

OVERCOMING THE BARRIERS TO ENVIRONMENTAL DISPUTE RESOLUTION IN CANADA

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The authors examine the use of alternative dispute resolution in resolving environmental disputes. A comparison is made on the status of environmental dispute resolution in the United States and Canada. EDR has been used in the U.S. since the 1970s, but is still in its infancy in Canada. The benefits of EDR are discussed as well as the limitations. The authors examine the barriers that are limiting the acceptance of EDR in Canada and make suggestions on how these barriers can be eliminated.

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I. Introduction

An American Bar Journal deemed Alternative Dispute Resolution (ADR) in the United States a healthy adolescent.¹ While originating primarily for labor disputes, its use has been expanded to resolve small claims cases, civil cases, and even some criminal cases, as well as complex public policy and public sector disputes. It has been used by health maintenance organizations to resolve patient grievances, by construction companies to resolve outstanding million dollar claims, by polluters to allocate financial responsibility for environmental cleanup, and by government agencies to resolve conflicts among diverse constituencies and even to formulate new policies and regulations. However, it has only recently gained notice and use in Canada.

Environmental dispute resolution, or EDR, has been used in the United States since the early 1970s. Since that time, hundreds of land use, pollution, water resource, air quality, and other environmental conflicts have been resolved through the use of facilitation, mediation, arbitration, and associated community-involvement techniques. In Canada, however, widespread use of EDR has not occurred. Why not? Is the U.S. simply the larger market for such efforts? Is the U.S. more open to innovations in dispute resolution? Are the environmental problems in the U.S. bigger than those in Canada? Are the U.S. political institutions and civil discourse more contentious and, thus, in greater need of new forms of dispute resolution?

Although we could answer "yes" to some or all of the above questions, in fact, we believe that there are specific administrative, legal, logistical, and credibility barriers in Canada that stand in the way of the greater use of EDR. The goal of this paper is to examine these barriers to using EDR in the Canadian system. The authors will briefly outline the history of the development of EDR in Canada and the United States. We will then look at the disadvantages and advantages of EDR, as well as the minimum conditions necessary for a successful mediated negotiation. We then consider the specific barriers that can prevent the use of EDR in Canada. Finally, we will offer some prescriptions for moving beyond the obstacles that we have identified in order to enable EDR in Canada.

¹ J. Greenya, "ADR: The Healthy Adolescent" (Nov.-Dec. 1997) 12 Wash. L. 20.

II. History of Environmental Dispute Resolution

A. United States²

Environmental issues gained widespread public and political attention in the 1970s in the United States.³ At the same time, alternative dispute resolution (ADR) was emerging as an alternative to handling disputes. Almost immediately, these trends became merged in the new field of environmental dispute resolution (EDR),⁴ which grew to help avoid protracted environmental court battles.

The first significant environmental dispute to be mediated was a long-running controversy over the proposed location of a flood control dam on the Snoqualmie River in the State of Washington.⁵ Later, the Storm King Mountain dispute provided more evidence that potentially expensive, lengthy environmental disputes might be better solved through mediation, rather than litigation.⁶

The Environmental Protection Agency (the "E.P.A.") was one of the first federal agencies to experiment with the negotiated rulemaking process.⁷ In 1987, the EPA made ADR an "agency-wide priority."⁸ By 1997, the EPA had finalized 12 negotiated rulemakings.⁹ EPA regional offices have created mediation programs to resolve such environmental disputes as allocation of

² Most of this section is drawn verbatim or paraphrased from L. E. Susskind & J. Secunda, "Environmental Dispute Resolution: The American Experience" in C. Napier, ed., *Environmental Conflict Resolution* (London: Cameron May, 1998) 16 - 55.

³ This ten-year period saw passage of the *National Environmental Policy Act of 1969*, Pub. L. No. 91-190, 83 Stat. 852, the *Resource Conservation and Recovery Act of 1970* (RCRA), Pub. L. No. 91-512, 84 Stat. 1227, the *Clean Air Amendments of 1970*, Pub. L. No. 91-604, 84 Stat. 1676, and the establishment of the United States Environmental Protection Agency. In 1972 alone, the *Federal Water Pollution Control Act Amendments of 1972*, Pub. L. No. 92-500, 86 Stat. 816, the *Federal Environmental Pesticide Control Act of 1972*, Pub. L. No. 92-516, 86 Stat. 973, the *Marine Protection, Research, and Sanctuaries Act of 1972* (*Ocean Dumping Act*), Pub. L. No. 92-532, 86 Stat. 1052, and the *Coastal Zone Management Act of 1972*, Pub. L. No. 92-583, 86 Stat. 1280, were all enacted.

⁴ G. Bingham & L. V. Haygood, "Environmental Dispute Resolution: The First Ten Years" (1986) 41:4 Arb. J. 3 at 4, define environmental dispute resolution as "a variety of approaches that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or a potentially controversial situation." This article will include references to ADR and mediation as well as EDR. Commentary on these broader concepts shows similar advantages, disadvantages, and barriers to their use. See S. Mernitz, *Mediation of Environmental Disputes: A Source Book* (New York: Praeger, 1980).

⁵ See Susskind and Secuda, *supra* note 2 at 18.

⁶ See Bingham and Haygood, *supra* note 4 at 7.

⁷ L.E. Susskind and S. McKearnan, *The Past, Present, and Future of Public Dispute Resolution in the United States* (Working Paper Series 95-7) (Cambridge: Program on Negotiation at Harvard Law School, 1995) at 9.

⁸ L. Peterson, "The Promise of Mediated Settlements of Environmental Disputes: the Experience of EPA Region V" (1992) 17 Colum. J. Env'tl. L. 327 at 338.

⁹ P.J. Harter, "Fear of Commitment: An Affliction of Adolescents" (1997) 46 Duke L.J. 1389 at 1425-28.

responsibility in Superfund cases.¹⁰ In 1993, four years after the Exxon Valdez tanker ran aground in Prince William Sound, causing the largest oil spill in the history of the United States, Secretary of Interior Bruce Babbitt raised the profile of government mediators by mediating the Alaska fishermen's battle with oil and gas companies.¹¹ Since that time, the Secretary has continued to mediate various environmental disputes around the country.

At the state level, the National Institute of Dispute Resolution (NIDR), formed in 1983, funded the establishment of new, state-sponsored mediation offices in Massachusetts, New Jersey, Hawaii, Wisconsin, and Minnesota.¹² Many of these state offices developed projects and programs for resolving difficult environmental disputes. The Massachusetts Office of Dispute Resolution, for example, inaugurated a wetlands mediation program to help resolve a large backlog of cases for the state's Department of Environmental Protection. The Montana Consensus Council, after nearly 30 years of conflict among traditional agricultural users of water and the increasing needs of fishers, environmentalists, and others for in stream flows, successfully convened a stakeholder dialogue to build agreement on draft legislation.¹³ In 1997-98, an in-depth nation-wide study of consensus building identified over 100 local, regional, and state land use and environmental conflicts where alternative dispute resolution had been utilized.¹⁴

B. Canada

In Canada, the use of ADR has not expanded as quickly or as broadly as in the United States. Not only is ADR a relative newcomer in Canada,¹⁵ but so is EDR and the environmental conflicts that call for its use. Environmental issues in Canada did not gain widespread attention until the 1990s.¹⁶

¹⁰ For example, EPA Region V began an ADR pilot project in 1988. As of June 1991, "five attempts at mediation have resulted in four Superfund cases being settled in Region V without resort to litigation in federal courts." See Peterson, *supra* note 9 at 338n.

¹¹ T. Melling, "Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card" (1995) 30 *Land & Water L. Rev.* 57.

¹² L. Susskind, "NIDR's State Office of Mediation Experiment" (1986) 2:4 *Negotiation J.* 323.

¹³ L. Susskind & P. Field, *The Montana Consensus Council: An Assessment of Its Mission, Outcomes, and Proposed Structure* (Montana Consensus Council Consulting Report) (Cambridge, MA: Consensus Building Institute: 1996) at 19.

¹⁴ L. Susskind, M. van der Wansem & A. Ciccarelli, *Mediating Land Use Disputes: Pros and Cons* (Cambridge, MA: Lincoln Institute for Land Policy, 2000) at 14 ff.

¹⁵ There were, however, several environmental mediations in Eastern Canada in the 70s and 80s. Vol. 4 of CELA's *Environmental Mediation - Theory to Practice*, lists and describes major Canadian mediations at 1-19. (S. Shrybman, *Environmental Mediation B Theory to Practice* (Toronto: Canadian Environmental Law Association, 1984)).

¹⁶ At least for federal environmental law: the first federal case of great environmental prominence in Canada was the *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1990] 1 F.C. 248 (T.D.).

An early, prominent, regulatory “negotiating” process did take place in Western Canada during the 1980s regarding the Alberta Swan Hills hazardous waste disposal facility. However, the first mediation, under the Canadian Environmental Assessment and Review Process, was initiated in April 1992. Federal, provincial, and local officials convened to mediate disputes over risks to Brant geese, impacts on fish habitat, and socio-economic impacts of the proposed construction of a small harbor in the Haida Gwaii/Queen Charlotte Islands. In June 1993, after the successful culmination of 15 major meetings, numerous work groups, and public consultation, a final consensus report was submitted to the Minister of the Environment.¹⁷

Six administrative tribunals in Canada, specifically the Alberta Environmental Appeal Board (the “Alberta EAB”), the Manitoba Clean Environment Commission, the Ontario Environmental Assessment and Appeal Board, the Ontario Energy Board, the Québec Bureau d’audiences publiques sur l’environnement (“BAPE”), and the Nova Scotia Environmental Assessment Board, employ some form of EDR. For example, the Alberta EAB mediated 45 appeals from 1993 to mid-1998.

III. *Disadvantages of Environmental Dispute Resolution*

While mediation is growing in use and acceptance across substantive areas as diverse as environment and labor discrimination, some commentators have questioned its generally claimed advantages and have cited several disadvantages. For example, many commentators have questioned whether mediation is, in fact, always cheaper or faster than litigation.¹⁸ Several commentators have asked whether the crown jewel of mediation, “the opportunity to create a solution in which all parties win,” is fact or mere optimism.¹⁹

While these disadvantages have been laid out in detail in the sources cited above, three disadvantages of EDR in particular, wherever it might be exercised, bear further elucidation. These include: A) lack of procedural safeguards to

¹⁷ J. Mathers, *Sandspit Small Craft Harbor Mediation Process: A Review and Evaluation* (Ottawa: Supply and Services Canada, 1995).

¹⁸ Another problem with ADR is that “it does not always work. If ADR is not successful, overall costs increase.” Tilleman, “Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England” (1996) 21:1 *Colum. J. Envtl. L.* 1 at 76. See also 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 *Envtl. Aff. L. Rev.* 239 at 279. “EDR can also appear expensive in terms of the front-end investment of time required.” (Susskind & Secunda, *supra* note 2 at 38). See C. Coglianese, “Assessing Consensus: The Promise and Performance of Negotiated Rulemaking” (1997) 46:6 *Duke L.J.* 1255 and N. G. Sipe, “An Empirical Analysis of Environmental Mediation” (1998) 64:3 *Journal of American Planning Association* 275.

¹⁹ L. Susskind, “Environmental Mediation and the Accountability Problem” (1981) 6 *Vt. L. Rev.* 1 at 7-8; See also J. P. McCrory, “Environmental Mediation — Another Piece for the Puzzle” (1981) 6 *Vt. L. Rev.* 49 at 58.

protect less powerful parties; B) inadequate representation of the public interest; and C) abuse of the process by the strong at the expense of the weak.

A. *No Procedural Safeguards*

The absence of clearly defined institutional procedures to define and narrow issues, subjects EDR to a host of possible abuses.

In the courts, well-established rules lay out when a conflict can be litigated, how it is litigated, when discovery takes place, what is and is not admissible as evidence, and so forth. Formal, extensive rules both bind and guide the conduct of disputing parties. Of course, the very rules and traditions of the judicial system that structure conflict are the very ties that bind these processes, sometimes to the point of a stranglehold. The formality, rigidity, and backlog of the courts have, in no small part, been the impetus for the emergence of ADR. Given that environmental issues usually involve multiple parties, a web of tightly linked issues, and complex scientific and technical concerns, the courts are considered to be even less capable of adequately resolving environmental cases than more traditional civil or criminal cases. While the existence of EDR in the “shadow of the law”, to borrow a phrase from Professor Robert Mnookin of Harvard Law School, has allowed it the very flexibility to meet the needs of particular problems in particular contexts for particular parties, its very flexibility is its weakness. Mediation, and ADR more broadly, can be considered a private matter with few or no procedural safeguards, from which the public is excluded. A related criticism in the context of NEPA²⁰ is that mediation and other settlements made “outside,” or at least to “the side” of the law, may undermine the protective intent and *raison d’être* of the law. For other critics, the relatively free flow of information encouraged in EDR is potentially dangerous. For those that approach mediation in a disadvantaged position, the breakdown of negotiation may simply mean the process has been an unofficial and unbounded discovery for those with opposing interests.²¹

B. *Inadequate Representation of the Public Interest*

Given that environmental conflict, by its very nature, often involves multiple parties and a public interest in a landscape, natural resource, or other environmental amenity shared by all, the more informal, “private” nature of

²⁰ The *National Environmental Policy Act of 1969* (NEPA), Pub. L. No. 91-190, 83 Stat. 852 at 853-55 (1970) (codified as amended at 42 U.S.C. ss. 4321-4370 (1988 & Supp. V 1993)). NEPA protects the environment by requiring the government to prepare environmental impact statements on government actions that can significantly affect the quality of the environment.

²¹ J. Goss, “An Introduction to Alternative Dispute Resolution” (1995) 34 *Alta. L. Rev.* 1 at 10.

EDR could encourage “back room” deals and could fail to adequately engage the public and protect the public’s interest in the environment. Inadequate representation of the public interest poses at least two problems. First, negotiated solutions may not have the full scrutiny of all the interested public and the media. Second, negotiated decisions with the assistance of EDR may not have allowed everyone to come to the table, especially those who see it as their responsibility to worry about broader public interests (e.g., wildlife, the rights of animals, or future generations), aside from particular institutional or financial interests.

One difficulty is that confidentiality and privacy is often an essential element of negotiation.²² Yet, environmental groups and other public interest advocates have served a useful social function by using the open processes of legislating and adjudicating to act as the watchdogs of industry and government. The cloak of confidentiality removes negotiations from the scrutiny of the public eye and raises concerns that the public interest will not be represented because mediation may effectively exclude these parties from the bargaining table.

Furthermore, mediation does not bind the public at large or set a legal precedent to simplify future issues over similar problems with different parties. Commentators suggest that this may be a distinct disadvantage where there is a desire to affect broader change or achieve a sort of economy in addressing the next environmental concern to be resolved. Generally, administrative processes are designed, in part, to protect the public interest and to highlight societal norms to guide future conduct.²³ It is important to recognize that settlements reached in environmental mediation affect not only the parties involved, but also 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.”²⁴ Given the widespread impact of many environmental settlements, there is a strong argument that the public has a right to know the basis for such settlements (particularly when governmental agencies are involved in the settlement discussions) and to be informed of any specific commitments that were made in the process. In the absence of such publicly available information, there is a concern that mediation behind closed doors may undermine the public’s confidence in the resulting agreement.²⁵

²² “Mediation has the highest chance of leading to effective resolution of a dispute where the discussion takes place in confidence.” *Ibid.* at 6.

²³ P.J. Harter, “Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality” (1989) 41 *Admin. L. Rev.* 315 at 317.

²⁴ E.R. Max, “Confidentiality in Environmental Mediation” (1993) 2 *N.Y.U. Envtl. L. J.* 210 at 211.

²⁵ Harter, *supra* note 23 at 341.

C. Potential Abuses

The predominant concern is that unequal power among parties, almost always a reality in environmental disputes, sets the stage for bullying of the less powerful parties.²⁶ One commentator notes that “powerful interests may actively embrace mediation as a way of co-opting their weaker opponents.”²⁷ Proponents of mediation have acknowledged the dangers of significantly unequal power relationships and suggest both mechanisms to equalize power relationships and advise the mediator to withdraw from decidedly one-sided negotiations.²⁸ Others have suggested that when it comes to efforts to fundamentally clarify and/or change rights and status quo power structures, adjudication is preferable to mediation.²⁹

Another form of abuse is using the process to gain possibly undeserved public approbation.³⁰ In a bad faith context, one party may use mediation as a vehicle for enhancing its own position. For example, potentially responsible parties (PRPs) under Superfund might attempt to use the mediation process to delay enforcement against them.³¹

²⁶ “EDR may be unsuitable in situations involving dramatic asymmetries of power; only rights-based forums (i.e. courts) can adequately protect the interests of the powerless.” (Susskind and Secunda, *supra* note 2 at 39.) According to Daniel Riesel, “inequality of power does not lend itself to a negotiated settlement because it discourages (sic) the party with power to avoid meaningful negotiations, and works against the mutual building of trust.” (D. Riesel, “Negotiation and Mediation of Environmental Disputes” (1985) I: Int’l J. of Disp. Resol. 99.) Douglas Amy notes that “mediation impartially reflects the imbalances of power in society itself” and “may actually work to legitimize imbalances in power by conferring an air of fairness to inequitable or co-optive agreements . . .” D. Amy, “The Politics of Environmental Mediation” (1983) 11 Ecology L. Q. 1 at 13. See also Amy, generally, 6 - 13, commenting on three power imbalance issues: 1) power can determine who is admitted and who is “left out” of this private process; 2) frequent disadvantage of environmental groups in technical analysis; and 3) lack of power can make involvement of environmental groups “less than voluntary.” Amy, *ibid.* at 7. See also J.C. Sassaman, “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 223.

²⁷ Amy, *ibid.* at 9.

²⁸ Susskind, *supra* note 19 at 14.

²⁹ See L. Susskind & J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (New York: Basic Books, 1987) at 188-92.

³⁰ According to Amy, developers can achieve a “public relations coup” by getting what they want in mediation without acting the “heavy” by going to legislative bodies or the courts. Amy, *supra* note 26 at 11. Furthermore, they can often get the “seal of approval from environmentalists” with only slight modifications of their project. *Ibid.* Amy also notes that the mediation approach of mutual responsibility and “mutual fault” tends to “shift the blame for the conflict away from pro-development groups” even if “environmentalists are the wronged party and deserve vindication.” *Ibid.* at 16.

³¹ Peterson, *supra* note 8 at 343, describes how EPA seeks to prevent “PRPs from resorting to mediation as a stalling tactic.”

IV. *Advantages of Environmental Dispute Resolution*

Proponents of environmental mediation cite a multitude of advantages. Tilleman notes:

Reasons for the increase in ADR 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 settling process, where there is a possibility that the standards can be agreed upon in advance — before the judicial review process.³²

Or, in the words of one U.S. federal official: “ADR techniques are generally considered faster, cheaper, and better able to leave the parties satisfied with the process.”³³

For the purpose of this article, these advantages will be grouped into four broad categories: A) saving money; B) saving time; C) better meeting the interests of parties; and D) producing wiser, fairer, and more stable outcomes. In each of these areas, EDR offers benefits not found in traditional judicial, legislative, and administrative decision-making processes.

A. *Saving Money*

For less powerful parties, EDR may be the only real opportunity to participate in dispute resolution since the costs of formal litigation can be absolutely prohibitive to those citizens and groups without sufficient financial resources. Lower expenditures offer an additional advantage for government agencies: it can counter the accusations that environmental agencies are wasting tax dollars.³⁴ Agencies are spending limited dollars on expensive enforcement actions when the money could be directed toward clean up or damage management.³⁵

³² W.A. Tilleman *supra* note 18 at 69-70.

³³ Melling, *supra* note 12 at 85. See also Mank *supra* note 18 at 281.

³⁴ Peterson, *supra* note 9 at 327, notes the general concern that “federal agencies and the entities they regulate spend too much time and too many resources in the courtroom.” Similarly, “Superfund and RCRA programs, and the state analogues to these laws, are under mounting pressure to reduce transaction costs to maximize monies going directly into cleanups.” *Ibid.* at 380.

³⁵ “Like individuals who are parties to an action, an agency has finite resources and should prefer the settlement of a dispute to the uncertain and potentially costly continuation of litigation.” J.S. Jacobs, *A Compromising NEPA? The Interplay Between Settlement Agreements and the National Environmental Policy Act*” (1995) 19 Harv. Envtl. L. Rev. 113 at 113.

The Alberta EAB estimates that \$20,000 is saved every time a case is settled in mediation versus a formal hearing. Since 31 of the 46 appeals mediated since 1993 have been settled without the formal hearing, this is a cost saving of approximately \$600,000.³⁶

B. *Saving Time*

According to one commentator, a 16-month mediation settling a 14-year conflict is a typical benefit of ADR in environmental disputes.³⁷ One commentator notes: "Out of necessity, the EPA has turned to ADR methods in an attempt to reduce its backlog of cases."³⁸ EPA has noted that time spent on setting up a case referral for court action could be more profitably spent elsewhere. Specifically, Peterson states that:

Though little hard data are available on the costs to EPA of developing a case referral package, the process can consume hundreds of hours of EPA enforcement personnel and attorney time. By contrast, the time spent evaluating and proposing a case for mediation averages between three to twenty hours per case. [Preparing agency cases for court] "puts a significant demand on legal and program staff". These staff may [be] diverted from other activities, such as negotiations and enforcement for response action.³⁹

Even if litigation is ultimately pursued, mediation can help to garner preliminary information and limit or define issues so that the litigation can be resolved more expeditiously. Finally, mediation has been found to be a viable alternative to stalled or failed negotiations between EPA and PRPs under CERCLA.

C. *Better Meeting the Interests of the Parties*

Using procedural and legal manoeuvres to address interests indirectly is awkward and inefficient at best, but in mediation, the parties focus on their real interests from the outset. Focussing on the underlying interests of parties, and

³⁶ One should note that while these claims are impressive, they are also case specific, are generally estimates, and are more often personal observations rather than hardheaded empirical analysis. In fact, if one can say ADR broadly, and EDR specifically, is coming of age in the U.S., one can conclude that evaluation of such activities is still a toddler unable to keep up.

³⁷ D. Singer, "The Use of ADR Methods in Environmental Disputes" (1992) 47:1 Arb. J. 55 at 58. The Army Corps of Engineers has used mediation to resolve disputes (A. Handler Chayes et al., *Partnering, Consensus Building, and Alternative Dispute Resolution: Current Uses and Opportunities in the U.S. Army Corps of Engineers* (Cambridge, MA: Consensus Building Institute, 1995) (IRW Working Paper 96-ADR-WP-8) at 13.

³⁸ Singer, *ibid.* at 58.

³⁹ Peterson, *supra* note 8 at 342, 337n, citing W.K Reilly "A Management Review of the Superfund Program 2-27" (June 1989).

helping the parties to jointly develop relevant information from those interests, is particularly crucial in environmental disputes that involve evaluation of highly technical scientific data and the interpretation of complex laws intended to protect, restore, or maintain the integrity of the physical environment. Once litigation commences, too often the focus turns to questions of procedure and law, not technical evaluation. Litigation focussed on procedure ignores the substantive purpose of environmental regulatory laws, by concentrating on what issues are accessible. Although one might assume that a judge is the best arbitrator of legal issues, this is not necessarily the case in the environmental arena.⁴⁰ Judges cannot be expected to understand the intricacies of most environmental statutes and regulations, let alone the technical intricacies of hydrology, chemistry, risk assessment, ecology, and the numerous other scientific disciplines required in environmental problem solving.

D. *Producing Better Outcomes*

Mediation can result in wiser, fairer, and more stable outcomes. Since almost all environmental disputes involve technical information and its associated uncertainties, basing decisions on credible scientific information is essential to effective decision making. Often in the courtroom, advocacy science is employed, with each side hauling out its bevy of experts, each disagreeing with the other, until the only certainty is confusion.⁴¹ Because mediation encourages collaboration rather than competition and joint fact finding rather than advocacy science, parties can work without subterfuge to bring about wiser solutions.⁴² If there is a dearth of information, mediation offers the opportunity for parties to pool data to gain the most accurate and best possible factual basis on which to make a decision.

EDR can also help bring about fairer outcomes. Outcomes that are at least perceived as fair are less likely to leave one frustrated party to challenge the outcome publicly, legally, or legislatively and destabilize the agreement. Unlike litigation, which limits parties to those with legal rights to assert, mediation can allow the net to broaden to include all parties with a significant stake in the issue, regardless of exacting legal rights or status. Affected

⁴⁰ "Judges are often unfamiliar with 'complex and constantly changing clean-up laws'." Peterson, *supra* note 8 at 362. See also S.M. Rennie, "Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting and Enforcement" (1989) 19 ELR 10479.

⁴¹ See L. Susskind & P. Field, *Dealing with an Angry Public* (New York: Free Press, 1996) c. 5. See also W. Leiss and C. Chociolko, *Risk and Responsibility* (Montreal: McGill-Queen's University Press, 1994).

⁴² Singer, *supra* note 37 at 67. See also J.G. Smith, "Alternative Dispute Resolution and the Wetlands Manual Debate: Could Negotiated Rulemaking Have Avoided the Impasse?" (1994) 9 Ohio St. J. Disp. Resol. 415 at 416-17, and E. Netter, "Mediation in the Public Interest: Land Use Examples" (1995) 18:3 Zoning and Plan. L. Rep. 17 at 18.

communities are more likely to be included in mediation than in litigation and are thereby empowered and inclined to support a solution over time.⁴³ Where, as often is the case when a citizen or environmental non-profit group is involved, there is an unequal balance in the resources available to each side, pooling of resources again can put the parties on an equal footing.⁴⁴ Similarly, mediation can balance power by including and educating parties who may have less knowledge and understanding of an environmental issue.

Because agreements reached in EDR are more likely to be based on credible, fuller technical information, and to have achieved "buy in" from multiple parties, EDR can ultimately produce outcomes that are more stable over time. Additionally, EDR can build better long-term relationships that in turn enhance the stability of agreements and pave the way for developing future agreements as well. Avoiding an adversarial relationship is particularly important in situations where parties know they will need to work alongside one another over the long-term. This is especially true in the case of regulatory agencies like the EPA.⁴⁵

V. *Minimum Conditions for Entering Into Mediation*

The perception that mediation is the cure for all ills can be misleading and undermine its appropriate application. Elizabeth Swanson has observed that "ADR does not eliminate conflict; it is a way of addressing it."⁴⁶ Indeed, there are times and conditions under which mediation is inappropriate. The two most essential conditions that must be met before EDR can be successful are: A) a readiness to negotiate and B) understanding that negotiation is preferable to other available options. The first condition can be summed up as "issues of principle": are the parties unwilling to compromise because they feel a core value is at stake? The second condition is commonly referred to as knowledge of one's BATNA (or "Best Alternative To a Negotiated Agreement").⁴⁷ Before turning our attention to the notion of "barriers" (those obstacles that make it hard

⁴³ See Sassaman, *supra* note 26 at 234.

⁴⁴ Sassaman, *ibid.*, notes that "Mediation helps to bridge the information gap because it engenders the sharing of data."

⁴⁵ "Another constraint on EPA's authority is the need for good working relationships with state and local governments. These entities play important roles in an overall scheme of federal environmental protection using CERCLA's unilateral enforcement authority] might create harmful tension between EPA and these governments...." Peterson, *supra* note 8 at 333-34. See also Peterson at 370-71.

⁴⁶ E. Swanson, "Environmental Conflict: Is ADR Really the Solution?" (April/May 1997) 21 Law Now 15 at 17.

⁴⁷ This concept was first articulated in R. Fisher, W. Ury & B. Patton, *Getting to Yes* (New York: Penguin Books, 1981). Generally, mediation is not used when parties believe that they can get what they want, or more of what they want, through traditional legal forums.

to clearly consider EDR as a viable option, or recurrent technical difficulties that arise once negotiations begin), we will explore these two minimum conditions in more depth.

A. *Issues of Fundamental Values and Principles*

Mediation requires that the “rules of the game” be at least clear enough so that one can negotiate within the confines of such rules, and it requires that the issues be “tradable.” Environmentalists argue that not all issues are capable of being translated into different, but equally valid, interests. Where the environmental stance is framed as symbolic, it is considered inappropriate for mediation. Once framed in a symbolic context, little opportunity exists for compromise. As one environmental lawyer stated, “there are times when you just can’t negotiate, because there are some things in the world that are non-negotiable.”⁴⁸ Safety, for example, particularly when it comes to child welfare, is not generally considered a negotiable issue. In another example, establishing clear claims to land by First Nations and better definition of aboriginal title, at least in regards to fundamental rights and obligations, is best left to the courts. Value disputes, where fundamental values and rights must be defined, are generally considered not amenable to mediation.⁴⁹

Matters that hinge on personal belief and ethical principles are also poor candidates for mediation. Even in instances where the parties come to the negotiating table with a mutual desire for a “fair” outcome, there may be a grave disparity between what each side thinks this entails, because ethical aspects of environmental disputes are likely to impact what a party may deem a “fair” solution to be. The use and effectiveness of mediation in environmental disputes is thus limited by the perceptions and beliefs of the parties involved in the conflict. The definition of a “fair” outcome will no doubt correlate to each party’s self-interest in achieving what they think is right.

B. *Better Alternatives Away From the Negotiating Table*

When parties rightly ascertain that unilateral action through a more formal legal, legislative, or public forum is preferable to any outcome that they can foresee from a mediated agreement, then they will not choose to negotiate until their assessment of their BATNA, or best alternative to a negotiated settlement, has changed.⁵⁰ For example, an environmental group may believe that the law clearly supports its contentions and, therefore, may seek a judicial determination that

⁴⁸ Amy, *supra* note 26 at 15, quoting from Northern Rockies Action Group, Selected Transcripts From the NRAG Conference on Negotiations, Fall, 1980 at 21.

⁴⁹ See Susskind and Cruikshank, *supra* note 29 at 188-92.

⁵⁰ Similarly, a party might not choose mediation if what they think they want is time (delay), and they think that mediation would expedite a resolution.

requires full industry compliance. A large industrial concern may believe it has a greater likelihood of influencing legislative bodies in its favor, rather than negotiating with aggrieved stakeholders of one kind or another. If a party can do better away from a mediated negotiation, then it only makes sense it should not participate.

An accurate assessment of one's BATNA becomes very important in considering the use of mediation. Some parties are eager to mediate a settlement because their alternatives or BATNAs have traditionally been poor. This would most likely occur with environmental groups whose resources and power bases are limited.⁵¹ Some parties may mistakenly reject mediation because they fail to identify and evaluate accurately the strengths and weaknesses of their most promising alternatives.

While mediation is not always the best mechanism for resolving a dispute, it also can be rejected without adequate consideration by the parties and for the wrong reasons. A party's discomfort with divergent dispute resolution styles can be a subtle, yet powerful, obstacle to the use of mediation. Some entities may be concerned about being perceived as "weak". Other parties may be so accustomed to adversarial tactics that they are uncomfortable with a less adversarial approach.⁵² If a party holds an unrealistic belief that a judge or jury will decide in their favour, it may undermine the negotiating process. This mindset will contribute to the disputants' willingness to go to trial.⁵³

VI. *Identifying the Barriers to EDR in Canada*

In the early years of environmental dispute resolution, the primary hurdle to the use of mediation was that it was unknown. As a result, practitioners had to establish both awareness of, and experience in, the process. Now that mediation and other EDR techniques have been used with increasing frequency over more than two decades, awareness exists, but opportunities and/or trust in the process may still be lacking. This article identifies three specific barriers to the use of mediation in Canada:

⁵¹ Examples include newly created groups formed to address a one-time dispute and "neighbourhood" environmental groups with a single agenda.

⁵² "For example, environmentalists and ranchers have been disputing for decades, and both may feel more comfortable with conflict than with a cooperative style where both sides work together to find cooperative gains." Melling, *supra* note 11 at 61-62.

⁵³ In order for a negotiated settlement to be deemed a success it must by definition, according to Richard Porter, leave the parties in a better position than the expected courtroom outcome. And although, there are no guarantees in assessing the likely outcome of a case in a courtroom, it may appear more quantifiable and more certain in terms that a definite answer will result, than in comparison to EDR. R.C. Porter, "Environmental Negotiation: Its Potential and Its Economic Efficiency" (1988) 15:2 J. Env'tl. Econ. & Mgmt. 129 at 130.

- (A) Legal and Administrative Barriers: existing laws and regulations that do not account for or unintentionally inhibit EDR, rendering mediation less accessible;
- B) Implementation Barriers: arranging funding, appropriate contracting, and identifying and financing a qualified professional facilitator can be difficult and impede the further use of EDR; and
- C) Evaluation Barriers: because there are no agreed upon standards for evaluating EDR (and EDR mediators, for that matter) and few completed evaluations, potential consumers cannot be assured of past successes, and clear, measurable outcomes based upon widely recognized criteria.

A. *Legal/Administrative Barriers*

The dictates of the law or an agency's rules may preclude or hamper the efficient or effective use of mediation or other forms of EDR. Legal requirements for the process of dispute resolution may polarize interests and prevent stakeholders from jointly deciding the best outcome. Similarly, statutes of limitation for settlements may severely constrain the use of mediation. The problem is exacerbated further when an agency begins to function as 'law-giver' seemingly reducing this function of government. Finally, an agency's sense of its own responsibilities, generated out of governing law, may play a part in producing resistance to mediation.

1. Lack of Legal Structures in Canada

In 1983, Shrybman noted the "absence of administrative or legal regimes that might countenance or sanction the use of ... dispute resolution."⁵⁴ Statutory or regulatory language rarely offers explicit authority to mediate. However, in Canada today, there are several statutory terms that suggest mediation and assisted negotiation. For example, there are several administrative processes in Canada that offer administrative tribunals the chance to enter mediation on valid procedural grounds. The most obvious tools currently provided by Canadian law are the "pre-hearing," preliminary hearings, auxiliary "meetings," or inquiries. Many tribunals have the authority to conduct "scoping" meetings or "issues" conferences, which again favor mediation because of their flexibility that brings parties together and allows mediation to work.⁵⁵ Thus, most Canadian tribunals appear to have the statutory adaptability to conduct and/or

⁵⁴ Shrybman, *supra* note 15 vol. 2 at 103.

⁵⁵ See i.e. Alta. Reg 114/93 as amended, s. 11. The pre-hearing then can be turned into a forum to offer mediation and negotiation with the end result being an agreement between parties that is offered for tribunal scrutiny and/or ratification in a formal hearing. Traditionally, such preliminary administrative meetings have been used by counsel as a rigid procedural venue to decide controversial hearing parameters — such as witness lists and statements of facts.

supervise mediation. In fact, some provinces like Ontario and Alberta, provide for mediation during or before the formal appeal hearings,⁵⁶ based *sua sponte* on the Board's motion or by request of any party.⁵⁷

Notwithstanding authority to pursue mediation in Canada, the procedural framework to accomplish mediation is usually silent regarding the following questions:

1. How and when does the agency participate?
2. Do staff or Board members participate?
3. Does the agency interview participants up front? Should it provide training for the parties, the Staff, or the Board?
4. Who is the mediator/facilitator? Has a convenor conducted a preliminary inquiry to negotiate matters, including issues to be raised and identifying parties to attend?
5. What are the costs of the exercise, and who pays?

⁵⁶ Section 11 of the Alberta Environmental Appeal Board's Rules of Practice (Edmonton: Environmental Appeal Board, 1999) states:

Mediation - Prior to determining the issues on appeal and whether to proceed, the Board may schedule a mediation meeting at which all parties may make representations on this issue. The Board will set the terms of reference for the mediation in advance and will notify all parties of the terms of reference in writing.

In Ontario, Environmental Appeal Board, Pre-hearing Conference Guidelines (Dec. 1994) ask:

1) Exactly what are the issues in each person's case? 2) Why are these issues being raised? 3) Is there any chance of an agreement or compromise on a particular issue or series of issues? 4) What are the relevant facts in their case, including background facts? 5) How many witnesses does each person expect to call? (As opposed to the order of witnesses). 6) Will they be calling *expert* (as opposed to lay) witnesses, and can these witnesses provide the information in a way that helps our Board? Why does each party require *this* witness, and so on. 7) On what documents will they be relying? 8) What documents should be provided to the other participants? The normal rule is *all* documents (although the regulations only require a summary of the facts and evidence to be provided at least 7 days before the hearing). 9) Can they provide those documents before the pre-hearing? (That would be helpful). If not, when can they provide them? 10) What documents do we really need to have an informed hearing and why does each party need them? 11) Do we have any preliminary matters that parties want to raise at the hearing (for example, standing, or that the Board does not have jurisdiction to hear certain aspects of the case (like federal law), or that appeals were filed improperly)? 12) How many hours or days of hearing time do we expect to take on preliminary matters, if any, and full hearing matters? For example, how long will their witnesses take? 13) Although the normal rule is that the Board will record the proceedings for its own use, does any party still feel it is important to have a court reporter at the hearing? If so, are all parties prepared to share the cost of a court reporting service? 14) The Board may want to ask for special witnesses to make representations at the hearing (like the Chief medical officer or a similar representative of the local board of health) at pp. 3-4.

⁵⁷ Alta. Reg. 114/93, s. 11; Ontario Environmental Appeal Board Guidelines of Practice and Procedure (1992) s. 31.

6. At what stage of the proceedings does negotiation occur? For example, should negotiation occur at preliminary hearings or at adjudicatory hearings? What issues should be negotiated at each stage in the proceedings?
7. Should the availability of negotiation cease at some point?

The fact that EDR is not uniformly embodied in law may negatively impact the expansion of EDR. Lack of familiarity with EDR can discourage parties from considering mediated settlements. Without some form of legal sanction, ignorance of EDR will persist. Parties may also resist EDR on the basis that it has no legal framework in which to negotiate and enforce agreements.⁵⁸ Disputants may fear that the ad hoc nature of EDR, particularly its lack of procedural protections, will put their interests at risk because there is no established process, standards, or criteria to guide them. Also, the absence of any explicit legislation governing the practice of EDR may engender inconsistencies in its application, which discourage parties from attempting its use.⁵⁹ Even if they chose to engage in EDR, they may do so with severe hesitations. For example, the free flow of information is key to effective communication and negotiation.⁶⁰ However, when a party feels that it is initially in a weak bargaining position, it may fear that openly revealing information undermines the strength of its position. Without clear knowledge of how mediation fits into an overall system of enforcement, these parties may not be willing to take such a risk and could create a self-fulfilling prophesy in which initial distrust leads to a failure to find a viable solution.

Overcoming the barriers to mediation may require proponents of EDR to demonstrate how poorly the alternatives to mediation meet the needs of environmental disputants. Despite the fact that EDR has been criticized for

⁵⁸ Shrybman notes that both industry and government responded to the survey by identifying the lack of formal legal structure as an obstacle to producing mediated agreements, *supra* note 15 vol. 2 at 101.

⁵⁹ E. Swanson, "Alternative Dispute Resolution and Environmental Conflict: The Case For Law Reform" (1996) 34 *Alta. L. Rev.* 267 at 277.

⁶⁰ The traditional view, established by George Priest and Benjamin Klein in 1984, holds that an increase in information in mediations can reduce the likelihood of an impasse. The underlying rationale is that more informed parties will have a more realistic view of the conflict and, hence, will be more likely to recognize what a reasonable outcome for the dispute is. This relies on the belief that parties will reach roughly similar conclusions based on the same information. G. Priest & B. Klein "The Selection of Disputes for Litigation" (1984) 13:1 *J. of Legal Studies* 1. A recent study by Babcock et al. suggests the contrary. They found that "predictions of judicial decisions will be systematically biased in a self serving manner. Even when parties have the same information, they will come to different conclusions about what a fair settlement would be and base their predictions on judicial behaviour on their own views of what is fair. As a result, [they] argue, expectations of an adjudicated settlement are likely to be biased in a manner that increases the likelihood of an impasse." The conclusion of the study was that by giving two parties more information surrounding a dispute will cause their expectations to further diverge and, therefore, increase the chance of an impasse. L. Babcock, G. Loewenstein, C. F. Camerer, and S. Issacharoff, "Biased Judgements of Fairness in Bargaining," ((December 1995) 85:5 *American Economic Review* 1337 at 1337.

being ad hoc, it is precisely the unstructured nature of the process that makes it more suitable to environmental disputes than litigation.⁶¹ Strict adherence to courtroom procedures and submission to adversarial processes make it difficult for parties to consider all the factors relating to the dispute. The nature of an environmental dispute is likely to affect a great number of people, and therefore, there are likely to be a greater number of participants. But the courts are ill equipped to deal with sorting out competing claims of more than two parties.⁶² EDR takes the power over decisions affecting the environment and places it in the hands of those most affected by the decisions. By allowing parties to directly participate in the decision-making process regarding environmental disputes and the formation of policy in negotiated regulations, EDR can be seen as a natural extension of responsible government.

2. Principles of Administrative Standing and Proper Representation

The power to judge environmental cases raises an important policy consideration.⁶³ The nature of environmental disputes is that conflicts that arise from the use, abuse, or contamination of public resources affect not only the rights of the immediate parties but also the rights of the citizenry at large. Disposition of commonly held public resources arguably ought not to be subject to the court's subjective interpretation of legal technicalities.

Additional obstacles that limit the accessibility and usefulness of EDR include the ongoing challenges of adequately representing all stakeholders and setting an appropriate agenda.⁶⁴ One of the key issues in any public sector mediation is whether the public interest, or all of the appropriate interests, are represented at the mediation table. Finding all of the proper interests and bringing them to the table can be a daunting task. One difference between private and public disputes is that with a private dispute the parties are readily identifiable, but in public disputes the number of stakeholders can be so great that it is virtually impossible to engage every group in negotiations.⁶⁵

For example, in Louisville, Kentucky, there was an attempt to mediate a 20-year dispute over the location for a new bridge over the Ohio River. In the mediation, significant problems arose around the selection of stakeholders and the allocation of voting privileges. Many stakeholders believed that advocates for opposing bridge sites had stacked the membership committee. The facilitator's

⁶¹ H.I. Rounthwaite, "Alternative Dispute Resolution in Environmental Law: Uses, Limitations and Potentials," in E. Hughes, Lucas and Tilleman (eds), 2nd ed., *Environmental Law and Policy* (Toronto: Emond-Montgomery, 1998) at 513.

⁶² B.G. Rabe, "The Politics of Environmental Dispute Resolution" (1988) 16:3 *Pol. Stud. J.* 585 at 588.

⁶³ *Ibid.* at 587.

⁶⁴ L. Susskind & C. Ozawa, "Mediating Public Disputes: Obstacles and Possibilities" (1985) 41:2 *J. Soc. Issues* 145 at 147-48.

⁶⁵ *Ibid.*

first recommendation to expand the membership was approved, and six new stakeholders were added.⁶⁶

A typical complaint is not that EDR processes are too exclusive, but rather, that they are too inclusive. EDR generally operates under the principle that affected or potentially affected interests should be included in the conversation where possible. In fact, it is stated explicitly in the Society for Professional in Dispute Resolution's Code of Ethics that under represented interests must be accounted for in some way.⁶⁷ Narrow rules of standing in traditional processes are typically broadened for the sake of ensuring inclusion by all affected and potentially affected parties. This raises the concern that EDR introduces any interest, no matter how radical or peripheral, into the conversation. In turn, this has the potential of allowing a tyranny of the minority or, at least, an impasse of the many.

Both sides of the representation issue were addressed in the mid-1980s in an article by Judge Patricia M. Wald⁶⁸ and in a response by Professor Philip Harter.⁶⁹ Judge Wald raised concerns over three critical problems: (i) whether or not all of the appropriate interests are represented before the agency; (ii) what kind of participation is appropriate; and (iii) what rules should be employed to reach consensus where there are conflicting group interests.⁷⁰ Professor Harter focussed on the potential for a neutral convenor to resolve some of the challenges of representation.⁷¹ The convenor could first request the agency to identify relevant issues and the persons affected by the agreement. Those identified would then be asked a consistent set of questions. This procedure "coupled with independent research, [would] usually uncover at least the major players and issues."⁷²

B. Implementation

Even if parties can see the benefits of mediation and agree to its use, initiating and implementing a mediated negotiation can be difficult. Funds can be hard to come by, and even if available, payment from one party can be seen

⁶⁶ L. Susskind et al., *Using Assisted Negotiation to Settle Land Use Disputes: A Guidebook for Public Officials* (Cambridge, MA: Lincoln Institute of Land Policy, 1999) at 9.

⁶⁷ Society for Professionals in Dispute Resolution, SPIDR, "Ethical Standards of Professional Responsibility", adopted June 1986.

⁶⁸ P.M. Wald, "Negotiation of Environmental Disputes: A New Role for the Courts?" (1985) 10 Colum. J. Envtl. L. 1.

⁶⁹ P.J. Harter, "The Role of Courts in Regulatory Negotiation — A Response to Judge Wald" (1986) 11 Colum. J. Envtl. L. 51.

⁷⁰ Wald, *supra* note 68 at 24 (referring to G. E. Frug, "Ideology of Bureaucracy in American Law" (1984) 97 Harv. L. Rev. 1276 at 1368-73.).

⁷¹ Harter, *supra* note 69 at 55.

⁷² *Ibid.*

as leading to bias, though payment from multiple sources can be contractually and logistically complicated and inefficient. Traditional contract mechanisms, where one party hires “their” contractor or advocate, are inadequate. Selecting a mediator can also raise questions of bias.

1. Financial Concerns

Mediation, although generally much less costly than litigation, can be both time consuming and expensive.⁷³ Mediation can be thwarted by the need for funds to pay mediators, or an imbalance in financial resources can hobble those parties with fewer available funds. An early study in Canada highlighted the problem:

It is inevitable that one of the difficulties that will be encountered during the course of mediating an environmental dispute will be the disparity in resources among the parties. The scarce resources available to local and more broadly based interest groups, will deny them the legal and technical expertise necessary to develop positions let alone negotiate compromises with respect to those positions. This by now is a familiar refrain and the problem is endemic to a regulatory process that is not yet fully rationalized. Major elements of the approval process are premised upon facilitating broad and public input. The apparatus created to accomplish this task is both expensive and time-consuming. It does not, however, provide the funds necessary to allow “public interest” groups to effectively participate. [Case studies have highlighted the significance of this resource issue to the ultimate success of the mediation. In each study where agreement was reached,] the public interest group received a subsidy that enabled it to retain counsel and hire consultants.⁷⁴

Even if sufficient funding exists, who pays can be a significant issue for several reasons. First, the mediator’s neutrality may be jeopardized, at least by perception, if only one party is paying the mediator’s bills. This could, at the least, imply a “first among equals” status for the paying party. Second, even if neutrality can be divorced from who pays, ownership in the process may be as important. Those who are willing to invest in a mediated process financially are likely to take more ownership of it in regards to participation, effort, and seriousness. Yet, not all parties have the same ability to pay. As noted above, merely participating in a mediated negotiation may be too costly for some organizations, let alone paying as well for the mediator’s time. Third, while payment by multiple parties may be ideal, logistically arranging joint funding through pooled accounts, memoranda of agreement, and other mechanisms can be difficult and time consuming to set up.

⁷³ Beyond the fact that the cost alone may bar some from mediation, the risk of undertaking mediation in such cases is that the mediation may fail, and the matter must ultimately proceed to a hearing or to trial with their own associated costs.

⁷⁴ Shrybman, *supra* note 15 vol. 2 at 104-105.

2. Contractual Concerns

Even if money is available, public agencies and their stakeholders may find it difficult to contract effectively for mediation services. There may not be sufficient contract vehicles in place for retaining mediators. Mediation is often difficult to categorize within standard service and consulting categories, scopes of work are difficult to manage, given that conflict and its resolution is dynamic and unpredictable, and the kind of contractual control that an agency must maintain over a standard contractor is not appropriate to mediation. While most agencies are familiar with contractors who are contractually bound to them and only them, in the case of mediation, regardless of who formally contracts with the mediator, the mediator is nonetheless bound to all the stakeholder parties. For instance, when a mediator issues a conflict assessment document, it is important that the assessment be released to all stakeholders at the same time to ensure neutrality and equal access to information by all parties. This, however, is in direct contrast to the typical release of documents where the contractor releases a draft document to the agency for review and modification, as necessary, and then and only then releases it to others outside the contracting agency.

3. Identifying Neutrals

Even if funding and contracting issues are resolved, the parties are faced with the issue of whom to hire as a competent mediator. At this time, there are no widely agreed upon standards for determining who is a competent EDR mediator. Questions about competency of mediators inhibit the use of mediation. Critics cite a lack of professional standards to regulate mediators as a disadvantage to mediation. Neither the United States nor Canada has registration, certification, or eligibility requirements for mediators.⁷⁵

While professional associations and codes of practice do exist, there is no bar or ethics board that can help to protect the consumer. In Canada, it is difficult to find mediators that have solid training and are skilled in environmental policy issues. Because the practice of mediation is unregulated, anyone can assume the title of "environmental mediator." Consequently, this may not inspire confidence in the quality or use of available mediation. Some professional mediation organizations in the United States have sought to address this concern by adopting standards of conduct for mediators.⁷⁶

In training and educating environmental mediators, arguments are now being made that mediators should be both "ethical and effective."⁷⁷ From environmental perspectives, these standards encompass the following:

⁷⁵ See Susskind, *supra* note 19 at 4-6.

⁷⁶ See SPIDR, "Ethical Standards", *supra* note 67.

⁷⁷ B. Glavovic, E. Dukes & J. Lynott, "Training and Educating Environmental Mediators: Lessons from Experience in the United States" (1997) 14:4 *Mediation Q.* 269 at 278-84.

1. Advocacy for sustainable development;
2. Environmental literacy (familiarity with environmental science and policy);
3. Significant life experience;
4. Commitment, integrity, and trustworthiness;
5. Ability to apply different ADR styles; and
6. Superb planning and organizational capacity.⁷⁸

While there are very good mediation courses offered by excellent teachers in Canada, there is doubt that any institution can “teach” the value-based principles found in the six points above. The procedural and professional issues facing environmental mediators are complex and real.⁷⁹ Thus, adoption of rigorous training and board or court sponsored certification, with the final selection allocated to board members or judges, could help stakeholders identify qualified neutrals. In the U.S., nearly thirty states have offices of dispute resolution, and most of them maintain a list of qualified neutrals.⁸⁰ It should be noted, however, that rosters rarely require rigorous admission and often avoid such admission standards to avoid charges of the government establishing unfair hurdles to business.

C. Evaluation

At present there exists no accepted conceptual framework for evaluating EDR. Caton Campbell and Floyd note that there has been very little analysis of the broader substantive issues underlying the use of EDR.⁸¹ “Moreover, very little effort has been made to place existing findings in the context of a politically-oriented theoretical framework that would facilitate long-term analysis as the number of cases grows.”⁸²

⁷⁸ *Ibid.*

⁷⁹ As stated by the Shrybman Report, *supra* note 15, vol. 2 at 106:

The absence of any well-defined decision-making hierarchy within some of the constituencies represented at the table;

The lack of bargaining experience on behalf of the representatives;

The innovative nature of the mediation process;

The often widening gap between the comprehension of those at the table and those they represent;

The pressure cooker and time constrained atmosphere within which negotiations often take place, and;

The absence of any coordinating mechanism within and among various government departments.

⁸⁰ Susskind et al, *supra* note 66 at 11.

⁸¹ See M.C. Campbell and D. W. Floyd. “Thinking Critically About Environmental Mediation” (1996) 10:3 J. Planning Lit. 235 at 236.

⁸² Rabe, *supra* note 62 at 590.

According to Rabe, there is a danger that much of the existing literature is suspect, as it is the work of researchers who are openly advocating the use of EDR.⁸³ As well, he notes that it may not be appropriate to draw analogies from research done in other areas, such as special education or labour. Unlike other areas that have specific conflicts between individuals, environmental disputes tend to involve very broad conflicts between groups. Rabe cites a study that found that “environmental policy was deemed an area in which the potential benefits to society were very high but the chances of success were very low.”⁸⁴ Further research is required to justify the use of EDR as an alternative to litigation and to substantiate its proponents’ claims of effectiveness. At present, the lack of credible information available to those considering EDR may encourage them to stick to the time-tested route of litigation.

VII. *Overcoming the Barriers to EDR*

A. *Overcoming Legal/Administrative Barriers*

1. Lack of Legal Structures

As with any other innovative process, it is difficult for EDR to gain recognition, given standard ways of doing business. Typically, innovation occurs within (or despite) existing legal and administrative frameworks until enough success and interest can be shown to justify changing existing rules, regulations, guidelines, and procedures. At this time, the use of EDR is on the cusp between invention and accepted practice. Nonetheless, EDR in Canada and the U.S. has already, in some cases, been sanctioned, or even mandated, by law.

The *Canadian Environmental Assessment Act*⁸⁵ of 1992 is the first federal Act to introduce mediation explicitly. The Act provides three options for public participation, including mediation. In addition, some provinces have explicitly authorized mediation, at least in the case of administrative tribunals. In Manitoba, the Minister has explicit authority to appoint a mediator.⁸⁶ In Nova Scotia, the Minister has similar discretion.⁸⁷ As mentioned above, there are several administrative processes in Canada that offer an opportunity to enter mediation on valid procedural grounds, including “pre-hearing” processes, preliminary hearings, auxiliary “meetings,” and inquiries.⁸⁸

⁸³ *Ibid.* at 595.

⁸⁴ *Ibid.* at 591.

⁸⁵ S.C. 1992, c. 37.

⁸⁶ *The Environment Act*, S.M. 1987-88, c.26, s. 3(3).

⁸⁷ *Environment Act*, S.N.S. 1994-95, c. 1, s. 14.

⁸⁸ Alta. Reg. 114/93, s. 11; Ontario Environmental Appeal Board Guidelines of Practice and Procedure, s. 31 (f).

In the United States, alternative dispute resolution has been prescribed by law in many cases. In 1982, the Administrative Conference of the United States (ACUS) developed formal recommendations for the use of dispute resolution techniques.⁸⁹ Congress enacted the *Administrative Dispute Resolution Act*⁹⁰ in 1990 that required public agencies to adopt policies that addressed the use of alternative means of dispute resolution in such matters as formal and informal adjudication, rulemaking, enforcement actions, issuing and revoking licenses and permits, contract administration, and other agency actions. Also in 1990, Congress enacted the *Negotiated Rulemaking Act*⁹¹ to establish a framework for the conduct of negotiated rulemakings. In 1998, Congress enacted the *Alternative Dispute Resolution Act of 1998*⁹² to authorize and encourage the use of ADR in U.S. district courts.

While broad legislative approval of EDR may not be as likely in the near future for Canada as a whole, agencies in the U.S. and Canada have found a number of ways to overcome a lack of explicit legislative guidance. Professional organizations, government agencies, the courts, and executive branches have all employed various means to provide clear guidance for how ADR generally, and EDR specifically, should be employed.

In 1997, the Society for Professionals in Dispute Resolution's (SPIDR) Environment/ Public Disputes Sector developed a set of best practices for U.S. and Canadian government agencies.⁹³ Some agencies have used strategic plans to develop guidance for and to implement EDR. For example, in 1997, the United States Bureau of Land Management approved a strategic plan for using alternative dispute resolution. This strategic plan established a steering committee, called for designated employees to encourage its use within the agency's offices, trained these designees, and integrated EDR into the national training curriculum. In Canada, to help address the lack of clear guidance, the Alberta EAB sponsored the drafting of a paper on the best practices of mediation in administrative tribunals.⁹⁴ This paper also includes model legislative language to guide those who wish to institutionalize the use of mediation in guidelines, regulations, or even statutes. The Alberta EAB, the Ontario Environmental Assessment and Appeal Board, and the Ontario Energy Board have all developed

⁸⁹ The Administrative Conference of the U.S., Recommendation No. 82-4, *Procedures for Negotiating Proposed Regulations*, later codified as 1 C.F.R. ss. 305.82-4 (1993).

⁹⁰ *Administrative Dispute Resolution Act*, Pub. L. No. 101-552, 104 Stat. 2736.

⁹¹ *Negotiated Rulemaking Act*, Pub. L. No. 101-648, 104 Stat. 4969.

⁹² *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315.

⁹³ Society of Professionals in Dispute Resolution, *Best Practices for Government Agencies, Guidelines for Using Collaborative Agreement-Seeking Processes*, Report and Recommendations of the SPIDR Environment/Public Disputes Sector Critical Issues Committee. Adopted by the SPIDR Board January 1997. Copies are available by phoning SPIDR's Washington, D.C. offices at 202-783-7277.

⁹⁴ M. Taylor et al., "Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices" (1999) 22 Dal. L.J. 51.

explicit rules of practice for mediation as part of pre-hearing settlement conferences.⁹⁵

Various federal and state governments have issued Executive Orders prescribing the broad use of ADR. The Commonwealth of Massachusetts' Governor, for instance, issued Executive Order No. 416, to "... order that state agencies work diligently to fully , wherever , alternative dispute resolution to resolve disputes. . . ."⁹⁶ In the case of the courts, states like Massachusetts have, or are developing, uniform rules of dispute resolution.⁹⁷ On the federal U.S. level, the National Conference of Commissioners on Uniform State Law, with the American Bar Association Dispute Resolution Sector, are drafting a Uniform Mediation Act.

As long as statutory language does not specifically prohibit EDR, agencies in the U.S. and Canada have found ways to utilize and institutionalize EDR without explicit legislative consent. Perhaps the claim that EDR saves time and money has made it easier for legislatures to allow these innovative practices to continue without explicit legislative approval. In addition, it is not difficult for politicians to support programs that promise "good process" and inclusion of all stakeholders rather than partisan and specific outcomes.

Experience in the U.S. suggests that when EDR has been specifically prescribed, it has not always led to more use of EDR. States like Montana and Texas have found that their negotiated rulemaking acts have prescribed a process with such formality that disputants prefer to use EDR informally through conferences, consultations, and advisory committees as part of the standard rulemaking process.⁹⁸ While broad legislative support has been crucial in some U.S. states to support offices of dispute resolution, and on the federal level to broadly encourage the use of ADR, more detailed, specific legislation may actually hinder rather than encourage the use of EDR. After all, the promise of EDR rests in its alternative, tailored, relationship-based, and case-specific use, rather than as a formalized, bureaucratic, mechanistic, and institution-based process.

2. Principles of Administrative Standing and Proper Representation

Questions of appropriate standing are not necessarily as clear in EDR as they may be in the judicial system. Traditionally, the courts determine who has legitimate standing and who does not by clear judicial criteria. In administrative hearings where there is a board, commission, or tribunal with vested authority,

⁹⁵ *Ibid.* at 100-102.

⁹⁶ Commonwealth of Massachusetts Executive Order No. 416, 16 November 1999.

⁹⁷ Massachusetts Supreme Judicial Court Uniform Rules on Dispute Resolution, Chapters 1 and 3, rules 1:18, 3:09 and 3:12, adopted on 1 May 1998.

⁹⁸ M. McKinney, "Negotiated Rulemaking: Involving Citizens in Public Decisions" (1999) 60 Mont. L. Rev. 499 at 509-11.

it too can determine who can participate (though often administrative processes are more open and inclusive of interested parties than the courts). Conversely, in EDR, where there is an effort to share authority and decision-making and to broaden control of the process, it is not clear who decides who has standing in the dispute.

Fortunately, over the years EDR practitioners have developed a set of guidelines and tools to address questions of standing and representation. Numerous practitioners have developed such tools as conflict assessments, convening reports, and graphic road maps to identify the key stake-holding groups and their representatives in the EDR process.⁹⁹ In a convening process, for instance, a facilitator might conduct interviews with a number of individuals who have expressed an interest in the issue, are representatives of local, regional, or provincial/state governments, and/or are technical experts in the issues. The facilitator can then use this data to help government agencies identify stakeholder groups and suggest ways that stakeholders can select representatives for the negotiating process. In addition to professional best practices, laws such as the U.S. Federal Advisory Committee Act¹⁰⁰ (the "FACA") and guidelines developed by various agencies to abide by the FACA, lay out specific criteria for membership in EDR processes, and they must abide by the law.¹⁰¹

Nonetheless, EDR, like any administrative and democratic process, still presents a difficult set of questions about how to truly represent the public. A recent (non-environmental) regulatory negotiation in the U.S. highlights the challenge. The tenant-based Section 8 rental housing assistance program, established in 1974, assists roughly 1.4 million low-income households who need financial assistance to rent homes and apartments from private landlords. The U.S. Department of Housing and Urban Development (HUD) distributes funds for Section 8 vouchers to over 2,700 public housing agencies (PHAs) across the country. For a host of reasons, HUD decided to revise its rules for allocation of these funds. Convened in 1999, the facilitators of this regulatory negotiation on fund allocation were asked to recommend a membership for a negotiating committee. By using the information obtained through 42 interviews, the facilitators determined that the following organizations might represent stakeholders in the regulatory negotiation:

- HUD representatives in the Office of Public and Indian Housing;
- National associations representing the interests of PHAs and private rental property owners;
- Individual PHAs (selected to represent diversity of size and region);
- Anti-poverty advocacy and affordable housing organizations directly

⁹⁹ See L. Susskind, S. McKernan and J. Thomas-Larmer, eds., *The Consensus Building Handbook* (Thousand Oaks, CA: Sage Publications, 1999) c. 2, 3, 4 and 6.

¹⁰⁰ 5 U.S.C. Appendix 2 ss. 1-15 (1972) (as amended 1976, 1980 and 1982).

¹⁰¹ *Ibid.*

and indirectly representing the interests of Section 8 voucher and certificate holders; and

- Independent public accountants (IPAs) who assist PHAs in meeting HUD budget and accounting requirements.¹⁰²

Ultimately, 30 members were appointed to the negotiating committee, as well as five alternates and ten observers. But can a representative sample of Public Housing Authorities truly represent all 2,400 public housing authorities? What about a few tenants' organizations seeking to represent all tenants' organizations across the U.S? And what of the tenants who are not organized enough to even have a tenants' organization? And what about the children in low income housing, with perhaps the greatest stake in safe, affordable, and clean housing? Who represents them?

Clearly, EDR does not have the full, complete, and practical implementable answers to these questions. Yet, neither do other administrative processes fully answer these questions of representation. EDR, by its tailored, case-by-case process design, seeks to raise these questions in each particular circumstance. In this sense, EDR practitioners are more likely to seek out and secure representation for affected stakeholders than those who are bound by more limited and constrained traditional processes. Chris Carlson notes: "The legitimacy of consensus building processes, which are often used as adjuncts to more traditional democratic forums, depends on whether they are viewed by stakeholders and the public at large as being representative of all interests and points of view. A bedrock principle of consensus-based processes, therefore, is that everyone with a stake in the decision should be represented at the table."¹⁰³ EDR, while not perfect, presents an opportunity to secure a more democratic and inclusive process than conventional means of administrative decision-making.

B. *Overcoming Financial Barriers*

1. Financial and Contractual Concerns: How to pay for EDR

When an agency decides it is appropriate and it is within their statutory and regulatory mandate to use EDR, another set of secondary questions arise, regarding funding and contracting. How will the program be funded? Who pays for the service, given the importance of neutrality for the facilitator, mediator, or arbitrator?

¹⁰² Consensus Building Institute, *Final Draft Convening Report for HUD's Negotiated Rulemaking on the Allocation of Tenant-Based Section 8 Funds*, (Prepared for the U.S. Department of Housing and Urban Development and Other Stakeholders) (Cambridge, MA: Consensus Building Institute, 1999).

¹⁰³ C. Carlson, "Convening" in *Consensus Building Handbook*, *supra* note 99, 169 at 185

Unlike litigation, where each party typically allocates a portion of their annual budgets to legal services, either on retainer or for on-going legal review, litigation, or settlement work, few parties regularly budget for mediators. Thus, when a conflict arises, agencies have the budgetary means to turn to attorneys but not to mediators. Furthermore, when parties decide to mediate, they often prefer that all persons privy to the dispute contribute to the cost of a mediator. But how do you pool money efficiently from different agencies, organizations, and businesses outside of government?

In the U.S., federal agencies have handled the problem of funding in a variety of ways. The U.S. EPA has developed a five-year contract for dispute resolution services.¹⁰⁴ While this contract mechanism provides a means to retain mediators, it does not directly pay for them. Each office within the EPA, if it chooses to employ EDR, must pay for the mediation out of its existing budget. This means that managers must make allocation decisions about paying for mediation versus paying for more technical assistance, more community involvement, or more of other activities. Thus, the EPA, as a whole, provides its staff and stakeholders the means to employ EDR. However, those directly involved in a particular dispute must be willing to pay for EDR. Another federal agency, the U.S. Air Force, has supported facilitation and mediation on a project level through community involvement budgets, rather than through legal budgets. The General Contracting Office (GSA) has developed streamlined contracting mechanisms to allow federal agencies' access to professional neutrals through training and organizational improvement budgets.¹⁰⁵ In recent years, the newly formed Institute for Environmental Conflict Resolution (IECR) in Tucson, Arizona, has provided funding assistance for conflict assessments, training, and the pilot use of EDR in new contexts. Prior to the formation of IECR, the now-defunct Administrative Conference of the United States (ACUS) provided administrative support, including research, training, and formal recommendations, to federal agencies interested in ADR and EDR.

At a state level, offices of dispute resolution were set up by state legislatures and through seed funding from the National Institute of Dispute Resolution (NIDR). These offices, through annual appropriations, fund staff members who are able to mediate and facilitate disputes at no direct cost to the particular agency and its constituents. Other state offices do charge their sister agencies a fee for their services, which is reimbursed to the state's overall budget. This, in turn, allows the state office to show its legislators that the work is at least partially self-supporting.

In the case of Canadian tribunals, the Alberta EAB, for example, offers mediation through its Board members with assistance from its staff. Thus, the cost of EDR is borne by the tribunal through its administrative budget. Given

¹⁰⁴EPA Prime Contract 68-W-99-010.

¹⁰⁵General Services Administration Contract GS-23F-9760H, Management, Organizational, and Business Improvement Services (MOBIS) of the GSA Federal Supply Schedule (FSS).

that the use of mediation significantly reduces the number of formal hearings, this spending is both appropriate and efficient.

Clearly, there are a number of ways to fund EDR, if an agency has a strong interest in pursuing it. However, funding EDR can take time to implement because innovative funding mechanisms do have to be found, at least at first, and funding EDR requires that agencies must make budgetary trade-offs between EDR and other activities.

2. Neutrality Concerns: Who Pays for EDR?

Aside from the question of identifying funding sources, is the concern about neutrality in funding. Stakeholders who want to take part may feel that the payment by one agency “taints” the process. Whether real or perceived, this question of who pays is troubling. Ideally, all parties would contribute something to the cost of a neutral in order to take ownership and control of the service. However, many parties do not have the means to fund such efforts, and the logistics involved in pooling money can be complicated and cumbersome. Consequently, in the U.S., consensus-building processes are often initiated and paid for predominantly by government agencies. A 1999 study of the use of assisted negotiation in 100 different land use disputes in the United States found that 78 percent of the EDR efforts were initiated by government officials on the federal, state, county, or local level.¹⁰⁶ As noted above, government agencies have found a myriad of ways to fund and contract assistance with EDR. However, such agencies have not been so successful at developing mechanisms for joint funding, such as pooled accounts, explicit revolving funds for mediation, and other “neutral” funding mechanisms, that could provide stakeholders additional assurances of objectivity and neutrality when independent, outside neutrals are hired to assist with EDR.

It should be noted that the U.S. and Canadian Society for Professionals in Dispute Resolution’s (SPIDR) Ethical Standards of Professional Responsibility does require that the Aneutral must maintain impartiality toward all parties’ regardless of who is paying.¹⁰⁷ Furthermore, stakeholders can design and implement oversight mechanisms that reduce the possibility that the paying party B most likely a government agency B can manipulate the EDR process. Some negotiating processes have appointed financial or contractor oversight committees to avoid the appearance or reality of one party or another unduly influencing the EDR process. For example, in a facilitated negotiation over air quality and public health in the State of Maine, the U.S. EPA provided the funds, but the facilitator’s monthly invoices were reviewed and approved by a financial subcommittee. The subcommittee was comprised of representatives of stakeholders from the four affected towns, the paper mill, the labor union, and

¹⁰⁶Susskind., *supra* note 66 at 20.

¹⁰⁷SPIDR, “Ethical Standards”, *supra* note 67.

the public agencies. The Natural Resource Trustee Council, established to identify and assess damages due to contamination to natural resources at the Massachusetts Military Reservation, has established a Contractor Oversight Committee. This Committee ensures that contractors are responsible to the five Trustees, rather than to the sole Trustee who contracts with and pays the contractors.

3. Quality of Service Concerns: How to Select a Qualified Neutral

Even if an agency and its stakeholders have the appropriate legal structures and guidance, the funding, the contracting mechanisms, and an agreement on who pays for a professional neutral, the participants in a proposed EDR effort are still faced with the challenge of who will credibly, competently, and neutrally assist them.

In a traditional legal context, there are clearly defined and rigorous academic requirements for attorneys, specialized professional schools in fierce competition for rankings, professional entrance tests to enter the bar, and established professional organizations that oversee ethics and standards. In contrast, the professional practitioners of EDR come from diverse academic and professional backgrounds, have no standard entrance exams into the profession, and though a professional society exists, it is relatively young and has little authority to intervene in individuals' practices. To make matters more complex, the field has not clearly defined when outside, independent, and more costly neutrals are necessary and when government can supply the same service in-house for less money and with less administrative complexity.

Once again, agencies have found a myriad of ways to help themselves and their stakeholders identify, review, and select EDR professionals who can ably assist them.

For those agencies where in-house mediation is allowed, or even encouraged, the selection process for mediators is relatively simple. For instance, the Alberta EAB encourages its Board members to mediate settlement disputes prior to formal hearings.¹⁰⁸ Because Board members have already gone through a political process of appointment, they have been screened and reviewed. While this approach eases the identification of mediators, it does not answer the question of qualifications and skill. Because Board members at the EAB and most tribunals are typically selected because of their political importance, technical or legal competence, or extensive work experience in a field, they are not necessarily skilled or prepared to mediate. The Alberta EAB has addressed

¹⁰⁸The neutrality of the mediator is assured by prohibiting the Board member who mediates the case from sitting on the panel who hears the case in a formal proceeding should the parties fail to reach agreement during settlement discussions. The Board also limits conversations between the Board member as mediator and the other Board members. (Ontario EAB Rules of Practice, *supra* note 57).

this challenge by providing introductory and annual training in mediation, developing clear Rules of Practice, establishing an evaluation of the mediation program, carefully monitoring the Board members, success at mediation, and assigning Board members who have shown an ability to serve capably in the neutral role. In addition, the Board has trained its staff in mediation and encouraged them to assist with case intake and the mediations themselves. This ensures the Board provides a consistent, informed, and educated presence when various Board members mediate cases.

Other agencies, which do not necessarily mediate disputes, have set up in-house offices of dispute resolution. These in-house offices serve a number of functions. They institutionalize an advocate of EDR who can encourage the use of EDR by the agency. At the same time, they provide the agency's staff who may be unfamiliar with the field assistance in identifying when EDR is appropriate and who can best assist the agency and its stakeholders. These in-house offices serve as conduits for, and screening mechanisms of, professional neutral services. Such U.S. federal agencies such as the EPA, the BLM, the Federal Energy Regulatory Commission, and others have set up in-house EDR offices.

Federal and state agencies in the U.S. have also developed rosters to help stakeholders, including themselves, identify and select neutrals. These rosters vary widely in the rigour of their requirements. Hawaii's Center for Alternative Dispute Resolution, for instance, requires that applicants to the roster fill out a comprehensive application describing their experience and education. Promising candidates are then interviewed and selected by a committee. Massachusetts' Office of Dispute Resolution (MODR) set up a rigorous process for ensuring that neutrals are capable of assisting in various kinds of Superior Court settlements. First, MODR established a performance evaluation around six skill-based criteria. Then, these criteria were applied to written scenarios, and then the applicants were observed during short mediation simulations. Candidates who passed this first test were then trained in a specialized training course, and those who succeeded in "graduating" were paired with experienced colleagues to assist them in the first actual mediations. For those undertaking EDR, the applicants had to pass through the Superior Court training, gain experience in those kinds of cases, and then undergo another intensive training and evaluation to qualify as eligible EDR neutrals.¹⁰⁹ Other states, in contrast, allow all interested neutrals to enter their names into a roster as long as they meet minimum requirements. In turn, the agency seeks to educate consumers of the service about the kinds of questions that will help consumers identify the most appropriate neutral for their needs.

More recently, at the national level in the U.S., the Institute for Environmental Conflict Resolution, established by an Act of Congress, developed an extensive list of minimum qualifications for its roster. Then, the Institute established an

¹⁰⁹L. Susskind & S. McKearnan, "The Evolution of Public Policy Dispute Resolution" (1999) 16:2 J. Arch. Plan. Res. 96-115.

intensive, web-based application process for all interested professionals. Because the criteria are extensive, and because careful screening of the applications occurs, consumers can be assured that the roster of potential mediators has been thoroughly reviewed.

In establishing EDR contracts, other agencies have established de facto rosters through contract bidding. For instance, the U.S. EPA has a national EDR contract that is bid on every five years. EPA in-house staff, with years of experience in the field, review the bids and the list of subcontractors under each general contractor, and award the contract based not only on the general contractors ability to manage complicated contracts, but also the general contractor's ability to bring on and make available highly qualified subcontractors.

Other agencies and organizations have chosen to avoid endorsing particular mediators and instead offer consumer education so that agencies and stakeholders themselves can be better informed of EDR professional services. The State of Montana, for example, developed a Consumer Guide to Selecting a Facilitator or Mediator.¹¹⁰ Minnesota's State Office of Dispute Resolution used a consensus-building process to prepare a short "user friendly" guide to mediation services.¹¹¹

C. Overcoming Evaluation Barriers

Until recently, proponents' claims about EDR far exceeded their ability to back them up. There are many reasons for this. First, EDR is new, and therefore clear and widely-agreed upon criteria for evaluation have not been available. Second, EDR is by its nature tailored and case-specific. Usually each EDR process, within the broad guidelines set by statute and regulation, is designed to meet the needs of the particular circumstances. This specialization makes it difficult to develop systematic evaluations across multiple "similar" cases. Third, there is the challenge of how to compare EDR to the alternatives. Since one cannot rerun reality to see how an outcome might have changed if it had been settled through traditional processes instead of EDR, it is difficult to find acceptable and appropriate comparisons for the purposes of evaluation. Last, EDR emphasizes relationship building, fairness, process, and dialogue as key outcomes, yet these results are by their nature difficult to evaluate.

Despite these challenges, evaluation of EDR is improving. In recent years, a few systematic studies of EDR in the U.S. have been undertaken and published. One study reviewed approximately 150 enforcement actions filed between 1 July 1988 and 30 June 1990 with the Florida Department of Environmental Protection (DEP).¹¹² This study found that 84.6 percent of the mediated cases were settled, compared to 70.6 percent of the cases handled

¹¹⁰Montana Consensus Council, *A Consumer Guide to Selecting a Facilitator or Mediator* (Helena, Montana: Montana Consensus Council, 1996).

¹¹¹Susskind, *supra* note 66.

¹¹²Sipe, *supra* note 18 at 276.

through standard administrative procedures. The regression analysis used by the researcher also found a statistically significant correlation between the use of mediation and settlement rates. However, in this study, the researcher found no significant difference between implementation of mediated settlements and implementation of conventionally settled cases. In another study published by the Lincoln Institute for Land Use Policy, researchers interviewed over 400 parties involved in 100 land use consensus-building cases utilizing a neutral facilitator or mediator.¹¹³ The researchers found that 86 percent of the interviewees had a positive view of assisted negotiation. They also found that 75 percent of the respondents believed that the agreement reached was implemented well. Sixty-nine percent thought that the agreement was more stable than what could have been achieved without neutral assistance, and 88 percent believed that the agreement was creative in producing the best possible outcome for the parties involved. Finally, in a preliminary study of U.S. EPA sponsored negotiated rulemakings, the researchers found that 78 percent of the participants in this process felt the benefits of such processes exceeded the costs.¹¹⁴

One of the more interesting recent exchanges regarding the evaluation of ADR in public policy disputes, including many environmental cases, is one between Philip Harter and Cary Coglianese. Coglianese sought to identify and utilize a comprehensive database of all negotiated rulemakings across all federal agencies in the U.S., using the Federal Register. Coglianese concluded that: 1) negotiated rulemakings were used very infrequently as compared to conventional rulemaking processes (less than 0.07 percent of final federal rules between 1983 and 1986 were developed through regulated-negotiation); 2) negotiated rulemakings did not save an appreciable amount of time as compared to conventional methods; and 3) negotiated rulemaking did not result in less subsequent litigation compared to standard processes.¹¹⁵ Harter responded, challenging Coglianese's methodology, stating that he failed to understand the particular context of the uses of regulated negotiation, and he miscounted the length of time it took because he failed to place the negotiated rulemaking cases in the larger rulemaking process in which they occurred. Whatever the case (and we tend to side with Harter), the good news is that EDR and ADR in the public policy setting have reached a point where serious evaluation and debate about its claims can occur.

Agencies who use EDR are also developing evaluation instruments and databases for each case they participate in or support. The Montana Consensus Council has developed a 24-criteria checklist for participants who participate in EDR processes. (Cite?) The Alberta EAB is developing a set of standard surveys

¹¹³Susskind et al., *supra* note 66 at 19-23.

¹¹⁴C. Kerwin & L. Langbein, "An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency Phase I", 1995, prepared for the Administrative Conference of the United States (Washington, D.C.).

¹¹⁵Coglianese, *supra* note 18 at 1273-1309.

and a database for participants in their mediated settlement conferences. The U.S. Institute for Environmental Conflict Resolution is supporting the development of methodologies for evaluating EDR. While the field of EDR evaluation certainly has a long way to go to develop credible and widely-supported evaluation criteria, as well as to acquire and analyze a wealth of data across hundreds, if not thousands of cases, it is on its way.

VIII. *Conclusion*

Unlike the Presidential system in the United States, Canada operates in a Parliamentary system, a system with wide latitudes in procedural frameworks. In the public welfare arena of administrative decision-making, legislators have often been criticized for establishing tribunals without final decision-making authorities. However, this has left tremendous negotiation advantages for administrative tribunals that operate in this system.

The argument could be made that the Canadian regulatory system may be a natural place for EDR to develop. In fact, it has been suggested that the establishment of the "quasi-judicial" system of administration in Canada is clearly a form of EDR. Snider and Yates cite the underlying reasons for the formation of regulatory agencies in the twentieth century:

- reducing the workload of increasingly overburdened legislators;
- developing cumulative technical expertise through specialization; and
- de-politicizing the regulatory process, permitting delegation of politically unpopular decisions.¹¹⁶

The transfer of regulatory responsibility to administrative agencies effectively achieves the above stated goals while maintaining a public forum for governing. Often the administrative hearing is subject to the rules of a court of record and is accessible to the public.¹¹⁷

Common law scholars like Professor Wade have argued that "recommending" tribunals fully examine the facts before passing any conclusions on to the Minister.¹¹⁸ Within this fact-finding process is an opportunity to create rules, interview parties, explore value differences (often impossible in an

¹¹⁶J.A. Snider & C.K. Yates, "Alternative Dispute Resolution: Use and Abuse of Information and Specialized Knowledge" (1995) 33 *Alta. L. Rev.* 301 at 309.

¹¹⁷"The public hearing does serve a useful purpose since it provides a forum for the stakeholders to identify themselves and to state their positions." (A. Levinson, "Environmental Dispute Resolution and Policy Making" (1988) 16:3 *Pol. Stud. J.* 575 at 581.

¹¹⁸H.R.W. Wade, *Administrative Law* 2nd ed. (Oxford. O.U.P. 1990), 259.

adversarial two-party hearing), and allow an aggrieved public to vent, all of which are critical elements in solving public interest disputes.

The professionalization of mediation can be viewed as a form of consumer protection.¹¹⁹ Introducing standards for those acting as mediators will build confidence for those considering EDR to deal with an environmental dispute. Certification was considered by the American Society of Professionals in Dispute Resolution in the 1980s. They suggested that the granting of certificates be on performance-based criteria rather than on the passing of training courses or university degrees.¹²⁰ This may be one way of including skilled community peer mediators without compromising protection of the consumer. One of the benefits of properly trained mediators is that a knowledgeable mediator will be able to determine whether a dispute has a good chance of being resolved through EDR. The ability to properly identify a case that is ripe for mediation will save the parties additional grief if the case is unsuitable for the process.

The potential solutions to problems arising from EDR are limited only by the participants' imaginations. Overcoming some of the logistical barriers associated with the use of EDR will require innovation and flexibility by the parties. A possible solution to the imbalance of resources is the use of either a joint fact-finding task force or a jointly appointed technical committee.¹²¹ Suggested solutions to the difficulty involved in monitoring and enforcing a mediated agreement include posting a bond until the terms are met or assigning responsibility of enforcement to one party, a government agency, or the mediator.¹²² The bottom line is that EDR has been proven to be not only effective, but also significantly cheaper than litigation.¹²³ This leads to the conclusion that money would be well-spent if it were invested in developing EDR as an institution.

¹¹⁹C. Morris & A. Pirie, eds. *Qualifications for Dispute Resolution: Perspectives on the Debate* (Victoria: UVIC Institute for Dispute Resolution, 1994).

¹²⁰*Ibid.* at 13.

¹²¹Susskind, *supra* note 64 at 149.

¹²²*Ibid.* at 150.

¹²³Goss, *supra* note 21 at 8.