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Mediation in Environmental Assessments in Canada: Unfulfilled Promise?

The federal environmental assessment (EA) process and most provincial EA processes in Canada either specifically provide for mediation as an option or implicitly allow for it. In spite of this, the actual use of mediation and other forms of alternative dispute resolution (ADR) has been almost non-existent in Canadian EA. There is an emerging view, however, that mediation could be applied usefully at points of the process when there is conflict among the parties. Such adjustments in process would signal the need for approval agencies and proponents to give serious consideration to more collaborative techniques of participation. The objective of this article is to consider how mediation has been used to date, and whether it has a role to play in improving the effectiveness, efficiency and fairness of EA processes in Canada. This is accomplished through consideration of the use of mediation in recent years and the results of interviews with twenty EA practitioners. Findings show that mediation has been mainly used in the EA context in the province of Quebec. However, most respondents felt that there is potential for the use of mediation to strengthen EA. Based on our findings we conclude by outlining three potential ways mediation could be used in EA: as a tool within a traditional EA process to mediate contentious issues; as a process replacement for a procedural requirement; and as a way to find an interim solution to a policy gap identified in a project EA.

Le processus fédéral d'évaluation environnementale (EE) et la plupart des processus provinciaux d'EE au Canada renferment des dispositions prévoyant la médiation ou l'autorisant implicitement. Malgré cela, le recours à la médiation et à d'autres modes de règlement extrajudiciaire des conflits (REJC) a jusqu'à maintenant été quasi inexistant en matière d'EE au Canada. Une opinion est cependant en train d'émerger, voulant que la médiation puisse être utilisée avec succès à diverses étapes du processus, lorsque survient un différend entre les parties. De tels ajustements en cours de route signifieraient aux autorités d'approbation et aux promoteurs qu'ils doivent envisager sérieusement d'adopter des techniques de participation plus axées sur la coopération. L'objectif de l'article est de voir comment la médiation a été utilisé jusqu'à maintenant et de tenter de déterminer si elle a un rôle à jouer pour améliorer l'efficacité, l'efficience et l'équité du processus d'EE au Canada. Pour y arriver, l'auteur examine le recours à la médiation au cours des dernières années et les résultats d'entrevues avec vingt praticiens de l'EE. Il arrive à la conclusion que dans un contexte d'EE, la médiation a surtout été utilisée au Québec. Par contre, la plupart des répondants croient que le recours à la médiation pourrait renforcer le processus d'EE. S'appuyant sur ce qu'il a appris, l'auteur conclut en décrivant trois façons dont la médiation pourrait être utilisée en EE : comme outil à l'intérieur d'un processus traditionnel d'EE pour résoudre des questions litigieuses, comme solution de rechange à une exigence procédurale ou comme moyen pour trouver une solution intérimaire pour combler une lacune dans une politique relevée dans le cadre de l'EE d'un projet.

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Introduction

Mediation is one of a range of alternative dispute resolution mechanisms that also include arbitration and negotiation.[1] What sets mediation apart from negotiation is that it is facilitated, whereas negotiation takes place among affected parties on their own. What distinguishes mediation from arbitration is that the mediator is not a decision maker, whereas the arbitrator does make the final decision after hearing from the parties. Mediation is a middle ground in the alternative dispute resolution field, an option that involves the parties giving up control over the process to the mediator, but retaining control over the final outcome. The mediator is the guardian of the consensus-building process, and will often be responsible for putting into words the agreement reached by the parties.[2] Key elements of mediation are generally recognized to include the following:

- The process tends to be confidential
- The process tends to be consensual
- The mediator is impartial and has no stake in the outcome
- The mediator is an advocate for solutions to problems identified by the parties
- The parties generally drive the mediation process
- The parties generally have decision-making authority
- The process can range from being purely facilitative to having evaluative components[3]

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1. See generally Julie MacFarlane, *et. al.*, *Dispute Resolution: Readings and Case Studies*, 2d ed. (Toronto: Emond Montgomery, 2003). See also Janice Goss, "An Introduction to Alternative Dispute Resolution" (1995) 34 Alta. L. Rev. 1; and Harry T. Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" (1986) 99 Harv. L. Rev. 668.
2. MacFarlane, *ibid.* at 281.
3. *Ibid.* at 285–286, 290.

These seven elements are generally accepted where mediation is used as an alternative to formal legal proceedings.[4] Mediation is now a common alternative dispute resolution tool in family and commercial disputes. While these elements are largely based on experience in these fields, most can generally apply equally to environmental mediation. While a number are also relevant in the specific context of mediation as an alternative to traditional environmental assessment (EA) processes, there are some unique issues to consider in the EA context. This article seeks to consider those unique issues of using mediation in EA.

Most fundamentally, when seeking to apply experience with mediation from other fields to the EA context, there are important factors to consider. In most areas of common usage of mediation, it serves as an alternative to court proceedings, not administrative processes such as EA. Whereas court proceedings generally focus on resolving disputes between parties, the EA process does not serve primarily to resolve disputes among participants. Rather, its primary purpose is to serve as a planning process in the public interest and to inform government decision makers of the risks, costs and benefits of proposed projects, policies, plans and programs. EA processes either encourage or require decision makers to minimize risks and costs and maximize benefits.[5] It is also noteworthy that the seven elements of mediation do not recognize the broader objective of engaging participants in the challenges of environmental protection and sustainable development, and the long-term benefits of such engagement. The focus of mediation as envisaged through these elements is strictly on resolving disputes among private parties. Critically though, mediation does require EA participants to work more collaboratively in seeking solutions to resolving conflict. This type of deliberative collaboration and involvement in decision-making is strongly encouraged in the literature on participation in EA, to make such processes more meaningful. In fact, some indicate that mediation provides for significant opportunities for public engagement.[6]

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4. *Ibid.*

5. Tyson Dyck, "Standing on the Shoulders of Rio: Greening Mediations Under the Canadian Environmental Assessment Act" (2004) 13 J. Envtl. L. & Prac. 335 at 337. See also Barry Sadler, "Mediation Provisions and Options in Canadian Environmental Assessment" (1993) 13 Environmental Impact Assessment and Review 375.

6. See, for example, Thomas Webler, Hans Kastenholz & Ortwin Renn, "Public Participation in Impact Assessment: A Social Learning Perspective" (1995) 15 Environmental Impact Assessment Review 443. See also A. John Sinclair & Alan Diduck, "Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions" in Kevin S. Hanna, ed., *Environmental Impact Assessment: Practice and Participation*, 2d ed., (Toronto: Oxford University Press, 2009) 56.

The objective of this article is to consider how mediation has been used in the context of EA to date, and whether it has a role to play in improving the effectiveness, efficiency and fairness of EA processes in Canada through signaling the need to give serious consideration to more collaborative techniques of participation. For our purposes we will take the concepts of effectiveness, efficiency and fairness as defined in the literature.[7] A process is considered effective if the information gathered contributes to decision making, predictions made were accurate, and proposed mitigation measures achieved their expected objective, or, more generally, approved projects contribute to sustainable societies. An EA process is considered fair if all interested parties have a reasonable opportunity to engage and influence decisions, there is a reasonable power balance among participants, and decisions on process and substance are made in accordance with principles of procedural fairness and natural justice. An EA process is considered efficient if decisions are timely and the cost of the process is reasonable.

We consider the role of mediation in EA in four steps. First, we explore selected literature on the role of mediation in environmental decision making generally, and EA in particular. This is followed by an overview of the use of mediation in EA in Canada. The results of a survey of selected EA practitioners are then reported and assessed. We conclude with an assessment of the potential for mediation to enhance the effectiveness, efficiency and fairness of EA at the federal and provincial levels in Canada.

I. *Foundations of environmental mediation in Canada*

In 1996, the National Round Table on the Environment and the Economy (NRTEE) published what has become an authoritative guide on the use of alternative dispute resolution in the environmental context.[8] Other sources have considered specific issues related to the use of mediation in an environmental context, but the NRTEE report is still the most comprehensive assessment of the use of mediation in an environmental

7. See, for example, Robert B. Gibson, *et al.*, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005); and A. John Sinclair & Alan P. Diduck, "Public Education: An Undervalued Component of the EA Public Involvement Process" (1995) 15 Environmental Impact Assessment Review 219. See also Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, ON.: LexisNexis Butterworths, 2008) at 17; and Julia M. Wondolleck, Nancy J. Manring & James E. Crowfood, "Teetering at the Top of the Ladder: The Experience of Citizen Group Participants in Alternative Dispute Resolution Processes" (1996) 39 Sociological Perspectives 249.

8. Gerald Cormick *et al.*, *Building Consensus for a Sustainable Future: Putting Principles into Practice* (Ottawa: National Round Table on the Environment and the Economy, 1996). [NRTEE]

context in Canada.[9] The NRTEE proposed ten principles of effective consensus building for sustainable development. While these principles vary in their relevance to the EA context, they do identify some key issues for the use of mediation in the environmental field. The principles offer a helpful framework for considering mediation as an alternative to traditional EA process options, as they have in other contexts related to environmental dispute resolution.[10]

- Principle 1 suggests that the process be "purpose driven," or that participants need to be motivated to participate constructively. Examples given of the kinds of purposes that may motivate parties to participate constructively in mediation include: frustration with the status quo; uncertainty about the strength of the party's position; desire for greater and more direct control over the outcome; desire to avoid a continuing public dispute; fear of the costs of a prolonged dispute; and desire for finality.[11]
- Principle 2 calls for the process to be inclusive, not exclusive.[12] In many cases it will be difficult to include every individual with an interest in the project to be assessed. To do so would either restrict the use of mediation to EA's with limited participants, or risk undermining the "efficiency value" of the mediation process, and turn the mediation into a panel review without the ability to resolve disagreements and therefore with limited hope of a successful outcome. The challenge for mediation in EA will be to find a way to have all interests represented without losing the

9. For additional literature on the role of mediation and other forms of ADR in environmental law, see Elizabeth Swanson, "Alternative Dispute Resolution and Environmental Conflict: The Case for Law Reform" (1995) 34 Alta. L. Rev. 267; Rosemary O'Leary & Susan Summers Raines, "Lessons Learned from Two Decades of Alternative Dispute Resolution Programs and Processes at the U.S. Environmental Protection Agency" (2001) 61 Public Administration Review 682; Carolyn Bourdeaux, Rosemary O'Leary & Richard Thornburgh, "Control, Communication and Power: A Study of the Use of Alternative Dispute Resolution of Enforcement Actions at the U.S. Environmental Protection Agency" (2001) 17 Negotiation Journal 175; John Andrew, "Making or Breaking Alternative Dispute Resolution? Factors Influencing Its Success in Waste Management Conflicts" (2001) 21 Environmental Impact Assessment Review 23; John Andrew, "Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts" (2001) 21 Journal of Planning Education and Research 166; and Neil G. Sipe & Bruce Siftel, "Mediating Environmental Enforcement Disputes: How Well Does it Work?" (1995) 15 Environmental Impact Assessment Review 139.

10. See, for example, Matthew Taylor *et al.*, "Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices" (1999) 22 Dal. L.J. 51 for a discussion of the use of mediation by environmental tribunals outside the EA context.

11. NRTEE, *supra* note 8 at 15.

12. *Ibid.* at 23.

benefit of a smaller group working together intensively to resolve complex issues.[13]

- Principle 3 states that interested and affected parties need to participate voluntarily.[14] To ensure voluntary participation, considerable work needs to be done up front to ensure those who have an interest in the EA process understand why the mediation process may be in their best interest. As suggested under Principle 1, it also requires someone to make a realistic assessment of the success in building support for the mediation process. At the same time, the voluntary nature of participation is something that needs to be monitored throughout the process. To be truly voluntary, parties would have to have the option at any time in the process to opt out of the mediation and revert to the traditional process.
- Principle 4 suggests that parties should design the process.[15] Giving parties the opportunity to be involved in the design of the process has the potential to motivate parties to participate, and to remain supportive of the process through difficult stages. The task of developing consensus on the process can also serve to build trust and confidence among the participants, and start the mutual learning process. It also provides the mediator with invaluable insights into the group dynamic before embarking on substantive issues.
- Principle 5 advocates for flexibility in the process.[16] One of the benefits of mediation is the possibility of building flexibility into the process. There is value in parties acknowledging up front that they will not be able to anticipate everything. This may encourage them to leave opportunities to make adjustments throughout the mediation process. Flexibility can improve the effectiveness and efficiency of the process, but it can also lead to prolonged debates about the process. Some of the developments that the process could seek to accommodate are changes in representation, the emergence of new parties or new issues, changes in priority, and unexpected factual disputes.

13. For a discussion of the importance of broad participation in EA mediation, see Dyck, *supra* note 5.
14. NRTEE, *supra* note 8 at 34.
15. *Ibid.* at 40.
16. *Ibid.* at 50.

- Principle 6 emphasizes the importance of providing equal opportunities for all parties to the process.[17] This principle is generally seen to be critical for the effective implementation of mediation in the environmental context, and would seem to be a challenge for mediation in EA. Access to resources will vary greatly among parties interested in the environmental assessment of a proposed project. Experience with mediation processes will vary, as will technical knowledge, resources and access to expertise.
- Principle 7 deals with the importance of respect for, and understanding of, a diversity of interests.[18] For mediation to produce a better result than traditional EA processes, one would expect the foundation for the mediation to be a willingness by all participants to understand and respect the values and interests brought to the table. This would seem to create the ideal conditions to engage participants in a process that will look for integrated solutions. Mediation does not require accepting the values and interests of others; rather it entails understanding and respecting those values and interests so that the process can focus on solutions in full awareness of the larger context.
- Principle 8 calls for parties to be accountable to the process and to their constituency.[19] The more difficult accountability to deal with in EA mediation would appear to be the accountability of participants to constituents. The main challenge is that most project EAs will encounter a range of interests. Some will be well organized and have established lines of accountability. Others will be in the process of forming as a result of the proposed project, or even only as a result of the proposed mediation process. Once a mechanism is found for the constituency to organize, information flow and getting approval before making commitments are key.[20]
- Principle 9 calls for realistic timelines throughout the process.[21] The basic idea is that through the imposition of timelines, participants can be motivated to focus on solutions rather than stick to starting positions. However, sufficient time must be allowed for the mediation process to take its course, for participants to have the

17. *Ibid.* at 59.
18. *Ibid.* at 68.
19. *Ibid.* at 78.
20. Principle 8 is closely related to Principle 2.
21. NRTEE, *supra* note 8 at 87.

opportunity to appreciate each other's values and interests, and to develop solutions that are respectful of them. A critical issue is the balance between imposing timelines and flexibility so that the timeline does not foreclose the opportunity to resolve outstanding issues.

- Principle 10 deals with commitment to implementation and effective monitoring of the agreement reached.[22] In most traditional EA processes, this task will largely rest with government. However, the commitment of the participants to support the solutions found and their effective implementation is one of the central benefits of mediation. For the mediation process, it will be important to consider how the solutions found can and will be implemented to avoid situations where government decision-makers are unable to accept recommendations from mediation because there are practical impediments to their effective implementation.

These 10 principles of environmental mediation offer a useful starting point for considering the unique challenges of using mediation in EA. In the following sections we review EA legislation and the use of mediation in EA to date. We then assess the results of a survey of practitioners and other experts in EA with the aim of identifying unique challenges of applying mediation in the EA context. Finally, we will return to the NRTEE principles to consider their application in the EA context to determine how mediation can be adjusted and utilized to improve the effectiveness, efficiency and fairness of EA.

II. *The use of mediation in EA in Canada*

The federal EA process and most provincial EA processes either specifically provide for the use of mediation in the EA process or implicitly allow for it.[23] In spite of this, the actual use of mediation in EA has been very limited to date.

Most EA processes in Canada can accommodate the informal use of a mediation process as part of the traditional EA process, either as a tool within the process, or to replace a particular step in the process, such as a scoping session or a panel hearing. Most provincial processes do so without specifically providing for mediation in their legislation.[24] At the federal level, there are legislative provisions for mediation, however, there is nothing in the Act to prevent mediation from being used informally in the

22. *Ibid.* at 95.
23. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [*CEAA*] at s. 20(1)(c)(i).
24. See Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, ON: LexisNexis Butterworths, 2008) at 186-187.

context of a screening, comprehensive study, or a panel review to resolve a particular issue or to replace a step in the process. The Quebec EA process includes similar options to make use of mediation within the EA process without formally establishing a mediation process in legislation, as do other provincial processes.

In the Canadian context the *Canadian Environmental Assessment Act* (CEAA), most explicitly contemplates the use of mediation, so a brief overview of the legal framework for mediation under the CEAA is offered here, starting with the key legislative provisions of the CEAA on the role of mediation.[25] The discretion under the CEAA to formally refer some or all of the assessment of a project to mediation rests with the Minister of the Environment.[26] A prerequisite for a formal referral of the whole assessment to mediation is that one of the following conditions be met:

- It is uncertain whether the project is likely to cause significant adverse environmental effects.[27]
- The project is likely to cause significant adverse environmental effects that may be justified.[28]
- The project may cause significant adverse environmental effects.[29]
- Public concern warrants a referral to mediation.[30]
- The project may cause significant adverse transboundary effects.[31]

Under section 29(2), the Minister can refer part or all of the EA to mediation under any one of these five conditions if the interested parties have been identified and are willing to participate. The term "interested parties" is defined to include anyone who has an interest in the outcome that is not frivolous or vexatious.[32] It does not depend on who can establish an interest to the satisfaction of the Minister. Discretion to exclude interested parties from the mediation process under the CEAA therefore is limited to an objective test of interests that are frivolous or vexatious.

Until 2003, mediation as a process alternative under the CEAA was practically only an alternative to a panel review. While it could legally

25. *Ibid.*
26. This is also true regarding any particular issue raised in the context of an assessment of a project.
27. CEAA, *supra* note 23 at s. 20(1)(c)(i).
28. *Ibid.* at s. 20(1)(c)(ii).
29. *Ibid.* at s. 28(1)(b).
30. *Ibid.* at ss. 20(1)(c)(iii), 28(1)(a).
31. *Ibid.* at ss. 46–48.
32. *Ibid.* at s.2(1).

replace a screening or a comprehensive study, in case of an unsuccessful mediation initiated under the CEAA, the only process option was a panel review. In other words, an unsuccessful formal mediation in place of a screening would result in the EA jumping from a screening to a panel review. This requirement in the CEAA was generally recognized in the 5 year review of the CEAA as one of the impediments to the use of the mediation provisions of the CEAA. As a result, the 2003 amendments to the Act addressed this issue by removing the requirement for all unsuccessful mediations to be referred to a panel review.[33] While not clearly set out in the Act, in case of a declaration by the Minister of an unsuccessful mediation under section 29(4), the project will now simply return to the EA process that would have been required had it not been referred to mediation. There is no guidance in the CEAA on what constitutes an unsuccessful mediation.[34]

Given that mediation can now replace any of the traditional process options under the CEAA, it is instructive to consider mediation in comparison to each of these options. Some of the features of these process options are unique to the CEAA, however, most EA processes in Canada contain similar elements. Mediation is similar to a panel review in a number of key respects, such as the substantive requirements under section 16 of the Act. On the procedural side, both mediation and panel reviews place responsibility in the hands of someone independent of proponents, intervenors and government decision makers. As is the case for panel members, the mediator is appointed by the Minister of the Environment, not by Responsible Authorities. Responsibility for scoping decisions rests with the Minister of the Environment in both processes. In either case, Responsible Authorities retain control over the substantive outcome in the form of the final project decision.

There are important differences between mediation and panel reviews. One key difference is the form of interaction among participants, and the role of the mediator versus the panel. The mediator seeks consensus among participants, while the panel evaluates the information and positions put forward and applies its own judgment to provide advice to the project decision makers. Furthermore, the role of intervenors is very different. In the mediation process, an intervenor is, subject to resources and capacity, an equal participant in the process. The intervenor's role in a panel review is to provide information and take positions without having any control over how that information is used and what conclusions are reached.

33. *Ibid.* at s. 29(4).

34. So far, this change has not resulted in an increase in the use of mediation under CEAA, suggesting that there are more significant barriers to its use.

Panel reviews can accommodate very different levels of involvement from intervenors, whereas mediation requires full participation. This means that practically, public engagement in mediation may be limited to intervenors who can commit to the level necessary to make a mediation process work. Finally, there is no guarantee that there will be any final result in a mediation process. In a panel review, the panel will make its recommendations regardless of whether participants can agree on whether, and under what conditions, a project should proceed, or if they perceived the hearing as being fair. In short, there are important similarities, but also some key differences between mediation and panel reviews.

Substantively, mediation is equal to a comprehensive study and more onerous than a screening. Specifically, requirements for the scope of the assessment under section 16 are the same for comprehensive studies and mediation, and more limited for screenings. In terms of the process, mediation is fundamentally different from both comprehensive studies and screenings in that it takes the process out of the hands of Responsible Authorities, while in the case of screenings and comprehensive studies, the process is largely controlled by Responsible Authorities. Mediation provides more opportunities for public engagement than screenings. Compared to comprehensive studies, mediation has the potential for more meaningful opportunities for public engagement, but the opportunities may be limited to fewer participants.

Participation in mediation can be limited, even though the CEAA does not allow parties with a legitimate interest to be excluded. There could be fewer participants because of the level of commitment required for mediation, because of the lower profile of a mediation process in affected communities, or as a result of efforts to encourage parties with similar interests to select one representative in the mediation process.

Criticism of the mediation process under the CEAA ranges from frustration about its lack of use, to concern that the mediation process as designed may not be an appropriate substitute for traditional EA processes. Dyck, for example, considers mediation in light of two Rio principles, precaution and public participation. He concludes that mediation as currently designed is flawed in that it does not address power imbalances among participants, does not guarantee that the environment is represented at the table, does not provide sufficient safeguards to ensure all interests are appropriately represented, and does not sufficiently value transparency over confidentiality.[35]

35. Dyck, *supra* note 5.

In his assessment of mediation under the CEAA, Dyck offers some insight into the only reported mediation within the federal EA process, the Sandspit mediation under the EARP Guidelines Order in the early 1990s.[36] The proposal involved a small craft harbour in the community of Sandspit, British Columbia. The mediation included federal departments, provincial ministers and intervenors from affected aboriginal communities and local residents. The process entailed fifteen meetings over fourteen months plus public consultations, and cost close to $250,000. At the end of the process, the participants agreed on a site for the small craft harbour as well as terms and conditions for its construction and operation. Significantly, based on Dyck's account, while the mediation resulted in consensus among active participants in the process, the debate over whether the selected site was appropriate continued among others who were not actively involved.[37]

Some provinces also provide for mediation within their EA process.[38] Our review showed that Quebec most often uses mediation in this manner, likely in part because it can be used as a replacement for a public hearing, if the parties involved agree.[39] Public hearings are very common in the Quebec EA process. While the Quebec *Environment Quality Act* does not specifically provide for mediation or ADR options, in practice any individual can request environmental mediation.[40] Upon receiving such a request, the Bureau d'audiences publiques sur l'environment (BAPE), an independent body responsible for environmental assessment hearings

36. *Ibid.*

37. *Ibid.* at 342.

38. In terms of legislative provisions for mediation, BC allows for mediation in sections 14(3)(a)(iii) and 22 of the *Environmental Assessment Act*, S.B.C. 2002, c. 43. The Manitoba legislation (sections 3(3) and 6(5) of the Manitoba *Environment Act*, C.C.S.M., c. E125) provides for the appointment of a mediator, but provides no further details on the process. The Ontario legislation (sections 6(5), 8 of the *Environmental Assessment Act*, R.S.O. 1990, c. E.18) provides for mediation and imposes a 60 day time limit on the process, but not much detail on the process. While we were not able to identify a case where mediation had been applied in EA in Ontario, we did find a comprehensive 2007 "Code of Practice" for the use of mediation within the EA process. In Nova Scotia, there is legislative provision for initiating mediation (*Environment Act*, S.N.S. 1994-95, c. 1, s. 34), but nothing further in legislation. Alberta, Quebec, New Brunswick, Prince Edward Island, Newfoundland and Saskatchewan and the three territories do not specifically refer to mediation in their EA legislation. In short, there are limited opportunities to track formal mediation processes in EA in Canada. To what extent informal mediation is taking place is difficult to track comprehensively because of the absence of legislative requirements to document its use.

39. Even though mediation is actually not specifically provided for in the legislation, Quebec does make more use of mediation than other jurisdictions in Canada. See *Environment Quality Act*, R.S.Q. 2009 c. Q-2.

40. The function of the Bureau in s. 63 of the *Act* is broad: "inquire into any question relating to the quality of the environment submitted to it by the Minister." However, the Bureau is not involved in the EA process applicable to James Bay or Northern Quebec.

in the province, can engage in environmental mediation under certain conditions, most notably the consent of interested parties.[41]

If parties do not agree to participate in the mediation, if mediation does not result in an agreement on the substance of the EA, or if the Minister does not believe that the agreement reached through the mediation process is in the interest of the public and protects the environment, the assessment will be referred to a public hearing. The legislation provides for strict timelines for various steps in the meditation, as well as for other steps in the EA process. Between 1978 and 1996, mediation was used 28 times, and was successful in 75 per cent of cases, suggesting that Quebec may be one of the jurisdictions to look to for experience with mediation in EA.[42] Since 1990 there have been a total of 39 projects that proceeded by way of mediation, and there are rules of procedure in place for the BAPE mediation process.[43]

According to government officials,[44] most mediated cases have involved a small number of parties, and have been restricted to typically two kinds of situations: road projects when they cause the loss of land or loss of use of land; and, landfill projects – not related to locating the project but rather noise, dust, and the number of trucks entering the site. Typically these types of mediation have lasted two months, whereas a hearing will take at least four months. If there is no agreement between parties at the mediation stage, the process can take 8-9 months by the time the required hearing takes place following the failure of the mediation process.

Quebec is by far the most active in using mediation tools, but there is also limited experience elsewhere. Manitoba's *Environment Act* includes provisions for mediation. These have been used very rarely, but through a combination of political will and administrative support on the part of the Clean Environment Commission,[45] some mediations have occurred in recent years. One of these, the Rothsay Rendering EA, was quite successful in that the community and company were able to agree on steps the company needed to take to reduce odours, and the company was able

41. See Bureau d'audiences publiques sur l'environment Québec, "Rules of Procedure Relating to the Conduct of Environmental Mediation" (February 2004), online: <http://www.bape.gouv.qc.ca/sections/lois_reglements/eng_lois_ind.htm> at Division VI on consent.

42. Barry Sadler, *International Study of the Effectiveness of Environmental Assessment* (Ottawa: Canadian Environmental Assessment Agency, 1996) at 137.

43. See *supra* note 41.

44. These were government officials who participated in the survey discussed in Part III of this article.

45. A. John Sinclair & Alan Diduck, "Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directions" in Kevin S. Hanna, ed., *Environmental Impact Assessment Process and Practices in Canada*, 2d ed. (Toronto: Oxford University Press, 2009) 56.

to secure funding to install the technology required.[46] The Commission is taking a cautious approach to using mediation and is trying to find ways to level the playing field for all participants at the mediation table. The Commission has had at least one case where the public participants requested that mediation take place, rather than a hearing. [47]

Having reviewed selected literature and considered the experience with mediation in EA in Canada, we will now turn to what we consider to be the key issues in determining whether mediation has a useful role to play in EA. Based on our experience with EA we have identified the following issues:

i. Whether mediation can ensure the adequate representation of the public interest in a mediation process, such as the interests of environmental protection and future generations;
ii. Whether mediation can accommodate sufficiently broad engagement of those interested and affected to ensure broad acceptance of the results;
iii. Whether mediation does in fact reduce the cost and improve the efficiency of the EA process; and
iv. Whether the process can provide sufficiently meaningful opportunities for participation and mutual learning resulting in better projects.

We consider these issues to be central to the fundamental question posed in this research project: whether and under what conditions mediation will contribute to the efficiency, effectiveness and fairness of EA in Canada. These issues therefore played an important role in the survey of EA practitioners we conducted as part of this research project. The results of this survey are discussed in the following section. After reflecting on the views of survey participants on these and related issues on the role of mediation in EA, we return to these key issues and what they tell us about the utility of mediation in EA in the concluding section.

III. *Interviews with EA practitioners*

Our approach to discussing the role of mediation in EA with Canadian practitioners was qualitative and involved semi-structured interviews with twenty individuals. Purposeful sampling methods were used to identify respondents in the initial phase of the research. We choose participants based on their long-standing involvement in, and knowledge of, EA in Canada. The measure of this was established by each person fulfilling several of

46. *Ibid.*
47. *Ibid.*

the following criteria: having been regularly referenced in the literature; having written guidebooks on EA; having reviewed and written for peer reviewed journals; having presented papers at national and international conferences; having recent active on-the-ground involvement in EA public participation activities; and being well known in the Canadian EA context. In fact, some respondents had dedicated their whole careers to the practice of EA in Canada. Survey participants include key decision makers for governments, proponents and intervenors in the EA process in Canada. Many of the survey participants either are, or have been, in positions to influence whether mediation would be used in specific EA's. They were drawn from various sectors including, government (5); academics (4); EA consultants (4); environmental non-governmental practitioners (5); and industry (2). Interviews were conducted mainly by telephone and lasted anywhere from 1 to 2.5 hours. QSR NVivo, a qualitative data-analysis software tool, was used to code and explore the data in search of themes or regularities. Themes derived from the literature were used to help to sort and code the data into data segments allowing the development of families of codes. Where practical, results are represented in the form of direct quotations from the interviews.

The interview participants were asked a wide range of questions relating to their views on mediation in EA, such as whether they thought mediation was useful tool for EA decision making, and about its use or lack thereof in the Canadian context. The interview design was informed by our review of the literature and experience with EA that revealed the key viability issues noted above. In many cases respondents referred to specific EA processes in providing their comments in addition providing more general reflections. Their responses have been organized into three themes: the utility of mediation; barriers to mediation; and options for the application of mediation.

1. *The utility of mediation*

The responses to this question fell into three categories: those that were supportive of the use of mediation in EA (10); those that saw potential, but felt that it was limited (5); and, those who opined the application of mediation in EA was not useful at all or had very limited potential (5). There was no strong relation between the sectors represented by the majority of interview respondents and their feelings on the utility of mediation. For example, there were very supportive ENGO and Government respondents, but also respondents from each of these sectors that felt it was not useful. However, both of the industry representatives felt the potential role of mediation in EA was very limited.

Those that were supportive suggested that mediation could increase collaboration, lead to better dialogue and be helpful in getting parties working together, as exemplified by the following comments:

> "Promotes dialogue, can lead to better solutions and can be less intimidating than formal hearing processes."
>
> "Mediation is fundamentally an open process, which provides opportunities for dialogue to find solutions acceptable for everyone, avoids formality of NEB type processes which can be intimidating."
>
> "Promotes dialogue, mutual learning and brings people together."
>
> "Increased collaboration, joint ownership of process, better outcomes and reduced costs. It is different than simply 'public consultation'."
>
> "Mediation fits with good public engagement. Collaborative processes are more useful for society as they have greater potential for lasting and sustainable outcomes."

Some of the supportive respondents also indicated that mediation might be most useful for smaller contiguous projects, and a couple also indicated that participants in the process need to be willing to compromise.

Those that saw potential for mediation as part of an EA process also made comments about its potential to "promote communication among parties." Most, though noted impediments to implementing mediation, such as the lack of incentives for proponents. For example respondents noted: "There is not much incentive for proponents… the outcome of the current process is known vs. the unknown outcome of mediation"; "the size of the project and consequently the number of participants"; "Useful for smaller projects with few parties and limited issues"; "Could be useful as an addition to EA to deal with local jobs, habitat compensation issues, as well as other barriers such as how can Responsible Authorities know they have identified all interested parties." Three respondents mentioned that mediation may be "useful for scoping decisions" or "for disputes over scope."

One strong theme that came from those respondents that did not think that mediation had a useful role related to the private nature of mediation as part of an EA process that is supposed to be open to the public:

> "EA is a public process, mediation is not appropriate because it's a private negotiation… Mitigation/compensation issues can perhaps be mediated, but fundamentally I don't believe it's appropriate for EA because you can't discuss public issues in a private setting."
>
> "If EA were a formal negotiative [sic] process, mediation could have a role. Because EA is not formally about negotiation, mediation is not

appropriate. Mediation is formally third party facilitated negotiation—EA is public."

Another noted that "EA is not a negotiated process, but components could work, if the parties agree, within an EA process."

Those that were not supportive questioned the basis for mediation since the requirements for it are often not present in EA:

"Requirements for effective mediation are often not present in EA, as many oppose the project under consideration completely; therefore there is no common ground to mediate. It would be very rare that you would have parties with room to negotiate. Proponents are entitled to a decision, and want the decision. It could be though that compensation issues could be mediated."

"Not very useful, as I understand mediation. It seems to me that it is much more useful for resolving disputes over environmental issues rather than being part of an environmental planning/review process."

2. *Barriers to mediation*

Table 1 captures the breadth of issues raised by interview participants that were identified as barriers to utilizing mediation within EA processes. All of the barriers listed were noted by at least three respondents, with the majority being mentioned by at least six respondents. Below, we discuss the barriers identified by at least half of the respondents, representing all of the sectors that participated in the survey. The first seven topics in the table meet these criteria.

Table 1. Barriers to mediation
1. No proponent or government incentive
2. Unfamiliar/intimidating process
3. Uncertain outcome
4. Identifying parties of interest
5. Cost
6. Lack of mediators
7. Lack of commitment to mediation processes
8. Timing in the EA process
9. Complexity and time commitment of process
10. No legal foundation
11. Authority of participating representatives to commit to a decision

Half of the respondents felt that there was "no proponent or government incentive" to use mediation over traditional EA processes. Some related this to a "reluctance on the part of government officials to champion mediation," which, in turn, was related by some to where blame would rest if mediation failed. Issues such as unfamiliarity with the mediation process as well as uncertainty over the substantive outcome of mediation, discussed below, were also brought up as a disincentive, particularly for proponents and government officials.

A number of participants expressed a general concern that unfamiliarity with the process might discourage most parties from making use of mediation. To anyone experienced with traditional EA processes, the mediation process can be unfamiliar and intimidating. It can be even more intimidating to an inexperienced participant, as mediation requires much more active and personal engagement than filing written comments or attending a hearing. More than half of the respondents suggested that mediation was unfamiliar to most regular EA participants, including government and proponents, and that this made the process seem intimidating. One respondent captured this concern by noting that "with no experience, there is reluctance to participate in it, especially when the proponent's consultants and legal advisors have no experience with it." Another commented that there may also be "some suspicions of process because it's an unfamiliar process in EA." A third indicated "there is no institutional memory in government because people in the civil service change so often resulting in a general lack of knowledge about what mediation is."

Some of the respondents mentioned proponent and government concerns about "unknown outcomes", or uncertainty over the outcome. One participant commented as follows: "It does not seem to me that there is much incentive right now for proponents to come to the table in most circumstances. They know the outcome of the process now so why move to an unknown process". The general sense was that professionals, proponents and government officials who engage with the traditional EA process regularly have developed a level of comfort about the likely outcome of the process. With mediation, there is no such experience, resulting in those who are reasonably comfortable with the outcomes from traditional EA to shy away from mediation. "Uncertainty as to whether the decision maker will implement the mediated solution," was also indicated as a disincentive.

Half of the participants indicated that they felt identifying the appropriate parties to participate in an EA mediation was a barrier. Many of them suggested that there is a "reluctance to proceed with mediation

(by government officials) for fear of missing a party." One respondent captured this by making the point that EA involves "Multiple and shifting stakeholders, with varying degrees of organization, thereby hampering any efforts to bring the parties together into a coherent mediation process." Some felt that this was particularly problematic for EA being carried out under CEAA, since Responsible Authorities are required to identify all interested parties. One respondent also noted that parties willing to participate may not represent all the interests that need to be represented to make mediation effective. Often, for example, it is not clear "who represents the environment" in mediation processes, especially if there is not broad based public involvement in the mediation.

The cost of mediation was raised as an issue by just over half of the respondents, but the majority of these suggested that cost is a "perceived barrier" and that in fact "mediation saves money": "The cost issue is a crock—it is in fact considerable [sic] less expensive. The costs if the process is dragged out or if there is a hearing are horrendous. I do not see any downside in a cost sense." Most of these respondents felt that cost savings came through avoiding other more expensive processes, such as panel hearings and court proceedings. Others indicated that the cost of mediation "can be significant" and that there is an "issue of who pays… particularly for a mediator that might have to come from an outside jurisdiction." One participant who believed cost was an issue argued that, "mediation is still expensive, despite the hypothesis that it saves money"; "If you're going to get good outcomes from any process it's going to cost money"; "I think the costs are high because often the expertise to do mediation has to be brought in from outside the jurisdiction."

Just over half of the respondents also indicated that the lack of skilled mediators was an important barrier to the use of mediation in the EA context in Canada. One respondent captured this concern as follows: "Finding skilled mediators [is] a big issue. BAPE often appoints BAPE commissioners with little or no mediation experience." The issue of experience was key for some respondents: "there are mediators out there, but not many have EA experience"; "There are zillions around—but we don't have many—perhaps none—that have done this type of mediation." A few of these respondents suggested that there were "good mediators" to draw into EA, but that the "pool was very small" and "hard to access because they tend to be sought after." One other respondent noted as well in this regard that, "there are a limited number of mediators that would be trusted by all the parties to an EA."

Lastly, most respondents indicated that there were issues related to what we have termed "commitment to process" for all parties. Many

suggested that there was a need for a commitment from the "senior level of government" for mediation to work. Most argued that this was lacking in the Canadian context: "We need senior level commitment for mediation to be implemented, in some federal departments we do not even have a commitment to EA, so there is certainly no commitment to mediation"; "Senior level support and commitment to process is a major issue." People felt that this commitment was needed in order to be sure mediated solutions would be implemented and that people were not just wasting their time. It was also noted by some that, "motivating parties to participate and potentially compromise their position" was a barrier that seriously impacted commitment to process. Obstruction of process was a strong sub-theme under the general theme of lack of commitment to the process. One person that exemplifies responses to this sub-theme noted that, "[o]bstruction of process is an issue, especially without trust. Some proponents may be reluctant to share information that might be used against them in court later." Another indicated that the "risk of obstructing process increases with number of parties. With too many parties, participants feel they have nothing to lose by obstructing."

3. *Options for the application of mediation*

We asked respondents to describe for us a situation that would be well suited for mediation in order to highlight the conditions that would allow for the effective use of mediation. While participants outlined a number of examples, the outcomes for effective mediation as part of EA coalesced across the sectors around the following conditions: willingness and motivation to participate; a set of discrete and clear issues; an incentive to participate; openness; and a manageable number of participants. Below we first highlight a few of the EA situations that respondents described that provide the context within which we discussed and indentified the conditions noted above.

> "I'm thinking that almost any EA could be suited to mediation because you've got some structure of involved and interested parties at the table. Contrast that [mediation] to the almost cynical process where the proponent is required to do A, B, C, and D, then they just hire their consultant to make sure that all the i's are dotted and the t's are crossed. They don't involve different parties unless they are required to. [There needs to be] a process that involves people explicitly earlier to avoid these problems."

> "A situation where it may be appropriate is when you have a project with a little bit of process underway and all the parties know what is proposed - so you have discrete and clear issues that have been raised.

For example, in CEAA s. 29 ss. 1, paragraph B allows the Minister to refer part of an EA to mediation because there are some items that are contentious. [An ideal situation is when] there's more on the table, [a] narrower set of problems that are well-defined, so it would therefore be less time consuming to iron it out in mediation."

"I guess mediation works best when there is a dispute between a small number of interveners with small number of environmental issues that can be mediated. Over and above that, public hearings are needed. So, if a small number of people have a problem with an aspect of a project then it might work well. If there were a property owner affected by a new highway you could certainly mediate issues of mitigation and compensation with that landowner. But questions of whether there should be a highway, and if so what capacity it should be built to and how many exits it should have and so on would difficult to resolve by way of mediation. You need the public involved, not just government."

"I will use a partly hypothetical situation – that of a logging road and a forestry company. The case would include local interests as well as the feds because of stream crossings. The company would have an existing mill and resource allocation—so the EA is about the road. So the company does the EA on the road and people in the area express their concern about the environment—they know the road is needed and will therefore likely be approved, but they want the best environmental solution on issues like the location of the road, how wide it is, what surface it has, whether it operates year round, the type of stream crossings there will be and other issues of that sort—and they want to avoid court or hearings. I think this would be the perfect case to bring in a mediator to help the parties come to innovative solutions on the issues they have. This is not to say that mediation could not work when considering bigger issues like alternatives. In fact, I think that mediation can also work in those situations as well."

"I think there needs to be a limited number of environmental issues among the parties. If there are a reasonable number of issues then I think people can talk them out. It can also work in cases where personalities are getting in the way of moving to a solution. In other words if there is high animosity among some parties—emotional stuff—then a mediator can help to work through that stuff. If personalities are blocking recognition of a way forward then I think that a mediator can help out a lot. But generally I think the projects need to be fairly small with a limited number of environmental issues and interests for

> it to work. On a big project though it might just be very possible for thorny issues to be broken off and sent to mediation. So some thorny environmental issues—or issues where coming to common ground seems difficult—could be separated off from the main EA process and sent to mediation with a report back to decision makers on that issue."

Within the situations described, over half of the respondents indicated that parties needed to have the "willingness" and "motivation" to participate. They indicated that "mediation could not be a forced solution otherwise it was doomed to fail… you need participants willing to come to the table." Participants have to be "willing to discuss in a constructive way project impacts, terms and conditions." Some respondents gave examples of situations that might motivate parties to participate in a mediation: "… So things like contaminated site disputes and other environmental disputes where the parties are motivated toward a solution—there are lots of examples in those cases"; "The opposition was so strong that the company could not get funding for the mill or insurance to build it where they wanted. This motivated them to sit down with the parties and mediate a solution." Others noted the positive outcomes that can result from such motivation: "[c]ollaborative processes like mediation allow people to work constructively together to resolve problems—especially when they are all motivated to do so."

While most respondents indicated that there needed to be a clear incentive for all parties to participate in mediation, many of the comments focused on the need for the proponent to be motivated:

> "Because proponents don't want to concede anything and don't feel that they have to, to get what they want. It's all about incentives. If you have no motivation to mediate because it's a less bad solution, then you won't do it? Without basic incentives, why would you do it?"

> "Potentially, and I think it has been [useful], but it's unlikely to be used if the process is not strong. By strong, I mean if proponents don't see that they won't get their way by going through the [regular] process, they won't have any incentive to do it [mediation]."

> "It does not seem to me that there is much incentive right now for proponents to come to the table in most circumstances. They know the outcome of the traditional EA process now so why move to an unknown process."

> "The proponent was not well liked in the community to begin with, which provided him with some incentive to choose the mediation route."

Many also commented on things that might provide parties with the motivation to participate: "… Both sides had significant incentives not to go to hearings, so both decided to make concessions so they could control the conclusions. They reached a negotiated agreement, mediation was less bad than what they had before them otherwise."

Openness was also a condition that a majority of the respondents identified as central to effective mediation in EA. Comments in this regard touched on two issues, "openness to share information" and "being open to listen to the views of others." The following comments capture the ideas offered by respondents: "Sharing information is key to meaningful participation in EA and especially for mediation"; "Proponents don't always bring their stuff [information] forward [early], so it's too late to do mediation because so many steps have already been taken"; "Now many proponents have lawyers on staff working on EA and in some instances I know they do not want to give out information because it might be used again their 'client' later in the process. So the process is becoming more adversarial right from the start." For some of the respondents being willing to "sit and listen" to the views of "other parties" was at the "root of good mediation." A few respondents equated it with nuclear power, noting that the sides in debate are entrenched; "There's an extensive literature on when mediation is potentially relevant, like you can't get the proponents of nuclear energy and those opposed to it around the table to come to an agreement"; "I would never mediate around nuclear power because I am totally opposed."[48]

Most respondents also argued that there needed to be a "manageable number" of participants to the EA for it to be successful. Without being specific, most respondents in detailing their ideal situation for EA indicated that the "number of participants needed to be limited" or "manageable." Words like "a few parties" or a "handful of interests" were sometimes used as descriptors: "It is a tradeoff and the mediator will have to organize things to actually limit the number of parties, maybe to 4 or 5 parties." One respondent indicated further that a smaller number is desirable, but with a range of interests:

> In my view there needs to be a sufficiency of interested parties but not so many that the process is swamped with them. Having a diversity of interested parties brings more likelihood of common ground being found, more likelihood that there will be someone around the table

48. Of course, in many such cases what is needed is a strategic environmental assessment on the broader policy issues that actively engages interested parties.

> who understands the interests and concerns of each other participant. That then helps in developing trust within the group which, in turn, can lead to creativity in problem-solving.

A couple also noted that the "risk of obstruction will increase with the number of parties at the table."

There were, of course, other conditions that a minority of respondents mentioned. The issues of "willingness to compromise" or "unwillingness of the parties to compromise" was one that was shared by a few. Another issue that was raised related to the problem of finding decision-makers willing to share their power: "There is a reluctance on the part of government officials to power share, to share authority"; "You cannot do real mediation without turning the decision making over to the mediator and the parties – this means sharing power"; "Proponents often fear that they will end up bargaining away decision-making power because they will lose control during mediation"; "The feds have resisted collaborative approaches to decision making. Part of this resistance is the real fear of giving up power." One other sub-theme related to the need to provide financial assistance to public participants, "might be too expensive for public groups unless they had funding assistance"; "all public parties will need financial assistance."

IV. *Discussion*

The survey offers invaluable substantive insights into the challenges and opportunities for mediation in the context of EA. It is also important to consider that most of the participants in the survey have 10 to 20 years of experience with EA in Canada, with a few having considerably more. As a result, the survey also sheds light on perceptions about mediation in the EA community. Many of the survey participants have been in positions to influence whether mediation would be used in specific EA's. Their perceptions on mediation can offer as much insight into the barriers and opportunities for mediation as the substantive information participants provided. It is clear from the survey that the majority of survey participants see some potential, but there is a range of views on whether, and under what circumstances, mediation can or should be used.

Issues raised about the use of mediation generally fall into three categories: inherent concerns; the proper selection of appropriate circumstances for the use of EA (or "case intake"); and the proper design of mediation processes. A number of survey participants expressed their views as inherent concerns about the appropriateness of using mediation in EA. One such concern is that EA should be a public process, and there is concern that mediation will turn EA into a private process. The

other concern is that certain interests (particularly nature protection and the interests of future generations) will not be adequately represented in EA mediation. It is important to note that while these two issues were raised by at least some of the survey participants as inherent concerns, they can also be viewed as concerns about the design of the mediation process depending on whether design responses are considered adequate in addressing the concerns.

The second category of issues deals with "case intake". A number of specific suggestions were made by survey participants on case selection. There was a general sense that cases should be either limited to, or focus on, EAs with fewer parties, fewer issues, and smaller projects. Another suggestion for case selection was to focus on situations where the core problems result from personality conflicts or broken relationships rather than fundamental substantive differences. A general acceptance of the project among interested parties, and a willingness to share power were also identified as possible case selection criteria. The 2007 Ontario Code of Practice for the Use of Mediation in EA offers a number of similar suggestions on the issue of "case intake."[49]

The third category of issues related to the proper design of mediation and received relatively limited attention from survey participants. This is not surprising given the limited time and the limited Canadian experience with mediation in EA. Survey participants tended to present their views in terms of inherent concerns with the use of mediation or case selection criteria rather than express views on whether and how mediation may be designed to overcome the concerns identified.

In terms of data on the concrete applications of mediation in EA, it is clear that survey participants viewed mediation differently, and considered different ways in which mediation could be used. Based on the results, we were able to identify three different ways in which survey participants viewed mediation in EA:

i. Mediation as a tool used within a traditional EA process,[50]

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49. Ministry of the Environment, "Code of Practice: Using Mediation in Ontario's Environmental Assessment Process" (June 2007), online: <http://www.ene.gov.on. ca/envision/env_reg/er/documents/2007/Finalmediation.pdf>. In particular, section 3.1 of the Code proposes a number of considerations. The criteria suggested are quite general, covering the willingness to participate, the ability to identify negotiable issues, the capacity and number of participants, and their willingness to work toward a mediated solution.

50. This option generally involves the informal use of mediation; it would not alter the traditional EA process other than adding a mediation process to deal with a particular issue that arose during the course of the traditional EA process.

ii. Mediation as a process replacement,[51]

iii. Mediation as a form of EA.[52]

Based on the interview data regarding how mediation might be used successfully, the literature and our own experience, we have reflected on each of these potential situations. Most of the interview respondents, representing all of the sectors, indicated that mediation could be usefully applied as a tool within traditional EA processes. This seems to us to be an obvious place to use mediation, since appropriate issues could be selected and the results would be taken back into the EA process, where other broader concerns relating to the environment and sustainability should be a consideration. Other barriers such as the number of participants and breadth of the issues being tackled could also be managed. Such use of mediation may also help to remove road blocks on contentious issues, or at least provide the opportunity for more directed dialogue on those issues, with a third party specifically helping to find common ground, something not often attempted within current EA processes even in the case of a panel review.

One of the challenges with the use of mediation as a tool within a traditional EA process is that the up-front work to select appropriate situations for the use of mediation and properly prepare participants is still important to the success of mediation. If this preparatory work is not initiated until an issue arises that cannot be easily resolved in the traditional process, there are likely to be time constraints that will discourage the use of mediation. One way to ensure appropriate time for the up-front work needed to make mediation effective would be to make an effort at the start of the traditional EA process to identify appropriate issues for mediation. We would advocate for this step to be incorporated as an automatic step in traditional EA processes.

There is a variation on the first option that we think is worth considering. We see opportunity to use mediation in dealing with policy issues that arise in the context of a project EA that have not yet been addressed by government and therefore often prove contentious within EA decisions. There are often social (e.g., immigrant labour) and environmental (e.g., greenhouse gas emissions) policy issues raised during the course of an individual EA that lack clear government policy. We have previously

51. This option involves the replacement of a process in the EA with mediation, but mediation would not constitute the whole process. Most commonly, mediation has been used to replace a panel hearing, but it could also be used to replace the traditional scoping process, or some other aspect of the EA process, short of carrying out the whole EA by way of mediation.

52. This option involves the full replacement of a traditional EA process with mediation.

recommended that government agencies consider the notion of a "policy off-ramp" within an EA process when a policy void exists in relation to an important aspect of a proposed undertaking.[53] Mediation would provide a known framework for such an off-ramp and would encourage the development of interim solutions on such issues in a timely and predictable way. The public interest and the environment would also be protected in that any outcome would apply to the case at hand only. An added advantage of this approach is that the policy community could be informed by any outcome once the issue is addressed within a broader policy context.

The second option, process replacement, also presents an interesting opportunity to use mediation that was supported by some of the interview respondents. By only replacing part of the process, it is easier to construct safeguards for the public interest since other aspects of the EA would still be dealt with in the traditional way. Mediation might also reduce the cost of EA by replacing certain EA activities. The hearing process is the obvious procedural step in traditional EA processes that could be replaced by mediation and could result in improved efficiency. The utility of such a replacement would depend on the number of potential parties to the hearings and the number and breadth of issues requiring consideration. Another important consideration of such a replacement is that hearings are meant to be open to the public, with many EA hearing processes allowing people to come and listen and present their views without pre-registering, even if registering ahead is encouraged.[54]

The impact of such a replacement of traditional hearings with mediation on effectiveness and fairness of the process would have to be carefully monitored. It is clear that many of the survey participants had concerns about this, and with good reason. The risk of turning a public planning process into a private conflict resolution process is real. At the same time, participants recognized that done well, there are clear opportunities for mutual learning, for more meaningful engagement, and for a shift from polarized positions to integrated solutions that address the core concerns of the range of interests involved, rather than ask decision-makers to choose among them. In some cases, a combination of a mediation process with a limited number of participants and an opportunity for members of the public to offer some comment may be most appropriate. This approach

53. Meinhard Doelle & A. John Sinclair, "Time for a New Approach to Environmental Assessments: Promoting Cooperation and Consensus for Sustainability" (2006) 26 Environmental Impact Assessment Review 185.

54. More generally, mediation can replace public engagement requirements in traditional EA processes.

was applied in Nova Scotia's strategic environmental assessment of tidal energy in the Bay of Fundy.[55]

On the efficiency side, careful thought will have to be given to which types of projects are suitable for replacing a hearing with a mediation process. For very large projects with many intervenors, mediation may be inefficient because of the difficulty of working with the complexity of issues and parties on a consensus basis. Ultimately, timing and the starting positions of the parties more than resources will likely dictate whether mediation can be an efficient process in such circumstances. For very small projects, mediation may be considered inefficient for the opposite reason. In many cases, such projects currently are not subject to consultations, or the consultation is minimal. Such projects may be included over time, as the value of public engagement is more broadly recognized. In the meantime, in our view it is the projects between these extremes—medium sized projects with a reasonable level of public interest—that hold the most promise for mediation.

Most interview respondents see limited opportunity for using mediation as a form of EA. As noted in the data above, it is not clear that the mediation process under CEAA, for example, is set up to properly consider all factors included in the scope of an EA (including purpose, need, impacts, cumulative effects), especially if the case involves a number of environmental and social variables, has impacts that cover a broad geographic scale and involve a number of interests. In our view, before the use of mediation as a form of EA should even be considered, much more experience with the more modest use of mediation under the first two options is required. In addition, legislative safeguards would be needed to ensure that the interests represented in the mediation process align with societal interests in EA decisions.

A step in the direction of legislative safeguards would be to identify the substantive interests that have to be represented in EA mediation. Adequate resources, support infrastructure, and accountability would also have to be built into the mediation process before mediation can be considered a form of EA. Another factor in determining whether mediation is appropriate as a form of EA may be whether the EA is being carried out in the context of a previous higher tier EA process that fully engaged the broader public, such as a strategic environmental assessment of the relevant industry sector or a regional environmental assessment. Experience with mediation as a tool

55. Meinhard Doelle, "The Role of Strategic Environmental Assessments (SEAs) in Energy Governance: A Case Study of Tidal Energy in Nova Scotia's Bay of Fundy" (2009) 27 Journal of Energy and Natural Resources Law 112.

within traditional EA processes should offer further insights into additional safeguards needed to enable the use of mediation as a form of EA.

Reflection on the 10 foundational principles identified in the NRTEE report can provide an additional lens from which to view the findings and from which to shape conclusions, as outlined in the examples below. In general, we found that there was considerable alignment between the 10 principles and the results of the survey. Many of the issues raised by participants are reflected in one or more of the principles.

For example, with respect to motivation (Principle 1), it was clear from the survey that motivation to participate was considered to be key by most participants. While many saw this primarily as a case selection issue, some recognized that there are opportunities to educate and otherwise motivate parties to participate constructively. Success in motivating parties will be key to ensuring the efficiency and effectiveness of the mediation process. In short, participants recognized that ensuring motivating parties in mediation requires two things: a proper selection of situations suitable for mediation, and preparatory work with all participants to ensure they have an informed understanding of the process and why it offers a better opportunity to pursue their interests than a traditional EA process.

The process of selecting appropriate cases for mediation is elsewhere referred to as the "case intake" process.[56] The upfront work of building an informed understanding of the benefits is important in its own right, but it can also help to identify when the mediation process is inappropriate. For example, it may become clear through this up front process that a party is only interested in delaying the EA process.[57]

On inclusiveness (Principle 2) many survey participants suggested mediation should be limited to EAs with few interested parties. This was seen by some as an effective way to match the principle of inclusiveness with the desire for efficiency in the process. In the context of improving EA, the issue this raises is whether there are ways to ensure inclusiveness without compromising efficiency, and how the efficiency of an inclusive mediation process compares to the efficiency of the process it would replace. Without inclusiveness, the fairness of the process is undermined. Where inclusiveness can be accommodated in mediation without compromising efficiency, mediation can contribute to enhancing EA by providing more effective ways of finding solutions to issues raised. In our view, the number of intervenors is too simplistic a measure to determine whether

56. Matthew Taylor *et al.*, "Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices" (1999) 22 Dal. L.J. 51 at 74.
57. *Ibid.*

mediation is appropriate. The starting positions of potential participants, their capacity, time constraints, and the long term value placed in helping those engaged to find common ground are all factors that should be considered in determining whether mediation can be an efficient process for a particular EA.

One way a mediation process could be made reasonably inclusive without making it unwieldy would be to support infrastructure for each of the key interests represented, so that one person could represent each significant interest in the mediation process, and that person would be accountable to, and have the support of, the full community of interest. This would require an identification of the key interests that should be represented in any EA mediation process, followed by an assessment of the capacity and willingness of existing organizations to engage effectively in the process. Interests that do not have the capacity to engage effectively would be supported financially and otherwise to enable their effective engagement. The relative capacity would then be taken into account in the design and implementation of mediation in the context of a particular EA.

The importance of providing equal opportunity for all parties (Principle 6) was clearly recognized by survey participants. Adherence to this principle is important for the effectiveness and fairness of the process. Mediation processes will have to ensure that appropriate access to financial resources, technical information, specialized expertise, and negotiation skills are available to all participants. A related point is that there needs to be a reasonable power balance for the mediation process to be constructive. Careful attention to the motivation of parties to participate is an important element of ensuring an appropriate power balance.[58]

The accountability of parties (Principle 8) to the process was raised as a concern by some of the survey participants. Solutions proposed for Principle 1 on motivation, particularly the up-front work to motivate parties to participate constructively, can be used to address this concern. There was less discussion by survey participants of the accountability of the parties to their constituents. As discussed under Principle 2, one way to address this form of accountability is to support networks to encourage each party to rely on, and be accountable to, the broader constituency they represent in the mediation process. Both forms of accountability are important for the effectiveness and fairness of the process.

Realistic timelines (Principle 9) were a concern to at least some of the survey participants. The issue came up in a variety of ways, such

58. For a discussion of the role of power in EA mediation, see Dyck, *supra* note 5.

as the need for efficiency, and the concern that uncertainty about the timing would deter proponents from participating. Appropriate timelines, therefore, are about more than efficiency. They also encourage parties to work constructively toward a solution, and thereby encourage effective and fair outcomes. In setting timelines, consideration will have to be given to the fact that most EA processes involve a mix of professionals and volunteers. This affects both the time they will need, and the time they will have available, to engage in the mediation process. The extent to which this needs to be considered may depend on solutions implemented under Principle 6 to ensure equal opportunities for all participants. The time available will, in many cases, be a factor in determining whether mediation is appropriate.

Participants did not explicitly identify the design (Principle 4) of the mediation process as a key issue, but the case for engaging parties in the design is compelling and consistent with the general feedback from the survey. Involving participants in the design has the potential to enhance the effectiveness and fairness of the process. In addition, one issue that arises from the survey that does not neatly fit into the 10 principles is the concern over the adequate representation of certain interests, such as future generations or nature protection, which is considered further in the conclusions.[59]

Conclusion

Our conclusion is that mediation continues to hold promise to improve the effectiveness, efficiency and fairness of EA in appropriate circumstances. From an effectiveness perspective, it is clear that mediation outcomes have the potential to lead to improved decision making. Participants indicated, in this regard, that mediation had the potential to promote a more thorough review of the project in question, or at least parts of the project through greater information exchange and questioning, which would encourage participant learning. It is hard to predict if this would result in projects that contribute to sustainable societies, but we expect that they would if the decision process delivers on the fairness criteria and if steps are taken to ensure the public interest is properly represented.

In terms of efficiency, the majority of participants felt that costs would be reasonable and that mediation could in fact save money, especially if a public hearing could be avoided. Time commitment was raised by a minority of participants and some of these felt that mediation process

59. The role of First Nations in mediated EA was also not raised in the survey. Clearly, mediation involving First Nation communities holds considerable promise. A full consideration of the role of mediation in engaging First Nations more fully in EA is, however, beyond the scope of this article.

would be too time consuming, while others felt the amount of time to come to a decision would be reasonable and the process could be much less time consuming than some other dispute resolution options and/or hearings.

On the whole there was also strong support for mediation playing a role in improving the fairness of EA since participants would have the opportunity to engage directly in the decision process, and the mediator would ensure that procedural rules of fairness were followed. Issues of power balance and the openness of the process to the public were, however, questioned by some participants.

The analysis of the data in relation to the contribution that mediation could make to the effectiveness, efficiency and fairness of EA has left us with three key questions, which we suggest deserve particular attention in decisions on whether to use mediation and in how to design and implement mediation processes for EA.

1. How does the mediation process ensure that the public interest is properly represented?

There are legitimate concerns that public interests—such as the protection of nature, the interests of future generations, and interests beyond the geographic area of the proposed project—may not be adequately represented in EA mediation. An initial response to this concern might be that neither the broader public interest, nor the environment, are commonly well represented in conventional EA. This is certainly a fair comment for EAs that do not involve meaningful public input through public hearings. If mediation were to open up a meaningful dialogue on some of these issues for EAs that currently do not involve the public in any manner, mediation could in fact improve participation and perhaps the outcome, as some of our respondents suggested. As we have seen, however, mediation is most commonly used and promoted as an alternative to public hearings.

Another possible perspective would be that it is the role of government decision makers at the conclusion of the EA process to ensure the public interest is protected. We do not consider this to be an adequate response in part because EA experience suggests that this power is unlikely to be exercised. Based on experience with panel recommendations, it is reasonable to expect that the results of the mediation will be accepted by Responsible Authorities without sufficient scrutiny of whether they represent the broader public interest, or ensure some level of sustainability. Overall, therefore, we do not consider these to be adequate responses to the concern about the public interest in mediation. In light of this, in order to move ahead with mediation, this concern needs to be acknowledged and

further avenues pursued to address it. At a minimum, we advocate for the pursuit of one or more of the following avenues to attempt to address this critical issue:

- Require a government official to be an active participant in the mediation process to ensure public interests not brought forward by other parties are adequately represented.
- Consider limiting the use of mediation to EAs which involve parties whose objective is the protection of nature, the interests of future generations and other public interests. The interests that need to be represented should be set out in legislation. The challenge in implementing this concept is that participant's objectives interests are generally a mix of self-interest and public interests.
- If all else fails, and until there is an adequate response to the concern, take a cautious approach. This would mean limiting the use of mediation to the consideration of issues that that are reasonably clear in the range of interests they affect.

2. How does the mediation process deal with power imbalances among participants?

The power imbalance among EA participants is, of course, not unique to mediation; it is an issue for all types of EA. We contend, however, that the stakes are higher in mediation, because the outcome is predominantly dependent on the capacity of the participants, whereas in traditional EA processes panel members or Responsible Authorities have the ultimate responsibility for the substantive outcome. The most effective ways to improve the power balance we have identified are the following:

- Ensuring through a case intake process that all participants are motivated to participate constructively in the mediation process.
- Encouraging networks of support and accountability for all major interests in the EA process.
- Ensuring access to funding and other resources, particularly for community, environmental and aboriginal parties.
- Allowing parties to be involved sufficiently in the design to ensure that the mediation process accommodates both professional and volunteer participants.
- Engaging interested parties early in the process to provide as much time and opportunity as possible to develop the capacity to participate effectively.

3. How is the mediation process selected, designed, and implemented to ensure it offers added value when compared to traditional EA processes?

Mediation can offer added value when used as a tool within a traditional EA process whenever it serves to resolve a dispute that is holding back the traditional EA process. Examples could include the siting of a sewage treatment plant in a community that is overall supportive of the plant, but is split over the most appropriate location. Mediation can offer added value in terms of efficiency and possibly effectiveness when it replaces hearings. It can be more efficient in that it can be more focused, less expensive and less time consuming than a hearing. It can be more effective in that it offers opportunities for more meaningful engagement. The key unanswered question when comparing mediation to a hearing is whether mediation can be as fair. For this reason, we do not advocate using mediation as a form of EA at this juncture, and to limit its use as a replacement for a full hearing to medium size projects with limited number of participants and clearly identified interests.

In terms of implementation, we propose that whenever mediation is to be used in EA, the "case intake" stage is clearly critical. The interview data and literature identify a number of factors that should be considered at this stage. These factors are additional to general conditions for effective mediation, such as capacity and willingness to participate. Key case intake factors in our view include the following:

- Is the proponent known and trusted at least in some of the affected communities?
- Is the proponent motivated and willing to participate constructively in the mediation?
- Is the basic proposal put forward by the proponent considered acceptable in directly affected communities, or are interest groups and communities fundamentally opposed to the facility or to the facility being located in their community?
- Are there fundamental value splits between the community and the proponent, and between interest groups and the community?
- Do any of the parties have mediation experience?
- Are EA documents viewed as reasonably complete and objective, or are they considered biased in favour of the proponent?

- Are stakeholders clearly identifiable, with sufficient capacity and organization to participate effectively, ensuring that parties can be brought together into a coherent mediation process.
- Is there willingness on the part of the government decision makers to support the mediation and participants to engage?

Beyond an effective "case intake" process, a number of other general recommendations flow from the literature, practice and interview data. In our view, the following steps should be taken to ensure mediation contributes to effective, efficient and fair EA:

- There needs to be an active roster of mediators trained to deal with EA issues. Mediators should be generally experienced in mediation and receive EA specific training.
- Panel members, secretariat staff, and other regular participants in EA processes should be educated on the mediation option.
- EA processes need to build in appropriate timeframes and financial resources for mediation.
- Efforts need to be made to encourage those responsible for EA processes to identify opportunities to use mediation early, based on whether it is likely to be an effective way of resolving an issue. Mediation should not be a process of last resort.
- We recommend building the consideration of the use of mediation into the process as a formal or even required step.
- Consideration should be given to mandating the Canadian Environmental Assessment Agency and similar provincial agencies to administer a program to build capacity and infrastructure among mediation participants to ensure a reasonable power balance and equal capacity and opportunity to participate in mediation.
- Care needs to be taken to design the process to provide adequate motivation for all participants to engage constructively in mediation. This will involve general consideration of the motivation of major interests in EA, as well as the flexibility to consider how to motivate specific parties in a particular EA to constructively participate in the mediation process.
- Consideration should be given to links between mediation in the project EA context and higher tier decision making processes such as strategic environmental assessments (SEA), regional planning and sustainable development strategies. For example, an SEA process that has fully engaged the public on the broader policy

issues involved in introducing a new industry to a region might offer a particularly fruitful context for the use of mediation at the project EA level.

In conclusion, we have considered the use of mediation in EA in three ways, within traditional EA processes, as a substitute for hearings or other forms of public engagement within an existing EA process, and as a form of EA. With the steps taken that we have outlined above, we advocate for option one, the use of mediation on a more regular basis as a tool within traditional EA processes. We also suggest it is time to experiment with option two: the use of mediation as a replacement for, or complement to, a hearing or other forms of public engagement in EA processes. Option three, using mediation as a form of EA may have potential in the future, but it is premature to use mediation in this manner. Much more experience needs to be gained from the use of mediation within traditional EA processes before it should be utilized as a complete form of EA.

Given these conclusions and the pending 7-year review of CEAA, we argue that it is time for the CEA to more actively promote the appropriate use of mediation directly with Responsible Authorities, proponents and practitioners so that much needed experience can be gained. The Agency also needs to build internal capacity for case selection and the conduct of mediation in the EA context. The lack of sufficient experience makes it difficult to recommend specific legislative changes; however, a few changes can be made based on what we know. If we are going to make better use of mediation in EA, a small but critical first step will be to enshrine the mandatory consideration of mediation as a process option in legislation. In case of CEAA, such a requirement could initially be linked to the comprehensive study list. The discretion to utilize mediation for small projects could be allocated to Responsible Authorities. The legislation should be clear on what happens when mediation fails, and who determines when and whether mediation has been successful or not.

Our final thought on the use of mediation in EA is that we cannot forget the main value of moving from traditional ways of engaging members of the public to mediation. This value is the opportunity for mutual learning among participants. This is the value against which any experiments with mediation need to be measured first and foremost. The downside risks of mediation in EA should therefore only be considered where there is a clear opportunity to reap the benefits of more effective mutual learning.