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Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?

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Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge?

Abstract

As mediation gains in popularity as a tool for resolving civil disputes, and particularly as a substitute for court decisions, some have questioned mediation's ability to assure fairness of process and outcome. Others have argued that the main strength of mediation lies in the power it gives the parties to invent their own approach to resolving their dispute, leaving little room for mediators to impose their own notions of fairness on the process. This article examines the extent to which mediators have an obligation to address issues of fairness in the processes they manage. Through a functional and context-based analysis of mediation, the author proposes a problem-solving approach to resolving fairness concerns.

Keywords

Mediation; Fairness

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DEFENDING THE WEAK AND FIGHTING UNFAIRNESS: CAN MEDIATORS RESPOND TO THE CHALLENGE?[©]

BY MICHAEL COYLE*

As mediation gains in popularity as a tool for resolving civil disputes, and particularly as a substitute for court decisions, some have questioned mediation's ability to assure fairness of process and outcome. Others have argued that the main strength of mediation lies in the power it gives the parties to invent their own approach to resolving their dispute, leaving little room for mediators to impose their own notions of fairness on the process. This article examines the extent to which mediators have an obligation to address issues of fairness in the processes they manage. Through a functional and context-based analysis of mediation, the author proposes a problem-solving approach to resolving fairness concerns.

Etant donné que la médiation commence à gagner en popularité en tant que moyen de résoudre les disputes civiles, et plus particulièrement comme substitut aux décisions du tribunal, certains commencent à remettre en question la capacité de la médiation quant à l'équité du processus et du résultat. D'autres ont soutenu que la force majeure de la médiation réside dans le pouvoir qu'il confère aux parties d'inventer leur propre approche pour résoudre leur dispute, en ne laissant aux médiateurs presque pas de marge de manoeuvre pour imposer leur propres notions d'équité dans le processus. L'article examine les limites dans lesquelles les médiateurs ont l'obligation d'aborder certaines questions relatives à l'équité dans les processus dont ils se chargent. Par une analyse de la médiation fonctionnelle fondée sur le contexte, l'auteur propose une approche pour la résolution des problèmes afin de répondre à la question de l'équité.

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What is truth? said jesting Pilate; and would not stay for an answer.

—Francis Bacon¹

I. INTRODUCTION

Truth, duty, and fairness are difficult issues to reason about in a postmodern world where relativism and pluralism are privileged concepts. Nowhere, perhaps, is this more evident than in the worlds of negotiation and mediation, where preserving individual autonomy in our dealings with others is seen as a fundamental reason for choosing these processes in the first place. In contradistinction, for example, to the courts, with their constraints as to the procedures by which individuals may interact and the outcomes that can be achieved, it is said that the promise of mediation and other forms of alternative dispute resolution (ADR) is that the individuals involved are free to choose both a process and an outcome that responds to their subjective needs and interests.²

Over the past twenty years mediation has rapidly expanded as a method of resolving civil disputes in North America. In Ontario, for example, the Superior Court of Justice now has a pilot program in Ottawa that requires an attempt at mediation in the early stages of most

¹ F. Bacon, "Of Truth" in *The Essays of Francis Bacon* (Norwalk, Conn.: The Heritage Press, 1972) at 3.

² See, for example, R.A.B. Bush, "'What Do We Need Mediators For?': Mediation's 'Value-Added' For Negotiators" (1996) 12 Ohio St. J. on Disp. Resol. 1 at 6; and C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2d ed. (San Francisco: Jossey-Bass, 1996) at 8.

civil actions.³ Two years ago, the Ontario Human Rights Commission began to offer mediation to complainants in an effort to reduce the Commission's case backlog. Most Aboriginal land claims in Ontario are now addressed through mediation. The federal Department of Justice has begun a comprehensive review of the possible application of ADR principles, including mediation, within federal agencies.⁴ Mediation, in other words, is increasingly becoming a preferred method of conflict resolution in relation to disputes involving social justice or public policy. Its proponents, including the current attorney general of Ontario, laud mediation as an opportunity both to improve access to justice, and to avoid the costs and inefficiencies of traditional litigation.⁵

The proliferation of mediation, however, has raised critical questions about how indifferent society at large can afford to be in relation to the adequacy of the mediation process and the fairness of the outcomes it delivers.⁶ The litigation process, to which mediation is often offered as an alternative, offers the claims of consistency, principle, and openness to public scrutiny in the way it addresses disputes between citizens. In a context where mediation is being promoted as an adequate or superior method of dispute resolution, are advocates of mediation left with no choice but to argue that self-determination is a sufficiently important strength of mediation that the process does not need to respond to litigation's competing claims with respect to fairness? Or can mediation respond to fairness concerns, while remaining true to the values that make mediation popular in the first place?

³ The Ontario Mandatory Mediation Program is a pilot project that is currently limited to courts in Ottawa and Toronto. In Ottawa, every civil, non-family case commenced since 1 January 1997 is subject to case management and to mandatory mediation, unless an order is made otherwise. In Toronto, 25 per cent of civil, non-family cases are currently subject to case management, of which the majority go to mediation; these numbers are expected to increase dramatically by the year 2000: see Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as am. by O. Reg. 453/98, r. 24.1 (mandatory mediation), and O. Reg. 555/96, r. 77 (case management).

⁴ The federal government has established a \$4.6 million fund to support the development of dispute settlement programs within the federal government, agencies, and organizations.

⁵ See The Honourable C. Harnick, Attorney General of Ontario, "Improving Access to Our Courts" (Keynote Address to Canadian Bar Association-Ontario, 31 January 1997) at 4: "The purpose of mandatory referral to mediation is to reduce unnecessary cost and delay and to facilitate early and fair settlements."

⁶ For criticisms of the use of ADR in relation to legal disputes, see O. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073; and R. Delgado *et al.*, "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) Wis. L. Rev. 1359. See also T. Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L.J. 1545 for a critique of the use of mandatory mediation in the context of family disputes.

Writings to date on mediation tend to offer limited practical guidance to the mediator troubled by concerns about fairness in negotiation behaviour. Perhaps because the proliferation of mediation in civil disputes is a relatively recent phenomenon in North America, what has been written is often at a high level of generality. The focus, for example, has been on the over-all role of a mediator (whether it is appropriate to be "directive" or "empowering") or on the opportunities and potential disadvantages of mediation as an alternative to the courts.⁷ Other commentators have concentrated on developing or critiquing model standards of conduct for mediators.⁸ As we shall see, such standards are of limited assistance to the mediator faced with specific fairness concerns during the process, particularly in cases where the mediator seems to have conflicting duties under the standards.

Analyses to date of the role of power and power imbalances in mediation suffer from the same limitations. They generally recognize that power imbalance between the parties is a factor to which the mediator should be sensitive, and note that the mediation process offers certain tools that may reduce the impact of such an imbalance.⁹ However, there has been little published analysis, outside the context of family mediation, of the dilemma faced by the mediator where a powerful party engages in apparently unfair behaviour that the ordinary tools of mediation have not remedied, and where termination of the mediation appears to the mediator to leave the weaker party in a worse position than if the mediation had not occurred.

There are two other sources that reflective mediators could turn to when faced with apparent unfairness in the negotiation process that they are facilitating. In assessing the acceptability of various forms of deception, for example, insight can be gleaned from the published debate on the appropriateness of lying and deception in negotiations.¹⁰

⁷ See, for example, the analyses of D. Luban, "The Quality of Justice" (1989) 66 Denv. U. L. Rev. 381; Fiss, *supra* note 6; and J. Macfarlane, "The Mediation Alternative" in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (London: Cavendish Publishing, 1997) 1.

⁸ See, for example, J. Feerick *et al.*, "Standards of Professional Conduct in Alternative Dispute Resolution" (1995) 1 J. Disp. Resol. 95; American Arbitration Association, American Bar Association & Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators* (Washington, D.C.: ABA, AAA, SPIDR, 1995) [hereinafter *Joint Standards*]; and L. Riskin, "Towards New Standards For the Lawyer in Mediation" (1984) 26 Ariz. L. Rev. 329.

⁹ See the discussion of the literature in Part 2(C), below.

¹⁰ See E.H. Norton, "Bargaining and the Ethic of Process" (1989) 64 N.Y.U. L. Rev. 493; G.B. Wetlaufer, "The Ethics of Lying in Negotiations" (1989-90) 75 Iowa L. Rev. 1219; J.J. White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980) Am. B. Found. Res. J. 926; and R.J. Lewicki *et al.*, *Negotiation*, 2d ed. (Chicago: Irwin, 1994) at 371-406.

Some degree of deception occurs in many, if not most, negotiations. However, as yet, there is no clear consensus on where the ethical boundary of unacceptable deception should be placed, nor is the mediator's duty clear when a party crosses that boundary.

Finally, some writers have suggested that mediators could usefully turn to traditional, ethical, and philosophical thinking in their effort to address ethical dilemmas, including the question of how to respond to apparently unfair negotiation behaviour.¹¹ Valuable for their exhortation to mediators to be clear and explicit regarding their own value systems, these commentators have had less to say about how a mediator might systematically develop a coherent relationship between the mediator's ethical values, the expectations and values of the parties themselves, and the functional goals of mediation.

There is evidence that many practising mediators care deeply about issues relating to procedural and substantive fairness in the negotiations they chair.¹² If the dispute involves legal entitlement, public policy, or human rights, are there meaningful options available to the mediator to address fairness concerns? What, for example, should the mediator do in a situation where one party appears to be using a gross inequality of power to extract consent to an outcome that is not consistent with the mediator's view of the likely judgment of a court? (The presence of counsel on both sides may not alter this power dynamic, particularly if the weaker party has little in the way of financial resources to pursue the issue in court.) If one party does not have the resources to support a court action and the stronger party reveals to the mediator that it has deceived the other in relation to a material fact, and if the stronger party cannot be persuaded to rectify the deception, are the ethical mediator's only available options to remain silent or terminate the process? These are important questions both for practising mediators and potential participants in mediation.

The purpose of this article is to suggest a framework by which mediators might systematically analyze ethical dilemmas similar to those posed above. While questions of duty and personal ethics are inevitably coloured by subjective considerations, this article will present a model

¹¹ See K. Gibson, "The Ethical Basis of Mediation: Why Mediators Need Philosophers" (1989) 7 *Mediation Q.* 41; S.C. Grebe, "Ethics and the Professional Family Mediator" (1992) 10 *Mediation Q.* 155; and L.M. Cooks & C.L. Hale, "The Construction of Ethics in Mediation" (1994) 12 *Mediation Q.* 55.

¹² See, for example, R.A.B. Bush, "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications" (1994) 1 *J. Disp. Resol.* 1 at 42-43 [hereinafter "The Dilemmas of Mediation"].

whereby the mediator's choices can be placed within a reflective framework that gives expression to the stated goals of mediation, the reasonable expectations of the parties, and the integrity of the process. We will show that a systematic problem-solving approach, involving preventative skills and mediator imagination, might assist the mediator to find appropriate, context-based solutions to the "problem" of deceptive or unfair conduct in negotiations.

To set the issues in sharp relief and to illustrate how the proposed approach might be applied, we will consider four hypothetical situations, set in the context of Aboriginal land claims mediation.¹³ Those scenarios are as follows:

(1) The chief negotiator for the government indicates, over a conference call involving the mediator and the First Nation negotiator, that the government does not provide compensation for a particular type of loss suffered by the First Nation. The mediator knows this is untrue, having been involved in previous negotiations where such compensation was provided.

(2) A government negotiator advises the mediator in confidence that his mandate permits him to place several million dollars on the table over the amount previously offered. This will be used, he says, only if a settlement is otherwise impossible.

(3) A government negotiator indicates in caucus to the mediator that her statement at the negotiation table, that she needs a delay of several months to reconsider the government's legal position, was misleading. In fact, she believes that a lengthy delay in the negotiations, which have been ongoing for several years, might help "cool" the settlement expectations of the First Nation, which she says are unreasonable.

(4) The parties have not made progress in a particular mediation for several months, primarily because of a significant difference in views on the legal principles that should apply to measure the First Nation's loss. The government negotiator has rejected the First Nation's request that the issue be directed to a mutually acceptable neutral legal expert

¹³ In the past three years, the Crown and First Nations in Ontario have experienced considerable success in settling long-standing land claims. Still, land claims mediation offers a convenient context to examine mediation fairness concerns for at least two reasons. First, achieving a fair outcome through a process that promotes reconciliation of the parties is an express goal of land claim negotiations. Second, in most cases, government negotiators enjoy a considerable power advantage. This is so not only because of the federal and provincial governments' greater resources, but also because the Crown's alternatives to a negotiated settlement are generally more favourable than the First Nation's. As a result, "unfair" tactics that might be adopted by the Crown in a mediation have particular potential to cause injury to the other side. The problem-solving framework developed in this article would apply to the negotiating conduct of any party.

for a non-binding view on the parties' legal positions. The mediation has been ongoing at taxpayers' expense for several years and significant progress has occurred on other elements of the claim.

How should the mediator respond, if at all, to the potential fairness issues raised by each of these scenarios? What are the sources of the mediator's obligations, if any, as they relate to fairness? Can the mediator's duty of impartiality be reconciled with mediator intervention in any of these cases? If mediator intervention can be justified, how can it be effected without betraying the expectations of the stronger party regarding the mediator's role as the facilitator of a process that respects both parties and their autonomy? These are questions that go to the heart of mediation practice.

II. POSSIBLE SOURCES OF A DUTY OF FAIRNESS

A. *A Functional Analysis of Mediation*

A logical place to begin our analysis of mediators' duties in relation to unfairness is by returning to first principles: consensus views as to the nature and purpose of mediation. In North America it is generally accepted that "mediation" refers to a process whereby an independent third party, without the authority to impose solutions upon the parties, endeavours to assist the parties to reach a negotiated agreement on issues of mutual concern.¹⁴ The process is usually one that is voluntarily entered into by the parties (although, as noted above, courts in Ontario have recently begun to require litigants at least to attempt mediation)¹⁵ and it is one that can be terminated by either party, or in certain circumstances, by the mediator. While the parties participate in the process at their own prerogative, they are also responsible (with the mediator) for fashioning the procedures by which the mediation will be conducted, and the terms of any agreement that result from the process. Mediation allows the parties to be highly participatory, in contrast to the traditional litigation process where lawyers, judges, and witnesses play a large part in describing and resolving the dispute. At the same time, the mediation process is

¹⁴ See Moore, *supra* note 2; Macfarlane, *supra* note 7 at 2; and R.A.B. Bush & J.P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) at 2.

¹⁵ See *Rules of Civil Procedure*, *supra* note 3, r. 24.1.

generally more informal than the courts, a fact which can permit the parties to address their dispute in a time-saving and cost-effective way.

Still, party autonomy, high participation, and informality are not unique to mediation, for they are characteristic of negotiation generally. What is fundamentally distinct about the mediation process is, presumably, the presence of a mediator. In North America, where the mediator is typically an independent party chosen by the disputants, one way in which the mediator is generally expected to be able to assist the parties is by bringing a new, external perspective to the process and to the parties' conflict. The mediator's *objectivity*, it is hoped, might assist the parties in communicating their perceptions of the conflict, in exploring their underlying interests, and in inventing options which might satisfy both parties' objectives. This is the functional goal that underlies the current consensus that a fundamental characteristic of formal mediation is that the mediator be a "neutral," with an objective view of the issues and the parties.

There is no universally accepted view, however, as to how exactly the third-party "neutral" should go about assisting the parties in relation to their dispute, nor is there consensus on how to define the appropriate limits of mediator interventions. There is general agreement that a mediator may usefully intervene in a number of ways. These include assisting in the setting of agendas; setting ground rules to promote respectful and meaningful communication between the parties; facilitating discussion of the parties' underlying interests; helping the parties collectively to invent and subsequently evaluate options that might satisfy their respective interests; "reality checking" in caucuses with the parties when their demands appear exaggerated; and preparing "one-text" draft agreements for the parties to consider.

While we will reflect later upon the different emphases that practising mediators place upon the interventions open to them, objectivity is the *sine qua non* that permits the mediator to be effective in each of these roles. The mediator's distance from the dispute (and from the benefits or trades that form the basis of an ultimate agreement) is what permits the mediator to bring a new and useful perspective to the dispute. A mediator who is perceived by either party as being too close to one party's interests will be viewed as merely another advocate at the table. In short, the mediator will not be effective.

The mediator's objectivity also serves the process by giving the mediator credibility in presiding over the ground rules of the mediation. To the extent that the mediator is charged with guiding the communication dynamic at the table (encouraging constructive dialogue, and controlling the flow of argument in a balanced and equitable way)

mediator objectivity is said to be key to inspiring party confidence in the process.

Finally, mediator objectivity has a functional value to the extent that the mediator may be able to assist the parties to resolve their dispute by encouraging them to reconsider initial positions, or by providing draft agreements that are less prone to reactive devaluation by one of the parties (*i.e.*, devalued simply because they were produced by an “adversary”).

Do the functions of mediator objectivity described above require that the mediator be *a priori* indifferent to negotiation behaviour that might reasonably be regarded as unfair? From a purely functional perspective, objectivity does not appear to require such indifference. For example, mediator objectivity is not inimical to an agreement by all parties that the mediator will be responsible to implement agreed procedural rules. Indeed, the mediator’s distance in interest from the parties and the benefits of any outcome arguably makes mediation an ideal forum for the enforcement of rules of procedural fairness. Further, in many cases the parties may in fact be proceeding from an unstated assumption that the mediator would not knowingly permit certain types of deceptive or exploitative conduct. Viewed in this light, the challenge becomes not whether the mediator’s distance from the parties requires the mediator to be passive in the face of such conduct, but rather whether the mediator is obliged at the outset to seek the parties’ agreement on what sorts of negotiation conduct fall within their expectations of the mediation.

For the mediator to accept some responsibility in relation to fairness does not seem inconsistent with the principle of party autonomy either. Although the ability of the parties to exercise freedom in their choice of negotiation behaviour is an important value of mediation, in that it permits the development of a negotiation process that recognizes the parties’ values and decisionmaking power in relation to their conflict, it does not follow that the ground rules agreed to must permit absolute licence in choice of negotiation behaviour, including the right to act dishonestly in a manner that injures the other. Other socially validated institutions, including the courts, do not grant this licence.¹⁶ Indeed, discouraging and responding to deceptive conduct in negotiations would promote the capacity of the parties to make informed decisions

¹⁶ For the classic liberal position on the exercise of freedom within a democratic society, see John S. Mill, “On Liberty” in J. Gray & G.W. Smith, eds., *J.S. Mill: On Liberty in Focus* (New York: Routledge, 1991) 23 at 108.

regarding the subject of the negotiations.¹⁷ In sum, unless other factors suggest that the context or the parties' expectations require that the mediator not intervene in cases of deception or exploitative behaviour, mediator objectivity and respect for party autonomy seem consistent with an even-handed response to such concerns.

A second accepted function of the mediator is to facilitate and enhance *constructive communication* between the parties. Skilled mediators can resort to a number of techniques to improve the level of communication between disputants and to reduce the likelihood of psychological damage from emotional exchanges. As described by Christopher Moore, for example, effective communication between the parties can be hindered by a number of factors, including excessive posturing, disrespectful conduct, extreme demands, jumbled communication, and inaccurate listening (due to emotional involvement, a dysfunctional relationship, or an adversarial mode of thinking).¹⁸ Skilful and sensitive mediators can minimize such communication dysfunctions in a number of ways. They can prevent interruptions, and reframe and restate communications in a way that promotes listening and understanding. They can use confidential caucuses with each party to encourage openness in the expression of concerns and objectives. They can use probing questions to draw out the basis of the parties' positions, and they can intervene in various ways to prevent unproductive emotional escalation by the parties.¹⁹

Although there is little doubt that enhancing communication at the table can play a key role in assisting parties to address their dispute effectively, an interesting tension is created between the mediator's function in this regard and the desire of most negotiators not to be completely transparent as to their objectives, alternatives to negotiation, and reservation points for settlement. (Indeed, this is what gives the confidential caucus in mediation much of its value for the parties.) We will examine later the legitimacy of non-disclosure and deception in negotiation, taking into account the mediator's obligation to protect confidential communications. It is worth noting, however, that barring other justifications, the mediator's function of maximizing effective communication also seems to conflict with an attitude of indifference to deception in general.

¹⁷ This is consistent with the analysis of L. Stamato, "Easier Said Than Done: Resolving Ethical Dilemmas in Policy and Practice" (1994) 1 J. Disp. Resol. 81 at 84.

¹⁸ See Moore, *supra* note 2 at 182-90.

¹⁹ *Ibid.* at 209-21.

A third significant value that the mediator brings to the process is *expertise*. Mediator expertise can take two forms. First, the effective mediator brings knowledge of process, derived from training and experience, that can assist the parties in a number of ways. The mediator's understanding of the causes and manifestations of conflict can bring insight and a broader perspective to the table regarding the parties' dispute. The mediator can also draw on that expertise to help the parties determine the most effective method of attempting to resolve their dispute. Thus, the mediator might bring a sophisticated problem-solving approach to parties that are experienced only in positional approaches to negotiation. Or, for example, the mediator's familiarity with opportunities for joint fact-finding or appraisals and the availability of qualified neutrals to conduct such work, might assist the parties to clarify subsidiary issues, thereby reducing the scope for adversarial argument.²⁰ Second, mediators can offer desired expertise relating to the substance of the negotiations, whether through knowledge of particular modalities for achieving solutions that might satisfy both parties' interests or, more controversially, through expertise that may be sought by the parties as to the likely ruling of a court on the issues under negotiation.

If a key function of the mediator is to bring procedural expertise to the table, it is at least conceivable that the parties would be receptive to a mediator's proposal that they avoid certain "unfair" or "deceptive" behaviour, particularly where permitting such behaviour would undermine the parties' commitment to engage in a cooperative effort to resolve their dispute. We will return to this point below.

The introduction of objectivity to a dispute, enhancement of party communications, and access to mediator expertise are critical functions of mediation. However, other important functional values can also be attributed to mediation. *Efficiency* in addressing conflict is one of these. Parties can achieve cost savings compared to litigation because of mediation's relative informality, the absence of burdensome procedural rules relating to disclosure and giving evidence, as well as the absence of monolithic institutions in the process. Like negotiation, mediation offers the opportunity for non-distributional solutions to

²⁰ For an overview of the various types of expertise brought by mediators using four general orientations toward intervention, see L.L. Riskin, "Understanding Mediators' Orientations, Strategies and Techniques: A Grid For the Perplexed" (1996) 1 Harv. Negotiation L. Rev. 7 [hereinafter "Understanding Mediators' Orientations"]. For a discussion of the application of mediator expertise in public policy disputes, see L. Susskind & J. Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (New York: Basic Books, 1987) at 149-50, 162-65.

disputes, which may lead to higher overall traded value and settlements that are more responsive to the underlying interests of the parties. As in negotiation, the solutions resulting from mediation tend to be durable because they are developed by the parties themselves. Also, the parties' experience in resolving their own dispute may strengthen their continuing relationship and give them a basis for constructively addressing, or preventing, future disputes that may arise between them.

Finally, in certain contexts, particularly where the disputants have an ongoing relationship, a key value of mediation may lie in its potential for *social transformation*. Through its reliance on a non-adversarial framework (in the sense that it favours an effort by both parties to understand and coexist with the other) in a setting presided over by a person with no authority to subjugate one party's interests to the other's, mediation has been promoted as a vehicle for personal growth and empowerment.²¹ For similar reasons, institutional mediation has also been promulgated in certain contexts as a preferred forum for addressing issues relating to social policy and improving relations between one social group and the body politic as a whole.²² Like the values of mediator objectivity, respect for party autonomy, enhanced party communications, and mediator expertise, the goals of encouraging durable agreements and promoting personal and social transformation appear consistent with mediator concern for fairness.²³

Can it be said, then, that mediators should be recognized as having a positive duty to assure minimal standards of fairness, either as to procedures or outcome? Let us consider the issues of substantive fairness (fairness as to outcome) and procedural fairness (fairness as to process) in turn. *Prima facie*, insofar as mediation is a voluntary process in which, by definition, the mediator has no power to impose a particular settlement, it is problematic to expect that mediation can assure an outcome that meets any standard of fairness independent from what the parties are ultimately able to agree upon. On the other hand, it is well recognized that mediators have the right to withdraw from the mediation process at any time. However, this prerogative does not equip mediators with the power to determine the parties' settlement for them. Apart

²¹ See, for example, Bush & Folger, *supra* note 14 at 81-112.

²² Thus, in Canada organizations such as the Indian Commission of Ontario and the Indian Specific Claims Commission have been established with mandates that include facilitation of claims and other governmental negotiations between Aboriginal groups and the Crown.

²³ Although it may well be that in the interest of efficiency, the extent of fairness requirements (in relation to sworn disclosure, for example) chosen by the parties will not be the equivalent of court rules.

from the power to withdraw, the only other power that mediators' functions would permit them to exercise directly in relation to fairness of substantive outcome appears to be the power to question the parties about the standards of fairness implicit in their positions or in a proposed settlement.²⁴ To the extent that a particular mediation process functions as an alternative to court resolution or as a means of resolving public policy or human rights issues, such an approach appears consistent with the functional goals of mediation. Still, to expect the mediator to go beyond questioning the parties in relation to substantive fairness, promoting the mediator's own conception of an appropriate settlement (at least without a request from both parties), would generally be unproductive and would defeat the nature of the mediation process—which is intended to permit the parties to fashion their own resolution of the dispute.²⁵

A commitment to assure some degree of *procedural fairness* appears much less vulnerable to attack as inimical to the functions of a mediator. It is accepted that an important role of the mediator is to assure the parties an equal opportunity to engage in a meaningful dialogue.²⁶ Further, as noted earlier, the principles of mediator objectivity and respect for party autonomy are consistent with the adoption by the mediator of a role in addressing deceptive conduct. In practice, however, adopting such a role may at times conflict with another duty (for example, mediators' duty to respect an obligation of confidentiality that may cloak the circumstances in which they learned of the deception). Where mediators are faced with such a conflict, resort to the functions of mediation in a general context does not appear to be decisive on the question of how mediators should respond.

It might be argued that the response to this dilemma depends, at least in part, upon how implicated the mediator should be considered to be in the integrity of the process generated by the parties. This in turn reflects the degree of interventionism that mediators are prepared to adopt or, put another way, the deference that particular mediators are prepared to manifest toward the principle of party autonomy. In general terms, there are four prevalent approaches adopted by mediators in this regard: (1) the problem-solving approach, where the mediator actively assists the parties in analyzing their interests, developing options that

²⁴ This approach is urged in relation to public policy mediation by Susskind & Cruikshank, *supra* note 20 at 164.

²⁵ Of course, it is always open to the mediator to suggest that the parties obtain appropriate advice on the substantive issues.

²⁶ See, for example, Moore, *supra* note 2 at 209-11, 336-37.

might address those interests, and finding neutral criteria for evaluating the acceptability of those options;²⁷ (2) the evaluative approach, where the mediator is asked to offer a non-binding view on the likely outcome of an adjudication of the dispute;²⁸ (3) the facilitative approach, whereby the mediator focuses primarily on encouraging constructive and respectful communication among the parties;²⁹ and (4) the transformative model, in which the mediator focuses on assisting the parties to become personally empowered by the manner in which they deal with the conflict.³⁰

Each of these approaches places a different emphasis on the values that mediation can provide: the neutral's objectivity; the neutral's expertise with respect to process; the neutral's expertise in relation to substance; and the neutral's ability to enhance communications between the parties. Can it be argued that because each approach reflects a different type of interventionism on the mediator's part, each might lead to different party expectations and (corresponding) duties on the part of the mediator in relation to deception or exploitative behaviour? Certainly in the case of a neutral who evaluates the strength of legal positions on the basis of agreed facts provided by the parties, the presence or absence of full communications regarding other elements of the dispute may have little relevance to the neutral's role or utility. In the case of the other three types of mediation, however, it is difficult to see how indifference to deceptive communications or exploitative behaviour is consistent with the primary function the mediator is trying to advance. We are left, then, with our original dilemma: how to balance the need of each party to participate in the process in a meaningful, productive, and informed way, with the competing demands of party autonomy and possibly confidentiality.

One view of how to resolve the dilemma of competing functional demands on the mediator has been expressed by Baruch Bush, a prominent and thoughtful advocate of the transformative approach to mediation. Bush has recently proposed a model standard of practice for mediators that deals specifically with the control of intentional abuse of the mediation process. His proposed rule would provide as follows:

²⁷ See, for example, Susskind & Cruikshank, *supra* note 20 at 178-84; and L. Susskind & P. Field, *Dealing With an Angry Public: The Mutual Gains Approach to Resolving Disputes* (New York: Simon and Schuster, 1996) at 37-42.

²⁸ See "Understanding Mediators' Orientations," *supra* note 20 at 26-32.

²⁹ See *ibid.* at 28-29, 32-34, for a description of two versions of this approach. See Susskind & Cruikshank, *supra* note 20 at 152-61, for a description of this approach in public sector settings.

³⁰ See Bush & Folger, *supra* note 14 at 81-112.

Where a mediator discovers an intentional abuse of the process, such as non-disclosure of vital information or lying, the mediator is obligated to encourage the abusing party to alter the conduct in question. The mediator is not obligated to reveal the conduct to the other party, nor to discontinue the mediation; but the mediator may discontinue, so long as this does not violate the obligation of confidentiality.³¹

Protecting confidential communications is an inescapable duty of the mediator. With respect, however, the suggestion that, as a general rule, mediators have no obligation to act when faced with lying or non-disclosure of vital information by one party, or to discontinue the mediation, but that mediators must protect at all cost the confidentiality of the party who hopes to gain from deception is a puzzling one. On its face, this rule would appear to apply regardless of the context of the mediation or the nature of the deception. The rule seems to result from a conclusion that one mediator function (the protection of party autonomy) should trump the other functions of mediation in all circumstances, regardless of the type of mediation or the parties' reasonable expectations in the context.³² Further, consciously permitting one party to deceive the other in relation to a fact material to the resolution of the dispute appears inconsistent (at least from one of the parties' perspectives!) with party empowerment or with recognition of the situation of both parties. Bush's proposed rule does not explain how mediation's acceptance of deception generally (including cases in which there is no attempt to justify the deception as "permitted" by the rules of negotiation) can be reconciled with the view that mediation should assist the parties to resolve their conflict in a durable manner that is likely to continue to be supported by the parties after the mediation.

From a functional perspective, promulgation of a general norm that mediators will permit deception as to material facts, and might not even terminate the mediation upon discovering such deception, would seem to place unscrupulous parties in an unusually advantaged position. They would know that by going to mediation they could use deception and benefit, without risk, from the abilities of a mediator and any expectations the other disputant might have as to the cooperative nature of mediation.³³ Where mediation is being promoted by public policy or

³¹ "The Dilemmas of Mediation," *supra* note 12 at 55.

³² Linda Stamato also suggests that it is not helpful to address the relationship between mediator duties in the abstract: see *supra* note 17 at 82.

³³ Of course, such a party may, depending on the context, be held liable for misrepresentation if discovered. Legal counsel in negotiations would remain bound by the duties owed to their profession, including the duty to act with integrity. See, for example, Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1997) Rule 1 [hereinafter *LSUC Rules of Professional Conduct*].

by public agencies as an alternative to litigation, this would seem to be a particularly problematic result. As Owen Fiss and other critics of ADR processes have pointed out, the absence of general requirements of disclosure and of evidence under oath, combined with the absence of formal procedural protections for weaker or relatively impecunious parties, already renders mediation a process that is vulnerable to abuse by stronger or manipulative parties.³⁴ Functionally, a norm that makes clear there will be no sanctions for any kinds of deception in the mediation process would make mediation even less credible and viable as an alternative to litigation, particularly in cases involving legal entitlement, government policy, or human rights.

In addition to the credibility of mediation generally, there is another functional reason why it seems important for mediators to be concerned with unfairness in negotiation behaviour: namely, the mediator's personal involvement in the process. The very nature of the mediation process is that it creates a *triad* of individuals involved in the effort to resolve the dispute.³⁵ Regardless of the mediator's approach, the mediator is for all purposes an integral part of the process, not a spectator. The mediator's responsibilities in facilitating the parties' communications at the very least make the mediator part of the process. In this sense, the mediator cannot help being implicated, at least at some level, in unfair behaviour that the mediator becomes aware of but of which one party remains ignorant. The mediator is a moral agent involved in the process. In keeping with our analysis of the nature of mediation and the functions of the mediator, the question then becomes how the mediator should reconcile knowledge of deception or "unacceptable" behaviour with his or her functions as mediator (including the duty to be impartial to *both* sides in the dispute) and with his or her ethical framework.

In conclusion, it is suggested that a review of the essential functions of mediation provides several cogent reasons why mediators should be concerned about fairness issues at the negotiation table. The challenge that remains for mediators is how to determine, in a particular context, whether conduct should be considered unfair, and how to respond, keeping in mind other duties that they may owe as a result of their functions. Let us turn now to some of the most prominent codes of

³⁴ See Fiss, *supra* note 6; and Luban, *supra* note 7.

³⁵ For an analysis of how the presence of a third party changes the dynamics of communication between two negotiating parties, see V. Aubert, "Competition and Dissensus: Two Types of Conflict and Conflict Resolution" (1963) 7 J. Conflict Resol. 26.

conduct for mediators practising in Ontario to see whether they offer assistance in addressing this challenge.

B. *Model Standards of Conduct as a Guide to Mediators in Relation to Fairness*

The past fifteen years have seen a proliferation of model standards by associations of mediation practitioners, particularly in the United States. In 1994, the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution jointly adopted model standards (the "Joint Standards") intended "to serve as a general framework for the practice of mediation."³⁶ A number of state and provincial associations of mediators have also adopted model codes of conduct³⁷ and associations of mediators in particular fields such as family disputes have followed suit.³⁸ With the exception of certain standards imposed on mediators who participate in court-connected mediation programs, such as the mandatory mediation program associated with the Ontario Superior Court of Justice,³⁹ model standards of conduct are not binding in a strict sense. Instead, they typically state that their intention is to serve as a guide for mediators' conduct, to educate the public and clients of mediation, and to promote public confidence in mediation.⁴⁰ As documents publicly promulgated by experienced mediators, the model standards are important references not only for insights they might provide the individual mediator, but also because they may be relevant to the expectations that parties might reasonably be expected to bring to mediation.

³⁶ *Joint Standards*, *supra* note 8 at i.

³⁷ Similar initiatives have been undertaken by Illinois, Colorado, and Florida. The Canadian Bar Association-Ontario has approved a draft set of guidelines for lawyer mediators: see Canadian Bar Association-Ontario, *Model Code of Conduct for Mediators* (Toronto: CBAO-ADR Section, 1998) [hereinafter *CBAO Model Code*]. See also *LSUC Rules of Professional Conduct*, *supra* note 33, Rule 25, which briefly addresses the duty of a lawyer acting as mediator to ensure that the parties understand that the lawyer is not acting as counsel for either party, and to recommend that the parties seek independent legal advice.

³⁸ See Family Mediation Canada, *Code of Professional Conduct* (Guelph: Family Mediation Canada, 1996) [hereinafter *Family Mediation Code*].

³⁹ This program requires participating mediators to follow the *CBAO Model Code*, *supra* note 37: see Ontario Mandatory Mediation Program, *Code of Conduct* (Toronto: Ontario Mandatory Mediation Program, 1999) [hereinafter *OMMP Code*], published with the *Rules of Civil Procedure*, *supra* note 3, r. 24.1.

⁴⁰ See *Joint Standards*, *supra* note 8; and *CBAO Model Code*, *supra* note 37.

What do the model standards say about the duties of the mediator in relation to deceptive or unfair negotiation behaviour? The Joint Standards identify duties of the mediator to respect the principle of self-determination;⁴¹ a duty to remain impartial and even-handed;⁴² to show the competence necessary to satisfy the reasonable expectations of the parties;⁴³ to respect the reasonable expectations of the parties with regard to confidentiality;⁴⁴ and finally, to conduct the mediation fairly, diligently, and in a manner consistent with party self-determination.⁴⁵ Other standards, including the Canadian Bar Association-Ontario Model Code (“CBAO Model Code”) used in the Ontario Mandatory Mediation Program, tend to cite the same primary duties.⁴⁶

However, the model standards tend to offer only limited guidance on the specific issue of the mediator’s obligations in relation to fairness and deceptive behaviour. Fairness in the Joint Standards is presented only in the context of procedural fairness as follows: “A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness.”⁴⁷ The Joint Standards do not clarify what is meant by “procedural fairness.” Nor do they clarify whether and how it would be appropriate for the mediator to intervene where one party’s conduct appears exploitative or deceptive.

The CBAO Model Code is even less specific about mediator duties to assure fairness. Article VII of the Code entitled “Quality of the Process,” requires mediators to ensure that the process “encourages respect among the parties.”⁴⁸ Mediators are required to have the skills necessary to “uphold the quality of the process,” although the latter term is not defined.⁴⁹ And the definitions section of the Code indicates that one role of the mediator is to encourage the parties to negotiate in good

⁴¹ See *Joint Standards*, *supra* note 8, Article I.

⁴² *Ibid.* Article II.

⁴³ *Ibid.* Article IV.

⁴⁴ *Ibid.* Article V.

⁴⁵ *Ibid.* Article VI.

⁴⁶ See *CBAO Model Code*, *supra* note 37, Articles 3-7, which closely mirror the *Joint Standards*, *supra* note 8.

⁴⁷ See *Joint Standards*, *supra* note 8, Article VI. See also Article VI (Comments), which requires the mediator to withdraw where the mediation is “being used to further illegal conduct” or where a party is unable to participate as a result of physical or mental incapacity.

⁴⁸ *CBAO Model Code*, *supra* note 37, Article VII.

⁴⁹ *Ibid.*

faith with each other.⁵⁰ However, unlike the Joint Standards, upon which it seems to be modelled, the CBAO Model Code does not expressly recognize any duty on the mediator's part to assure procedural fairness. Presumably this omission was deliberate. At any rate, mediators in the mandatory mediation program in Ontario are issued written instructions that, "in addition to the principles set out in the CBAO Model Code of Conduct" mediators who participate in the program must make a commitment "to encourage fairness within the mediation process."⁵¹

It would be inaccurate, however, to conclude that the CBAO Model Code ignores the importance of fairness within the mediation process. In fact, the Code stipulates that mediators may suspend a mediation in six cases, at least five of which are based on fairness concerns. They include situations where, in the mediator's opinion, the process is likely to prejudice one or more parties, or is detrimental to one or more parties or the mediator; or where a party is using the process inappropriately, is delaying the process to the detriment of the other, or is not acting in good faith.⁵² In each case, if the condition is not rectified, the mediator is required to terminate the process.⁵³ The CBAO Model Code does not define "prejudice," "detriment," or lack of "good faith," and does not offer guidance to the mediator as to how to formulate and monitor a process that would help protect the parties from such a result. Nor (apart from the option of suspending negotiations) does the Code offer guidance as to how a mediator should intervene to try to rectify such a situation if it arises. In the end, although the CBAO Code states that its three main objectives are to guide mediators' conduct, to provide a means of protection for the public, and to promote confidence in mediation,⁵⁴ it actually offers very little philosophical or practical assistance to the mediator faced with fairness concerns.

Some standards of conduct refer directly to the mediator's function in monitoring both procedural and substantive fairness.⁵⁵ The

⁵⁰ *Ibid.* Article II.

⁵¹ *OMMP Code*, *supra* note 39, Article III(1)(j).

⁵² See *CBAO Model Code*, *supra* note 37, Article XI.3.

⁵³ *Ibid.* Article XI.4.

⁵⁴ *Ibid.* Article I.

⁵⁵ See the discussion of the Colorado standards in A.M. Davis & R.A. Salem, "Dealing With Power Imbalances in the Mediation of Interpersonal Disputes" (1984) 6 *Mediation Q.* 34; and of the Illinois standards in J. Dworkin & W. London, "What is a Fair Agreement?" (1989) 7 *Mediation*

Family Mediation Canada Code of Professional Conduct (“Family Mediation Code”) devotes an entire article, including six sub-rules, to “Ensuring Fair Negotiations.” The Family Mediation Code states that the mediator has an obligation “to ensure procedural fairness,”⁵⁶ and to ensure that the participants reach agreement on the basis of informed consent.⁵⁷ Further, the Code stipulates that “impartiality does not imply neutrality on the issue of fairness,” requiring the mediator to ensure “balanced negotiations” and to prevent “manipulative or intimidating negotiation techniques.”⁵⁸ The Family Mediation Code also addresses the issue of substantive fairness, stating explicitly that the goal of family mediation is a “fair and workable agreement.”⁵⁹ Mediators are given authority to terminate the mediation if they believe that any agreement being reached is “unconscionable.”⁶⁰ In general, the Code is helpful to family mediators in identifying specific mediator duties in relation to substantive and procedural fairness, and for its particular focus on the importance of informed consent. However, the Code does not directly deal with deception, nor does it purport to give the mediator practical direction in developing a response to manipulative negotiating tactics.

In general, however, particularly outside the area of family law, the standards of professional conduct reviewed offer little guidance on the ongoing obligations of mediators in relation to fairness. Most impose no obligation on the mediator to ensure the substantive fairness of settlement options. This is a view that is consistent with our functional analysis of mediation, which leaves responsibility in the parties’ hands to determine an outcome that best meets their interests. It fits also with the practical reality that the mediator is not likely to be an expert on the strength of each party’s legal position nor, in most cases, would the mediator be capable of prioritizing their objectives in relation to the dispute.⁶¹

Q. 3 at 6.

⁵⁶ *Family Mediation Code*, *supra* note 38, Article 9.2

⁵⁷ See *ibid.* Article 9.1.

⁵⁸ *Ibid.* Article 9.4.

⁵⁹ *Ibid.* Article 3.

⁶⁰ *Ibid.* Article 13.4, although, as grounds for terminating the mediation, it is not enough that the agreement fails to meet “legal guidelines”: see *ibid.* Article 9.6.

⁶¹ It is interesting that the strongest statements of mediator responsibility in relation to substantive and procedural fairness arise in the context of family mediation. Perhaps this is a function of the perceived importance of social values in that area or of the fact that innocent third parties may be affected by the mediation outcome, or due to a different ethic of care resulting from the preponderance of women practitioners in this area. A mediator duty in relation to substantive fairness has also been argued in the context of public disputes: see, for example, Susskind &

On the other hand, most of the professional standards reviewed do impose a general obligation on the mediator to ensure some degree of procedural fairness, and expressly authorize termination of the process if the mediator believes that one party is not participating in good faith, or that continuing the mediation will cause harm to one of the parties.⁶² This too meshes with our analysis of the functions of mediation, particularly the goals of enhancing communication and protecting party autonomy. As noted, however, the standards are generally of little assistance in defining the extent of the mediator's responsibilities in relation to procedural fairness.⁶³

Even more importantly for our purposes, model standards of conduct for mediators offer little or no guidance as to the appropriate course for mediators where a duty in relation to fairness appears to conflict with the duty to respect party autonomy, impartiality, or confidentiality. Yet this is exactly the locus where the most difficult issues of duty are likely to arise for experienced mediators.⁶⁴ Thus, under the Joint Standards it is left to the mediator to choose how party autonomy and procedural fairness should be defined and weighed where the mediator is aware that deliberate deception has occurred regarding a material fact. The language of the Joint Standards appears to privilege the concepts of party autonomy, impartiality, and confidentiality (described respectively as "fundamental," "central," and "important") but does not authorize the mediator to subordinate any one of the enumerated duties.

The Joint Standards, like the CBAO Model Code, do not offer practical guidance, other than terminating or suspending the mediation, for mediators aware of a negotiation tactic that they consider deceptive

Cruikshank, *supra* note 20 at 164.

⁶² See *CBAO Model Code*, *supra* note 37, Article XI.3.

⁶³ The vagueness of the model standards' prescriptions in relation to fairness finds its reflection in a wide variety of approaches to fairness by practitioners and writers alike. For example, Baruch Bush argues that the mediator has no general duty to correct intentional deception by one party, even in relation to a "vital fact," if the deceiver cannot be persuaded by the mediator to do so himself: see "The Dilemmas of Mediation," *supra* note 12. In contrast, C. Chaykin, "Mediator Liability: A New Role for Fiduciary Duties?" (1984) 53 U. Cin. L. Rev. 731 at 752, 759, suggests that a mediator who permits deception or lack of information to play a part in the fashioning of a negotiated settlement may be held liable for breach of fiduciary duty in certain contexts. See also J.L. Maute, "Public Values and Private Justice: A Case for Mediator Accountability" (1991) 4 Geo. J. Legal Ethics 503 at 504-05, where the author advocates a particularly strong test of mediator accountability for fairness in cases where mediation supplants public adjudication of the dispute.

⁶⁴ This point is suggested by Stamato, *supra* note 17 at 86; and "The Dilemmas of Mediation," *supra* note 12 at 45.

or unfair.⁶⁵ The challenge for the mediator becomes particularly pronounced when, as in three of the hypothetical scenarios described in Part I, above, the mediator has become aware of apparently deceptive behaviour through a confidential discussion with one of the parties. Short of withdrawing from the mediation, what strategies should the mediator adopt to promote procedural fairness and the integrity of the process? Here again, the model standards are generally unhelpful.⁶⁶

As might be expected, model standards do not respond to the special circumstances that may surround a process of institutional mediation expressly established to advance particular social values of equity and fairness, such as the mediation of human rights complaints or Aboriginal claims. Nor do the standards deal directly with the special context of power imbalance between the parties. This appears to be a particular weakness of the standards for mediations that either replace a court determination of the issues or occur in the context of a policy to advance justice or other social values.

In the end, perhaps, model codes of conduct can offer only limited assistance to mediators struggling with difficult fairness issues because such decisions cannot be made in a meaningful and appropriate way without considering both the central functions of mediation generally, and the context of the mediation in question. That context includes the circumstances that gave rise to the mediation, the expectations of the parties involved, and the mediator's own values. These are factors to which we shall now turn, beginning with a key concern raised by the hypothetical scenarios: the impact of a power imbalance at the table.

C. *The Special Context of Power Imbalance*

Few issues in relation to mediation have been as hotly debated in recent years as the interaction between the fairness of the mediation process and the existence of a power imbalance between the parties. Critics of ADR argue that the resolution of disputes with a legal content, outside the procedural safeguards of the court process, risks leading to

⁶⁵ See *Joint Standards*, *supra* note 8, Article VI; and *CBAO Model Code*, *supra* note 37, Article XI.3-4. The *Joint Standards* are quite restrictive even as to the circumstances in which suspension or termination is described as an option. (The comment to Article VI requires withdrawal when the mediator is unable to remain impartial, when the mediation is being used to further illegal conduct, or if a party is unable to participate due to incapacity.)

⁶⁶ As discussed, a noteworthy exception is the *Family Mediation Code*, *supra* note 38, Article 9, which at least sets out six general guidelines on promoting a fair mediation process.

the exploitation of parties who are not equipped to bargain as equals with the powerful.⁶⁷ Impecunious disputants, it is said, may be pressured to accept settlements that fall below their legal entitlement because of their inability to await settlement or struggle through an expensive and protracted court process. Critics argue that without the information available under court discovery processes, and without access to a third-party neutral with power to enforce the law without regard to rank or wealth, disputants who lack resources or strong alternatives to negotiation are vulnerable to being ignored or exploited by those with greater resources. Further, it is claimed, negotiation or mediation outside the court process can “cool out” legitimate social grievances, diminishing viable movements for social reform by reason of their secrecy, the lack of precedential impact of their outcomes, and their failure to bring outmoded views of the law or equality before the crucible of judicial scrutiny. Advocates of mediation cannot afford to ignore the critique that power imbalance between parties in ADR processes can lead to a failure of “justice within the system” (*i.e.*, justice as a court applying the law would determine), and also reduces the likelihood of “revisionary justice” (justice as embodied by necessary reform of existing rules and institutions).⁶⁸

The question of how well the court system, as presently structured, meets the goal of providing justice without regard to disparities in resources or social status is a debate that we will not enter into here. Still, the extent to which mediation can provide justice in the light of power relations between the parties is an important one, particularly to the extent that mediation processes are offered as an alternative means of accessing justice or social equity.⁶⁹ Proponents of mediation have argued that one of mediation’s virtues lies in its potential both for empowering the parties and assisting them in recognizing the authenticity of the interests of other disputants. As regards the potential for mediation to foster such a transformation of the parties, Lon Fuller has argued that the central quality of mediation is “its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and

⁶⁷ See, for example, Fiss, *supra* note 6 at 1076-78; and Delgado *et al.*, *supra* note 6.

⁶⁸ For further analysis of this point, see Luban, *supra* note 7 at 383-411, 417-21. See also Fiss, *supra* note 6 at 1085-86.

⁶⁹ For a presentation of ADR in terms of its access to justice advantages, see Harnick, *supra* note 5.

dispositions toward one another.”⁷⁰ Others, like David Luban, have described the possibilities mediation opens up for fostering discussion undistorted by power, social class, and ideology, and for empowering disputants in their ability to cope with other conflicts and with social structures generally.⁷¹

If questions about how mediation responds to the issues of power go to the heart of the debate about the quality of justice provided by mediation, then it is important in considering the duties of the mediator to understand how power dynamics may affect the mediation process. “Power” has been defined in the context of negotiations either as the ability of one party to influence the outcome of the negotiations, or as the capacity of one party to inflict damage on the other.⁷² In either case, power can be analyzed as a factor that may assist a disputant in furthering its interests through the negotiation process. Power, real or perceived, may arise from a number of sources. Fundamentally, the strength of each party’s alternatives to a negotiated outcome will determine both their capacity to walk away from the negotiations and their vulnerability to negotiation pressures from the other side.⁷³ The extent of a party’s power in this sense may be capable of being influenced by actions of the other to diminish the desirability of those alternatives. Thus, for example, one disputant’s ability to leave the table without achieving settlement may be affected by public pressure initiated by the other disputant to negotiate a resolution in good faith.

A party’s ability to influence the outcome of negotiations may arise from a number of other sources as well. Bernard Mayer, for example, has identified ten sources from which a party might derive negotiation power. These include decisionmaking authority, expertise regarding the issues under negotiation, access to resources, the ability to influence decisionmaking procedures, negotiation skills of the party or their representative, the ability to inflict discomfort on the other party, and the “inertial” power of a party that wishes to continue the status

⁷⁰ L.L. Fuller, “Mediation—Its Forms and Functions” (1971) 44 S. Cal. L. Rev. 305 at 325.

⁷¹ See Luban, *supra* note 7 at 411-12. Luban’s analysis draws in part on the writings of J. Habermas on social justice and the possibility of removing coercive and hierarchical influences to create the conditions necessary for the “ideal speech situation” in which a cooperative search for truth can occur.

⁷² See B. Mayer, “The Dynamics of Power in Mediation and Negotiation” (1987) 16 Mediation Q. 75.

⁷³ See R. Fisher & W. Ury, with B. Patton, ed., *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991) at 101-11.

quo.⁷⁴ Not all of these potential sources of power will translate in a particular negotiation to an ability to influence the other disputant. Indeed, as Roger Fisher and William Ury have pointed out, some sources of power, such as financial resources, may prove to be a source of vulnerability in certain contexts.⁷⁵ Clearly, however, a number of factors relating to the status and relationship of the parties, and unrelated to issues of principle, law, or notions of fairness may influence the outcome of a negotiation. How, if at all, are the mediator's functions affected by the presence of such factors in general, or by a dramatic asymmetry between the parties' ability to call on such factors to aid them in the negotiation?

Some commentators have pointed to empirical evidence that negotiation parties that enjoy a significant power imbalance appear more prone to non-cooperative, manipulative, or exploitative behaviour.⁷⁶ In light of this concern, many mediation practitioners advocate efforts by the mediator to counter such behaviour and empower the weaker party.⁷⁷ They note that the mediator's role also brings a degree of power in the sense of ability to influence the outcome of negotiations. The mediator's own power derives from a number of factors, including the mediator's personal credibility, and the mediator's various abilities to influence the ground rules of the process; to direct the parties' exchange of views; to view the parties as equally worthy of respect and to encourage the parties to act in a manner consistent with such respect; to assist the parties to articulate and explore their interests and options for settlement in a principled way; to assist the parties in accessing financial support for the negotiations; and to recommend and direct the parties towards relevant professional advice where appropriate.⁷⁸

⁷⁴ See Mayer, *supra* note 72 at 78.

⁷⁵ See Fisher & Ury, *supra* note 73 at 106-08.

⁷⁶ See Moore, *supra* note 2 at 334; and Lewicki *et al.*, *supra* note 10 at 401-02.

⁷⁷ See, for example, Davis & Salem, *supra* note 55 at 18-23; Stamato, *supra* note 17 at 84; D. Neumann, "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce" (1992) 9 *Mediation Q.* 227 at 232; and Dworkin & London, *supra* note 55 at 6-7. See also Moore, *supra* note 2 at 335-37: although Moore does not directly advocate mediator interventions to correct the effects of power imbalance, he lists a number of techniques that may be adopted by a mediator who wishes to do so, and notes that the mediator would be wise to enlist the stronger party's support before making such interventions.

⁷⁸ See Mayer, *supra* note 72 at 80-81; Davis & Salem, *supra* note 55 at 18-23; and Moore, *supra* note 2 at 327-33.

What does a functional analysis of mediation suggest about the role of the mediator in relation to power? First, it is clear that power relationships among all three participants may to some degree influence the course and outcome of the process. Second, many of the standard tools of the mediator that focus on improving communications, fostering interest-based negotiations, and promoting a constructive, respectful atmosphere among the parties, may have some positive influence on the power relations at the table. The use of such tools appears to fit squarely within the functions of mediator objectivity, promotion of party autonomy, and enhancement of party communications. It is unrealistic, however, to expect that the use of these tools in a conventional way can fully eliminate the potential impact of significant differences in resources or, more importantly, of substantial variations in the strength of the alternatives to a negotiated agreement open to each party.

Further interventions by the mediator to address particular consequences of power imbalance on the negotiations will have to be reconciled with the mediator's duty of impartiality. If the stronger party engages in behaviour that appears to violate procedural or substantive fairness, the mediator appears to be returned to the basic task of reviewing the goals of the particular mediation and balancing the demands of duties that appear to conflict. It is worth keeping in mind, however, that although a significant power imbalance between the parties may render one party particularly vulnerable to exploitative behaviour by the other, this vulnerability may never be exploited by the stronger party through resort to deceptive or unfair conduct. As such, the existence of a significant power imbalance between the parties would seem to be an important, but in the end, only a contextual factor to which the mediator should be sensitive when assessing the need to respond to fairness concerns.

We will return to the question of how power imbalance may be addressed in an overall approach to fairness issues. First, however, we need to consider the relevance of another significant contextual factor in relation to mediator duties—the parties' expectations concerning the mediation process.

D. The Reasonable Expectations of the Parties

One way of approaching the issue of mediator duty, from both a philosophical and legal perspective, is to consider duties that may arise from promises, either express or implied. Professional mediation typically occurs in the context of a contract for services between the

mediator and the parties.⁷⁹ Such a contract will include a statement of the parties' understandings in relation to the process. Among other things, those understandings frequently advert to the role of the mediator as a third-party neutral rather than as an advisor for either party; the confidentiality of the mediation as it relates to third parties; the fact that the mediation process is without prejudice to the parties' legal rights in other forums; the terms under which disclosures by one party to the mediator will be held in confidence by the mediator; and the terms under which the mediator may terminate the process.

It is axiomatic that specific representations made to the parties by the mediator, either orally or in a written contract, will affect the mediator's duties to the parties. As such, it is critical to note, the mediation contract can be a vital tool for ensuring that the parties understand and agree in advance on how the mediator will deal (or not deal) with particular issues relating to fairness. The mediation contract and the ground rules agreed to by the parties at the outset of the mediation can and should reflect the expectations of the parties with respect to fairness and the mediator's role in ensuring that these expectations prevail. The parties' expectations regarding fairness will inevitably be shaped by the factual, legal, and social background of the dispute. A review of this context at the outset of the mediation should assist the mediator in anticipating the types of process concerns that the parties may wish to discuss. The expectations of the parties in relation to disclosure might well be higher in a negotiation involving third parties, such as children, or in a mediation involving a public agency aimed at reaching a fair resolution of social justice issues, than in a mediation between represented parties who have undergone court disclosure.

The opening of the mediation process is an ideal time to discuss these expectations and to make them explicit. Although parties unfamiliar with negotiation or mediation may not be aware of the particular types of conduct of which they should be wary, the experienced mediator should be able to raise the types of issues that could arise (regarding disclosure, for example) and seek the parties' views on how they wish to address those concerns. Clarifying such issues at the outset will typically have two advantages. First, it is often easier to reach such understandings at the outset of the process, on the basis of mutual commitments, than during the heat of negotiations where the "rules" are unclear and tense bargaining is in process. Second, addressing procedural concerns at the outset will draw the parties' attention to concerns about the process that may not have previously

⁷⁹ Mandatory court-annexed mediation is a noteworthy exception.

been considered. A clear understanding of the kinds of fairness assurances that will be incorporated in the mediation process will better enable the parties, even in the absence of process agreements, to anticipate concerns and protect themselves against exploitative behaviour.

In summary, a context-based review of the parties' expectations regarding acceptable negotiation behaviour will be critically important in determining what constitutes unfair conduct in a specific mediation, and what the mediator's response should be if such conduct occurs. Such an approach would avoid the imposition upon the parties of the mediator's own views with respect to fairness in the process, whether based upon surveys of mediation participants generally or upon the mediator's own view of his or her role. Further, it might be hoped that a review with the parties of their shared expectations would reduce problematic behaviour, as the ground rules would be ones by which the parties have freely agreed to abide.

E. Ethical Values and Mediator Judgement

Given the limitations of model standards in defining the mediator's duty in relation to fairness and the potential conflicts inherent in the functions traditionally attributed to mediation, it is perhaps not surprising that mediators frequently report difficulty in deciding how to respond to concerns they may have regarding manipulative or exploitative behaviour at the negotiation table.⁸⁰ At a certain point in all cases what will be required is the exercise of good judgement—a process that involves the application of the mediator's personal values. Such judgement, it is suggested, will be required at two discrete stages: first, in evaluating whether particular negotiation behaviour violates the integrity of the mediation process; and second, in determining the most appropriate mediator response to that behaviour. How can the mediator's own ethical values be brought to bear in a reflective way on issues relating to fairness? Following our analysis, it would seem, at a minimum, that they should take into account the mediator's duties to the parties arising from the functions of mediation generally, and from the reasonable expectations of the parties in the context of the mediation at hand.

⁸⁰ For a discussion of the major types of dilemmas reported by professional mediators in a recent United States survey, see "The Dilemmas of Mediation," *supra* note 12 at 9-40.

Various commentators have recently provided useful analyses of how traditional ethical thinking might be brought to bear on mediator dilemmas.⁸¹ Most have noted that two influential schools of ethical philosophy offer insight (from the perspective of Western culture) into the general question of how reason might be applied in a systematic and unself-interested way to determine “right” behaviour. “Utilitarian” thinking proposes that acts be judged, not based on any notion of their value in themselves, but rather on their propensity to maximize general welfare. For utilitarians, acts should be judged based on their ends. “Deontological” thinking, on the other hand, holds that human beings owe certain absolute duties to others and that certain acts (fulfilling promises, for example) are intrinsically good. For followers of this school, other humans, as moral beings, must always be treated as ends in themselves and must never be subordinated to notions of general welfare.⁸²

The suggestion that mediator values in relation to fairness should be determined in a reasoned manner is clearly a helpful one, although a detailed analysis of how traditional ethical thinking might be applied in mediation is beyond the scope of our analysis. Nevertheless, some brief comments on the application of general ethical philosophy may be helpful. First, the debate between the deontologists and pure utilitarians has been ongoing for at least one hundred and forty years. In a pluralistic society and in mediation, in particular, where respect for party autonomy is a fundamental value, it would be neither practical nor appropriate for mediators to attempt to impose a Procrustean worldview on the diverse values that disputants will bring to the manner in which they negotiate.

Second, neither utilitarianism—even if its assumptions are accepted—or a deontological approach appear to lead to non-subjective conclusions about what it means to act in a “good” way. Utilitarianism, for example, faces the dilemma of how to define general welfare, whether in terms of happiness, fulfilment of economic utility, or otherwise. Further, even if consensus can be reached on this point, marginal utility, general happiness, and other expressions of the

⁸¹ See Gibson, *supra* note 11; S.C. Grebe, K. Irvin & M. Lang, “A Model for Ethical Decision Making in Mediation” (1989) 7 *Mediation Q.* 133; and C. Morris, “The Trusted Mediator: Ethics and Interaction in Mediation,” in J. Macfarlane, ed., *supra* note 7, 301 at 308-17. In the context of unassisted negotiations, see D. Lax & J. Sebenius, “Three Ethical Issues In Negotiation” (1986) 2 *Negotiation J.* 363.

⁸² See B. Williams, “Consequentialism and Integrity” in S. Scheffler, ed., *Consequentialism and its Critics* (Oxford: Oxford University Press, 1988) 20.

common good reflect intangible qualities, and the measurement of the common good appears to be an elusive and uncertain task. As for deontological views of the “good,” although in their pure form they avoid the challenge of trying to measure consequences, they suffer two other obstacles in application: (1) the challenge of defining what sorts of acts should be considered intrinsically good; and (2) in its absolute form, the limitations of attempting to define the goodness of acts without regard to their consequences in a particular context.

It has been said that human notions of morality in any given context are, at least in part, conditioned by and reflective of our cultural and social surroundings.⁸³ If that is so, it suggests a pragmatic approach to how mediators might exercise ethical judgements in relation to fairness. In present North American society, considerations of general utility *and* the general rightness of certain types of conduct toward others (fulfilling promises, for example, or acting toward others as we would like to be treated ourselves) are frequently involved in the exercise of human judgement as to what is an appropriate way of acting in a particular context. Since it seems important to the functional effectiveness of mediators that their judgements be as predictable as possible and congruent with the expectations of the parties, it seems preferable for the mediator to suggest and discuss with the parties pragmatic ground rules in relation to fairness at the outset of the process.

Sarah Grebe has suggested that current model standards of mediation conduct seem to reflect three generally accepted ethical principles: (1) non-maleficence (in general the mediation process itself and the actions of the mediator should not cause harm to a party); (2) justice (both parties should be treated fairly); and (3) respect for personal autonomy.⁸⁴ If, in this context, one grounds one’s view of justice in the idea of equality—that the parties should be treated by the mediator in a manner that disregards their attributes or their positions in the negotiation—and if one adds to Grebe’s three principles the concept that mediators should act in a manner that fulfils their commitments to the parties (the promise principle), one has the basis for a reasonable and practical framework for dealing with fairness concerns in a particular case. We will now sketch out how such a framework might work in the context of the hypothetical scenarios described in Part I, above.

⁸³ For references to the literature in this regard, see Cooks & Hale, *supra* note 11 at 58-59; and Morris, *supra* note 81 at 316-17.

⁸⁴ See Grebe, *supra* note 11.

III. DEALING WITH UNFAIRNESS: A PROBLEM-SOLVING FRAMEWORK

A. *The Approach Outlined*

How can the mediator bring to bear, in a reasoned manner, the variety of factors that appear pertinent to fairness dilemmas? Our analysis suggests that issues of fairness in mediation must be examined on a case-by-case basis, having regard to the nature of the negotiation conduct, the essential functions of the mediator, the expectations of the parties, the factual, legal, and social context of the mediation, and the mediator's own ethical perspective. Recognizing that these factors may create competing demands, it is submitted that they can be weighed in a functional, problem-solving manner as follows:⁸⁵

(1) *Review the factual context of the mediation.* Is either party potentially vulnerable to non-disclosure or misrepresentation of facts material to the negotiation? Are both legally represented? Has court-supervised disclosure occurred in relation to the dispute? What is the history, if any, of the relations between the parties? What alternatives to negotiation does each party have? Are there unrepresented parties whose interests might be directly affected by the resolution of the dispute and who the parties should consider inviting to participate in the mediation?

(2) *Consider the social policy implications, if any, of the mediation.* Is the mediation supplanting court resolution of the issues? Will third parties be affected by the outcome? If government or a governmental agency is a party to, or has instigated, the mediation, are there public policy or justice objectives that have been endorsed in relation to the mediation?

(3) *Develop appropriate ground rules at the outset of the mediation* in relation to disclosure of material facts; the parties' commitment to

⁸⁵ Ethical dilemmas have long been seen in Western thought as a "problem" to be solved by the actor. In developing the "problem-solving model" presented here, I have been inspired by Roger Fisher and William Ury's approach to solving problems in negotiation: see Fisher & Ury, *supra* note 73 at 41-98. In the context of family mediation, Grebe, Irvin & Lang, *supra* note 81 also suggested analyzing the facts and developing options to address mediator ethical dilemmas. The model presented here goes further, in that it: i) proposes a functional analysis of the negotiation behaviour to determine whether intervention is appropriate; ii) proposes the use of the accepted functions of mediation, the ethical principles of non-maleficence, justice, and autonomy, and the parties' expectations as "objective" criteria by which the options should be evaluated; and iii) provides an interactive approach whereby the parties and the mediator seek to preemptively deal with the acceptability of negotiation behaviour in advance.

negotiate in good faith to meet particular time frames (if the negotiation is likely to be protracted); and, if appropriate, to use joint experts or jointly obtain a neutral view of the law if an impasse on an issue of legal entitlement lasts beyond a specified length of time. If a government agency is a party, seek agreement of the parties on an appropriate source and level of funding for any parties that may lack resources and qualify under relevant funding criteria. Clarify and seek agreement on the terms of the confidentiality of private communications with the mediator, and other qualifications regarding the roles the mediator will or will not play in relation to the negotiation. Consider whether agreement can be reached with the parties on specific mediator remedies (including disclosure to the deceived party and termination) in relation to particular forms of deception or other negotiation practices that the parties agree to be unfair. State, and ensure the parties understand before proceeding, the central values of the mediator in relation to mediator function and acceptable behaviour of the parties. Advise the parties of the limitations of the mediator's role, as agreed by the parties, in assuring full disclosure, the substantive fairness of any agreed resolution, and procedural fairness throughout the mediation.

(4) *Analyze the nature of the behaviour.* When confronted with negotiation behaviour that seems to the mediator to raise serious fairness issues that have not been remedied by the mediation process, analyze the nature of the behaviour. Consider the procedural agreements and stated goals of the parties. Also consider the acceptability of the behaviour in light of the law, negotiation practice, the functional effect of the behaviour in relation to the goals of the mediation, and the mediator's ethical views regarding the behaviour. Discuss the justification, if any, for the behaviour with the party that has engaged in the behaviour. Discuss with the party, if appropriate, options for the party to remedy the effect of the behaviour.

(5) If the mediator continues to believe that the behaviour is unacceptably prejudicial to the goals and terms of the mediation, *invent, through brainstorming, a list of possible options* available to the mediator to respond to these concerns. Consider carefully, in particular, whether there are pragmatic, non-intrusive methods of addressing the behaviour. This is a particularly important (and often ignored) challenge for the mediator. There will usually be several options open to the mediator in any particular situation: some may address a fairness concern effectively, while intruding less than others on respect for party autonomy or other mediation goals.

(6) *Evaluate the acceptability of the options developed.* Such an evaluation should be undertaken by reference to the functions and

duties of the mediator, the goals of the mediation, the agreements of the parties in relation to the mediation, and the terms of applicable professional standards of conduct. Consider, in particular, the duties of impartiality and respect for party autonomy including the importance of promoting informed consent to negotiated outcomes. Reflect upon any other applicable ethical values in relation to the list of options, including the duty not to cause harm to one of the participants and the duty to treat the parties in a just and equal manner. Determine, to the greatest extent possible, using values external to the mediator (the mediation agreement, the accepted functions of the mediator, the reasonable expectations of the parties, etc.), which of the options is most appropriate in (a) responding effectively to the behaviour; and (b) intruding as little as possible on the autonomy and interests of the party seeking to benefit from the behaviour. Consider, in particular, whether suspension or termination of the mediation is most appropriate. Furthermore, consider whether the preferred response to the behaviour is worse, from the perspective of the goals of the mediation process, and the duties of mediators to the parties and to themselves, than no response at all.

(7) *If possible, discuss the mediator's proposed response to the behaviour with the party that engaged in it, together with the reasons the response has been chosen, and the consistency of the response with the mediation agreement. It may be useful to include a discussion of the functions of the mediator and the mediator's duties in relation to party autonomy. Reconsider the appropriateness of the response in light of any new information provided.*

(8) *Implement the response in a manner most consistent with the appearance of mediator impartiality toward the parties and the parties' positions, mediator obligations of confidentiality, procedural fairness, and respect for party autonomy.*

We are now in a position to return to the hypothetical mediator dilemmas. In accordance with the approach suggested above, we will begin by briefly reviewing the factual, legal, and social context of contemporary land claim mediation in Ontario.

B. *Application of the Framework*

1. Context

Aboriginal land claims currently accepted for negotiation by Canadian governments relate to assertions by Aboriginal communities

that their property rights under Canadian statutes, common law, or equity, have been violated by the Crown. The events that gave rise to a claim may date back to the time of treaties or first contact with Europeans, although until relatively recently Aboriginal people had very limited access to Canadian courts to advance such claims. (A law that made it a summary conviction offence for a lawyer to accept money to advance an Aboriginal claim without obtaining consent of the federal government was repealed only in 1951.)⁸⁶ The federal government did not adopt a formal policy of addressing Aboriginal claims through negotiation until 1973.

The federal government stands in a fiduciary relationship with Aboriginal people, owing a duty of trust and good faith in its dealings with Aboriginal lands.⁸⁷ Judgments of the Supreme Court of Canada have urged the Crown to negotiate its outstanding obligations to Aboriginal communities in good faith.⁸⁸ The current federal Specific Claims Policy, applicable to most Aboriginal claims in Ontario, makes it federal government policy that claims will be recognized on the basis of "lawful obligation" and that negotiation is the preferred means of settlement.⁸⁹ The policy's compensation guidelines prescribe that, as a general rule, compensation to Aboriginal communities "will be based on legal principles."⁹⁰ The policy criteria were drafted unilaterally by the federal government.

About one hundred land claim negotiations are currently ongoing between Aboriginal communities and the federal and provincial governments.⁹¹ Of these, many have been proceeding for several years, and it is not unusual for a currently active negotiation to have

⁸⁶ The restrictions had been formalized in *An Act to amend the Indian Act*, S.C. 1927, c. 32, s.6, as rep. by *An Act respecting Indians*, R.S.C. 1952, c. 149.

⁸⁷ See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103; and *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at 1108-09, Lamer C.J.C. [hereinafter *Delgamuukw*]. On the Crown's fiduciary duty towards Indians generally, see L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

⁸⁸ Most recently, see *Delgamuukw*, *supra* note 87 at 1123.

⁸⁹ Canada, Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy—Specific Claims* (Ottawa: Supply & Services Canada, 1982) at 19 [hereinafter *Outstanding Business*].

⁹⁰ *Ibid.* at 30. The current policy of the Ontario government is also based on an assessment of the claim in accordance with legal principles.

⁹¹ M. Coyle, "Land Claim Negotiations in Canada" in S.B. Smart & M. Coyle, eds., *Aboriginal Issues Today: A Legal and Business Guide* (Vancouver: Self-Counsel Press, 1997) 53. See also Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 595-96 [hereinafter *Restructuring the Relationship*].

commenced more than fifteen years ago.⁹² Although recent years have seen a markedly new momentum in achieving claim settlements, the existing federal claims negotiation process has been criticized as unfair and ineffective by independent bodies.⁹³ The current federal government has pledged to reform the claims process and negotiations to that end with the Assembly of First Nations have been ongoing since 1993.

Although Aboriginal communities are usually represented by counsel through funding provided by the Crown, in most cases the federal and provincial governments enjoy an imbalance of power in the negotiations.⁹⁴ This is so for a number of reasons. First, the governments have much greater financial, legal, and technical resources than the claimant community. Second, the federal and provincial governments each determine on an annual basis the extent of negotiation funding that will be provided to each First Nation claimant and the purposes for which the funding may be used. Third, the alternatives to negotiation available to the Crown are typically much more favourable than those available to the Aboriginal community. Litigation of claims takes several years and involves considerable cost to the claimant, while in practice, from the governments' perspective, delay in resolution of a valid claim has the result of deferring their obligation to make payment. If the First Nation is successful in litigation of its claim, funds are paid from general government revenues and the payment will not be subject to public criticism. In contrast, payment of a negotiated settlement must ordinarily come from departmental budgets and may then face negative political and public scrutiny. In addition, although federal claims policy explicitly excludes the application of so-called technical defences such as laches and statutes of limitation,⁹⁵ Aboriginal claimants that decide to litigate their claims must contend with these defenses. The courts have recently shown flexibility in certain

⁹² See Indian Commission of Ontario, *Indian Negotiations in Ontario: Making the Process Work* (Toronto: Indian Commission of Ontario, 1994).

⁹³ See, for example, *Restructuring the Relationship*, *supra* note 91 at 534, 544-49, and other independent commentators cited therein: see Canadian Human Rights Commission, *Annual Report 1990* (Ottawa: Minister of Supply and Services, 1991); Canadian Bar Association, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988); and Indian Commission of Ontario, *Discussion Paper Regarding First Nation Land Claims* (Toronto: Indian Commission of Ontario, 1990) [hereinafter *Discussion Paper*].

⁹⁴ Clearly, however, the balance of power in a particular negotiation must be considered on a case-by-case basis.

⁹⁵ See *Outstanding Business*, *supra* note 89 at 20-21.

contexts in addressing such technical defences,⁹⁶ but successful prosecution of claims litigation remains a risk-filled alternative for the Aboriginal claimant. Finally, as for the option of appealing to public support to pressure the federal and provincial governments to address a particular claim in a timely and fair manner, Canadian public sympathy for the plight of Aboriginal communities has yet to evolve into a significant issue that governments have had to address in seeking election.

In summary, current Aboriginal claims negotiations in Canada occur in a context that is informed by legal principles, by a fiduciary obligation owed by the federal government, and by a federal policy that prefers negotiation of its obligations. At the same time, despite many significant settlements, the negotiation process is often a protracted one, characterized generally by a power imbalance in favour of the governments. This general context must be considered by the mediator in addressing each of the hypothetical dilemmas.

2. Analysis of the conduct

We are now in a position to analyze the hypothetical scenarios described in Part I, above. For the sake of simplicity, we will review only the first two situations in detail.

a) *Scenarios one and two*

Recall that the first two scenarios involved lack of full and accurate disclosure of factual background by one party. In the first, the Crown negotiator has misrepresented the types of compensation available to the First Nation; in the second, the Crown has failed to disclose the full amount of financial resources available for settlement. How might one evaluate such behaviour from a fairness perspective? There has been much thoughtful analysis of the ethics of deceit and misleading tactics in bargaining.⁹⁷ We will not examine the debate in detail, for our analysis does not require a universal definition of

⁹⁶ See, for example, *Blueberry River Indian Band v. Canada (Department of Indian Affairs)*, [1995] 4 S.C.R. 344 at 365-66 (Gonthier J.), 402 (McLachlan J.), ruling that applicable legislation in British Columbia contained “no specific limitations” on claims for breach of fiduciary duty.

⁹⁷ See, for example, Lewicki *et al.*, *supra* note 10 at 371-406; G.T. Lowenthal, “The Bar’s Failure to Require Truthful Bargaining by Lawyers” (1988) 2 *Geo. J. Legal Ethics* 411; Norton, *supra* note 10; White, *supra* note 10; and Wetlaufer, *supra* note 10.

unacceptable negotiation behaviour. For the purposes of our analysis, we need only make certain general observations. First, the law in Canada generally prohibits certain types of deception in relation to issues of fact during bargaining, for example, through the law on intentional and negligent misrepresentation. Second, in certain contexts (fiduciary relationships are one example) the common law requires good faith dealings between the parties. Third, the parties may have entered the mediation, particularly one that supplants or supplements a court process, with certain expectations regarding the parties' openness in relation to material facts, or in regard to other aspects of the negotiation process, and these expectations may have been openly endorsed by both parties in the mediation agreement or otherwise. Fourth, in relation to the outcome of the negotiations, one party (most often a government agency) may have publicly committed, through policy or otherwise, that the goal of the mediation is to achieve certain standards of justice or other social objectives.⁹⁸ Fifth, the mediator may believe that certain minimal rules regarding negotiation behaviour are required for the integrity of the mediation process or for the protection of third parties, and the mediator may insist that those be discussed and accepted by the parties if they wish to obtain that mediator's assistance.

One might begin by examining local bargaining practices to determine what bargaining practices are common and therefore may be foreseen and accepted by both parties. The first hypothetical scenario is an example of factual misrepresentation in relation to current government practice that might be relied upon by the First Nation to its detriment. Common bargaining practice in North America appears generally to reject as unacceptable negotiation behaviour the active misrepresentation of material facts relating to the subject matter of negotiation.⁹⁹ Intentional or negligent factual misrepresentations undermine the validity of any agreement reached and, if they are relied upon by the other party to its detriment, they may give rise to an action at common law for deceit.¹⁰⁰ Further, if it was made by a federal negotiator, the statement came from a party that owes a fiduciary duty of

⁹⁸ The Canadian government, for example, has committed to fulfilling its "lawful obligations" in relation to specific land claims: see *Outstanding Business*, *supra* note 89.

⁹⁹ For references to empirical data on this point, see Lewicki *et al.*, *supra* note 10 at 395; and Norton, *supra* note 10 at 545.

¹⁰⁰ See L.N. Klar, *Tort Law*, 2d ed. (Toronto: Carswell, 1996) at 190-92.

good faith and full disclosure toward the other.¹⁰¹ Finally, the statement was made in the context of negotiations informed by a public government policy of fair dealings.¹⁰² That a government negotiator would misrepresent the truth relating to its practice is unlikely to be something that the other party could fairly be said to expect, nor is it evident that encouraging factual misrepresentation of this kind is necessary to permit functionally effective bargaining. While the analysis here has been brief, it is suggested that a mediator might reasonably conclude that the negotiation conduct in the first scenario raises important fairness concerns.

Turning to the second scenario, full disclosure regarding a party's settlement point does not appear to be normally expected during bargaining in North America. Indeed, some degree of deception regarding a party's reservation price appears to be widely accepted.¹⁰³ Further, from a functional perspective, it is arguable that silence or exaggeration in relation to settlement point can be justified because it is recognizable as a bargaining tactic and does not prevent the other party from negotiating a settlement based on independent measures of the value of the subject matter or on another criterion.¹⁰⁴ Permitting a party to conceal its settlement point (which may change over the course of the negotiations as a result of the bargaining dynamic) does not appear to interfere with the parties' ability to negotiate a settlement that they both consider fair.

At the same time, the laws of misrepresentation would not normally require disclosure of a party's settlement point.¹⁰⁵ In the context of the hypothetical scenarios, one would need to consider the legal duties of disclosure that may flow from a fiduciary relationship. Still, while an argument might be made that the fiduciary has a duty to disclose its view of the extent of any legal obligation owed to the weaker party (and even this proposition seems debatable where the weaker party has been afforded independent legal counsel) it would probably be difficult to sustain a further duty to disclose internal policy discussions

¹⁰¹ See the references, *supra* note 87. For a discussion of the duties of good faith and disclosure owed by fiduciaries generally, see P.D. Maddaugh, "Definition of Fiduciary Duty" in Law Society of Upper Canada, *Special Lectures of the Law Society of Upper Canada 1990: Fiduciary Duties* (Toronto: De Boo, 1991) 15; and M. Ross, "Conflicting Interests: The Fiduciary Duties of Agents," in *ibid.* 175.

¹⁰² See *Outstanding Business*, *supra* note 89 at 19.

¹⁰³ See Norton, *supra* note 10 at 536-37; and Lewicki *et al.*, *supra* note 10 at 394.

¹⁰⁴ See Norton, *supra* note 10 at 537.

¹⁰⁵ See Klar, *supra* note 100 at 490-95.

regarding negotiation limits. In sum, a preliminary analysis of reasonable party expectations, functional bargaining needs, and applicable law, suggests that the government's non-disclosure of the extent of its mandate should not, barring other considerations, be considered unfair negotiation behaviour requiring mediator intervention.

b) *Options for mediator response*

Continuing our analysis of the first two dilemmas, the first and longest-reaching intervention of the mediator should have been to discuss with the parties, at the outset of the process, appropriate ground rules to promote a timely resolution of the claim in accordance with principles that both parties consider fair and effective. Nothing within the social or legal context of the negotiation suggests that the parties would object to a rule that neither party may intentionally mislead the other in relation to facts at issue in the negotiation. Indeed, the parties might agree at the outset that the mediator's obligation of confidence should not extend to the presentation by either party of statements of fact that the mediator knows to be inaccurate, and that may be relied on by the other party in concluding the terms of settlement. Following our earlier discussion, the mediator could seek agreement that the parties would not be expected at any point to disclose internal discussions with respect to negotiation strategy or, unless they so wished, their perception of the reservation point at which they would accept a settlement. In the context of the policy underlying this mediation, the mediator could also seek agreement that the parties will negotiate diligently and in good faith. Finally, in connection with issues of substantive fairness, as both parties have legal counsel, the parties might agree that the mediator will not evaluate the fairness of any position advanced by either party, but that he or she may pose questions to both parties to test the mediator's understanding of the consistency of settlement options with the parties' underlying interests, or with the legal principles relevant to the dispute.

With the benefit of agreement on these and other issues that the parties consider relevant to fairness in the mediation, misunderstandings or disagreements should be less likely in relation to both the mediation process in general, and the mediator's role in addressing fairness concerns.

The final critical stages in determining the appropriate mediator response to each of the situations would involve developing and evaluating the mediator's options in light of the goals of the mediation,

the legal context, and the competing duties of the mediator. Let us briefly consider the situations in turn.

The first situation involves conduct that would mislead the claimant in relation to past and current settlement practice. Options that might be considered by the mediator include: (1) lightly correcting the statement at the time it is made; (2) discussing subsequently with the negotiator the need to correct the false impression created, together with the reasons for doing so; (3) if appropriate, directing the claimant to other Aboriginal claimants who have reached settlements to discuss the types of compensation incorporated in those settlements; (4) terminating the mediation; and (5) expressing concern to the negotiator's superiors that a false statement has been made. Confidentiality must be considered, but since the fact of previous and current practice is a matter of public policy, permitting the mediation to continue on the basis of the misrepresentation appears contrary to the principle of informed consent, government policy, and legal principle insofar as the policy is intended to reflect legal obligations. In particular respect for the principle of party autonomy and the promotion of trust between the parties, pursuing the second option listed above may be the most appropriate.

The second situation involved non-disclosure of the availability of additional settlement monies. Nothing contained in the legal, factual, or policy context appears to change our earlier analysis that failing to disclose a party's internal view of its settlement point is inappropriate negotiation conduct. Ideally, as discussed, this conclusion will have been addressed in the negotiation ground rules. No mediator response appears necessary, barring other evidence of a failure to address the substantive issues in good faith.

c) *Scenarios three and four*

The purpose of the foregoing discussion was to demonstrate that a methodical, but context-based analysis of the acceptability of a particular negotiation practice is possible, and that certain types of deception or other exploitative behaviour can be considered unacceptable to the extent that they are not consistent with the parties' reasonable expectations, prevailing law or policy, or the functional needs of bargaining. As we have seen, options for mediator response to the unacceptable conduct can be developed and weighed within a similar context-based, functional framework. The same approach can be applied to the final two hypothetical dilemmas where the mediator is concerned that the weaker party may be prejudiced by a lengthy delay in

the negotiations. In one case, the Crown negotiator is seeking delay for the express purpose of lowering the other side's expectations; in the other, although the mediation has been stalled for some time, the Crown negotiator is refusing a request to obtain a neutral view of the parties' legal position.

While space does not permit a detailed application of the framework to the final two scenarios, both arguably raise important fairness concerns in the context of land claims mediation. Claims negotiations are typically lengthy, in part because of their complexity and the magnitude of the issues at stake. The fact that the Crown is not required to abide by an independent review of its legal obligations in a particular claim, and the lack of meaningful sanction if either party fails to address issues in a timely manner undoubtedly can impede the resolution of such claims. Increasing the accountability of both parties and limiting the possibilities for delay are already a key focus of recommendations for systemic reform of the claims process in Canada.¹⁰⁶

In both of the final scenarios the mediator should analyze the acceptability of the conduct in the context of stated public policy regarding claims negotiations, the federal government's obligations as a fiduciary, the investment of public funds in the process, and the agreements of the parties at the outset of the negotiations. If such an analysis suggests that either situation raises important concerns as to the integrity of the process, the options for active mediator response include discussion of the goals of public policy with the negotiator, discussion of the appropriateness of the conduct with policymakers within government, and focus on the issues of accountability and delay during the initial development of negotiation ground rules with the parties. Again, the mediator's options would be weighed with regard to the negotiation context, the functions of mediation, and the reasonable expectations of the parties. And again, the ideal approach to addressing the fairness concerns raised by the last two scenarios will likely involve consideration with the parties of appropriate safeguards in the initial ground rules that will guide the mediation.¹⁰⁷

¹⁰⁶ For proposals for reform on this issue, see *Restructuring the Relationship*, *supra* note 91 at 596-613; and see the recommendations in *Discussion Paper*, *supra* note 93. Mechanisms to increase accountability of both parties in respect of their legal positions and the timeliness of the process are currently the subject of negotiations between the federal government and the Assembly of First Nations.

¹⁰⁷ For example, the mediator could seek agreement at the outset that if the parties remain at an impasse on a particular legal or factual issue for a specified length of time, at the request of either party, the non-binding view of a mutually acceptable neutral expert will be obtained through

IV. CONCLUSION

Dealing with fairness in the mediation process is a legitimate concern of mediators, disputants, and policymakers alike. There are several advantages of adopting the framework suggested above for dealing with issues of fairness within mediation. First, the various model standards of practice that to date have been adopted by mediation practitioners tend to offer little practical guidance to mediators in terms of how to balance their duties in addressing issues of apparent unfairness in negotiation behaviour. Second, the model proposed is context-based, permitting the mediator to respond to the overall objectives of the mediation in question and the parties' expectations in relation to the process. If neither of the parties at the outset, upon reflection and upon receiving appropriate independent advice, nor applicable policy or mediation objectives, raise concerns about the consequences of particular types of negotiation conduct, then party autonomy in that regard will normally be relatively unfettered. Third, the model directs the mediator to reflect upon negotiation behaviour and mediator response within a framework that takes into account the functional goals of mediation. Fourth, the model should promote creativity in the tactics adopted by the mediator in "solving" the problem of dealing with unfairness. Fifth, the model encourages transparency and predictability in the mediator's role, and is thus conducive to consensual and effective mediation. Finally, adoption of the model should encourage prevention of unexpected dilemmas in the mediation process, through its focus on adopting appropriate ground rules for the mediation at the outset.

the offices of the mediator. (Experience in land claim negotiations suggests that the parties will have more difficulty agreeing to such a process once they are locked in a particular impasse.) If the parties do not accept this suggestion, at least they will enter the negotiation having expressly considered that the process may prove unproductive in the case of a significant legal or factual dispute, and can plan their alternatives accordingly.