics in a mediator have been described as consisting of:

> *"neutral; respectful of the principle of self-determination; empathetic; unbiased in appearance and in deed; creative; flexible; conciliatory; credible; able to facilitate discussions; possessing good negotiating skills; positive; sensible; trustworthy; intelligent; patient; non-judgmental; possessing a sense of humour; professional; confident; possessing good interpersonal skills; proactive; able to help parties identify their priorities and interests; fair-minded; realistic; skilled at dealing with anger and conflict; possessing effective listening skills; possessing effective communication skills; sensitive to emotional needs of the parties, and tactful"* [38]

No one can dispute the above-noted list of desirable characteristics whether in mediators or otherwise. But contrast this list with the practical observation of how such attributes interconnect to result in the effective execution of a mediation by a mediator:

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[38] Emond, D. P., Mediation Advocacy (Emond Montogomery Publications Limited: 1998), p. 55

> *"Two advanced skills trainers... have emphasized the need for mediators to be highly biphasic, building trust through the capacity to behave in opposite ways depending on circumstances. In their words: to be both proud and humble, sensitive and tough, strong and gentle, humorous and serious, trusting and cautious, optimistic and pessimistic... The ability to achieve that degree of instinctive adaptability can be learned, but mostly is rooted in personality and aptitude... "* [39]

ii. Random Observations about JDRs

At this juncture, I offer some observations about JDRs starting with the concept of party autonomy. The Honourable Justice Robert Graesser has authored an excellent paper entitled *Judicial Dispute Resolution Advocacy* from October, 2011. He has the following to say about the process followed by judges at JDRs:

> *"Every judge is different to some degree as to his or her approach or style, and willingness to be other than evaluative. Some judges will mediate (focusing on the parties' interests instead of their rights or legal positions), but if that is ultimately ineffective, he or she will provide an evaluation of the case. Some judges will use evaluative interventions during a mediation, but shy away from giving any kind of detailed evaluation. Some judges will shy away from giving any kind of evaluation. Some judges will be entirely evaluative (focusing on the parties' rights) and be unwilling to explore interests or mediate. Some judges will essentially evaluate (focusing on the parties' rights). Some judges will conduct a mini-trial, take a break to consider the matter, and return to deliver a decision. The judge might then leave. Others might stay, to help the parties settle the case with the benefit of the judge's evaluation. Some judges will caucus with the parties; some will not..."*

This observation effectively captures the spectrum of mediation approaches one can expect from Alberta Judges at a JDR. Query whether they reflect personal preferences and comfort levels on the part of the Judges involved without consideration for the value that flexibility, through a fusion of various approaches at a JDR, might provide to both the judge and the success of the exercise, not to mention some regard and respect for concept of party autonomy.

Elaborating further on JDRs goes beyond the intended scope of this paper. But in the interests of prompting reflection and discussion on a number of interesting issues related to JDRs, a few additional observations are respectfully offered herein. A heavy responsibility naturally rests with our Judges to deliver appropriate and principled justice in their work and to follow processes that ensure that justice is not only done but seen to be done. Caucusing tends to be a major component to most mediations whether private or judicial. Transparency in the delivery of justice is a major consideration. Query whether more Judges ought to be concerned about the caucusing component

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[39] Leathes, M. 2020 Vision: Where in the World Will Mediation be Within 10 Years? (Canadian Arbitration and Mediation Journal: Spring Summer 2011), p. 33

to their work in the context of private and sometime confidential discussions with one party to the exclusion of the other.

To the extent Judges sitting as judicial mediators are inclined or are invited by the parties to provide evaluative input in the course of a JDR, oftentimes it is a specific finding on the dispute at hand offered with the preamble: "if I were hearing this matter, this is how I would find". At least two issues arise from this scenario. First, very few disputes realistically lend themselves to an accurate prediction of a likely Court outcome at the conclusion of trial. With respect, the evaluative input from a mediator is typically best provided as an assessment of risk on various issues and a range of possible realistic outcomes at trial. This approach also facilitates further negotiations, following the evaluative input, between the parties. A specific finding on a case offered by any mediator can often polarize the parties and set them back and not forward in working toward a compromise resolution.

Second, query whether Judges have cause for concern in offering specific opinions on a Court outcome on the basis of mediation briefs, limited evidence to that stage of the proceeding and limited dialogue at the JDR itself. Litigation experience tells us that the appearance of a case at the conclusion of trial is often substantially different than at its outset – witness performance is always unpredictable, surprises at trial are the norm not the exception etc.. Still further, if there is one certainty to our litigation process it is that any JDR Judge will not and cannot sit as the trial Judge and so what the JDR Judge opines as a likely trial outcome, were he or she sitting as Judge, is somewhat moot. In short, and with respect, the evaluative input of any mediator in most cases is best delivered on a platform of what most Judges on most days might be inclined to find and not on a specific number but on a range of outcomes, whether that range be broad or tight depending on the circumstances of the case and the issues, law and facts involved. These observations are not unique or original. Some Judges have thoughtfully reflected on them on a regular basis.

And finally, mediators, both judicial and private, must always be sensitive to the parties not feeling intimidated, by virtue of their presence and stature, into a settlement. It must also be appreciated that the absence of a settlement does not automatically reflect bad faith on the part of one or more parties assembled for a mediation. No mediator, private or judicial, likes to see bad faith creep into the mediation process but failure to achieve resolution rarely reflects bad faith on the part of one or more parties involved.

iii. Preparation and Advocacy by Counsel

While some mediators will take the time at the outset of a mediation to explain the process to those, in particular, for whom it is a new experience, this step hardly suffices as prudent preparation of

clients for the process. Once the idea and possibility of resolution emerges in the life of a file in litigation, counsel should bring considerable focus and attention to a multitude of considerations. Various process alternatives (direct negotiation, JDR, private mediation, arbitration) should be discussed with clients. An assessment of the merits of the case in driving a reasonable settlement position is critical and it might, in the first instance, dictate that more information and evidence is necessary before a settlement is sought whether through mediation or otherwise. If sufficient information and evidence is available counsel will often still be left with a problem where their clients are concerned related to resolution expectations that far exceed a reasonable assessment of the merits of the case. This disconnect needs to be narrowed if not completely bridged in advance of a mediation for any degree of success to be anticipated at it. Oftentimes this disconnect is fueled more by the psychological considerations referenced earlier than an assessment of the merits of one's case. All the while, counsel should be checking in with opposing counsel to ensure that these same steps are being undertaken in the opposing camp in the lead up to any mediation. There is little point to counsel and clients on one side of the dispute ledger having all their "ducks in a row" in advance of a mediation only to discover, at the outset of the mediation, that the other side does not.

Once in the mediation, the same general attributes and grounding necessary on the part of a mediator (sensitivity to viewpoints, dispute history, psychological considerations, the law that applies to the dispute at hand etc.) is important with counsel. Some have suggested that counsel should consider assuming something close to the role of co-mediator with the mediator with a view to fostering an atmosphere conducive to achieving a settlement. These topics amongst others are effectively explored in two recent and excellent Canadian books.[40] While some tempering of court room advocacy is generally advisable in a mediation context, opposing counsel ought to be free to advocate effectively on behalf of their clients and the merits of their position. This task, however, need not involve excessive confrontation, impatience or a complete absence of sincere engagement with opposing counsel and client. Modest adjustments to advocacy in the mediation context brings with it another benefit – helping the cause of the profession to more civil interaction amongst counsel and clients.

iv. It just was not meant to be...

Mediations are a voluntary process and notwithstanding good faith on the part of opposing parties, good preparation in advance of a mediation and effective counsel work at it, the circles representing the opposing positions at the mediation cannot always be made to intersect. Excessive pressure

[40] MacFarlane, J. The New Lawyer (UBC Press: 2008)
Adams, G.W., Mediating Justice: Legal Dispute Negotiations (2nd Edition)(CCH Canadian Limited: 2011)

exerted to that end by either a mediator or counsel involved represents a form of disrespect for party autonomy and self-determination which, as stated earlier, is a foundational principle underlying negotiations that take place in the mediation context. Furthermore, quite often sufficient progress toward resolution is made at a mediation thus facilitating a settlement in the days that follow. This circumstance speaks to one more responsibility on the part of counsel, if appropriately instructed, to continue settlement efforts building on the momentum created at a mediation in an expeditious fashion.

It must also be remembered that in larger, multi-party disputes, the mediation process commonly will go beyond one session. In the face of busy schedules amongst parties, their counsel and the mediator, it is often difficult to maintain any momentum toward resolution. Responsibility to do so rests, in the first instance, with the mediator but, in the end, requires commitment and availability by the parties and their counsel with the process being pursued.

> "You can lead a man to a lamp-post but you cannot make him see it"."
>
> *Old Saw (adapted)* [41]

[41] Mace, C.A., The Psychology of Study (Methuen & Co. Ltd.,London, 1955) p. 15