

# Designing Mediation Systems for Use in Administrative Agencies and Tribunals— The B.C. Human Rights Experience

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## **I. Introduction**

This chapter is designed to explore, and stimulate discussion about, the issues facing administrative tribunals and agencies in the design and implementation of systems for mediating disputes that come before the agency or tribunal for resolution. It is based on research we have done evaluating the system of early mediation employed by the British Columbia Human Rights Commission (the “Commission”) shortly before its abolition and the system currently in use by the British Columbia Human Rights Tribunal (the “Tribunal”). The results of our study of the Commission’s Early Mediation Project were published in 2004.<sup>1</sup> In this chapter we concentrate on the data we collected for our study of mediation at the Tribunal, though we draw comparisons with the results of our earlier study.

Our research was carried out with funding provided by the Social Sciences and Humanities Research Council of Canada’s Community University Research Alliance Program (CURA). Our primary community partner during the first stage of the research was the Commission. During the second stage of the project, our primary partner was the Tribunal. The CURA program is designed to promote alliances between post-secondary institutions and community organizations in order to take advantage of their different expertise. The goals of the research programs are to assist community organizations with their work and to examine the broader societal implications of the systems being studied.<sup>2</sup> More specifically, our objective was to determine the advantages and disadvantages to our partner agencies of mediation, to examine the degree to which mediation by these agencies serves the needs and interests of parties to the litigation, and to assess the degree to which such mediation is consistent with the broader objectives of human rights legislation.

In most Canadian jurisdictions, human rights complaints are filed with a human rights commission. The commission then investigates the complaints and decides whether or not they should be referred to a tribunal for adjudication. Mediation can take place either while the

complaint is before the commission or after it has been referred to the tribunal.

That was the model used in B.C. at the time of our study of the B.C. Human Rights Commission's Early Mediation Project.<sup>3</sup> However, amendments that came into effect on March 31, 2003 abolished the Commission.<sup>4</sup> Today, complaints are filed directly with the B.C. Human Rights Tribunal. There is a disclosure process prior to the hearing and the Tribunal has the power to dismiss a case short of a full hearing, but there is no separate investigation of the complaint. Thus, we have been able to evaluate human rights mediation in two different administrative settings.<sup>5</sup>

Though our primary focus is mediation conducted by human rights agencies, we hope that this study raises issues that are relevant in other administrative law settings. Therefore, we begin with a description of the role of mediation within different types of administrative agencies. We then describe issues that we think deserve consideration in designing a mediation process. That part of the paper focuses on mediation by agencies that adjudicate disputes between two parties, but we think that many of these factors are also relevant to mediation conducted by other types of administrative agencies. We then describe the empirical results of our study in order to test a number of the hypotheses developed earlier in the chapter. We also offer more concrete conclusions about what the mediation systems we have investigated have been able to achieve.

## **II. Mediation in Different Administrative Settings**

The first question a tribunal or agency needs to face in designing a mediation system is whether to offer mediation services at all.<sup>6</sup> We will therefore begin by exploring some of the considerations that, in our view, ought to be borne in mind in addressing that question. Once a decision has been made to offer mediation as a dispute resolution alternative, a number of issues arise in planning the type of mediation system the tribunal wants to employ. It is likely to be the case in every situation that there are some factors that reflect the unique circumstances of the tribunal, and it is not our goal to provide a comprehensive list of elements that go into the design of every conceivable mediation system. Rather, we want to explore what seem to us to be the major types of choices that the designers are likely to confront in creating mediation systems for tribunals whose main focus is adjudication. Our approach in this part of the paper is not prescriptive. At this stage we are interested in identifying

issues for discussion and exploring the types of considerations that seem relevant to the choices that ought to be made around these issues.

#### **A. Why Offer Mediation Services?**

As we indicated above, the initial question that needs to be addressed in mediation system design is whether a tribunal or agency ought to be offering mediation services at all. Consideration of this question leads conveniently into a second question, which is what goal or goals are being served by any mediation system that might be contemplated. In many instances, tribunals will give an affirmative answer to the first question, and some people might wonder why it is worth considering at all. The reason, in our view, is that it is extremely useful to focus attention on both the anticipated benefits and the anticipated costs to the tribunal of offering mediation services before the tribunal gets committed to any particular feature of a system design. A clear articulation of the goals the mediation system is designed to serve also facilitates evaluation of whether these objectives are actually being met.

For purposes of this discussion, we find it useful to draw distinctions among four broad types of tribunal activities. The first activity involves the resolution of a dispute between two parties.<sup>7</sup> When a tribunal engages in this type of activity, the subject matter of the dispute normally falls within the specialized jurisdiction of the tribunal, and the traditional role of the tribunal is the adjudication of the dispute in accordance with the relevant legal rules and tribunal policies. The second activity is the administration of a complaints-based system of enforcement of regulatory standards.<sup>8</sup> Adjudication will normally form part of this system, but it is typically the case that the agency will have recourse to a variety of less formal mechanisms for the resolution of complaints and securing compliance with standards. The third activity is the administration of a regime that determines a claimant's eligibility for a benefit or entitlement.<sup>9</sup> Finally, the fourth activity is tribunal policy-making or rule-making. Some kinds of multi-party adjudications can have more in common with tribunal policy-making than they do with traditional bi-party adjudication, especially where they involve the distribution of benefits and burdens among a variety of interested parties who are themselves representatives of broader constituencies.<sup>10</sup> For present purposes, we will characterize those activities as policy-making or

rule-making even though they may take the form of an adjudicative decision.

The categories we have just identified are not intended to be watertight. For example, some bi-party adjudications by labour relations or human rights tribunals may have sufficient significance as precedents that they begin to take on the characteristics of policy-making or rule-making decisions. Nor are we suggesting that every agency or tribunal fits neatly into these categories, or that any particular tribunal ought to engage in only one of these activities. The utility of the categories is that they help to highlight the roles of different persons affected by the agency or tribunal's activities and the different types of considerations that are likely to be relevant to an agency or tribunal in deciding whether or not to offer mediation services in relation to each type of activity. Our work has been mainly in the field of specialized bi-party dispute resolution and to a lesser extent complaints-based systems of law or standards enforcement. As a result, the bulk of this paper will focus on the first type of tribunal activity, with some potential overlap into the second. Nevertheless, we think it is useful to begin by comparing and contrasting the different benefits and disadvantages that mediation may offer to these different types of tribunals.

### **1. Bi-party Dispute Resolution Tribunals**

For a tribunal that is engaged in bi-party dispute resolution, there are two broad considerations that may make it attractive to offer mediation services. The first consideration is that offering mediation services may reduce the adjudicative workload of the tribunal, thereby helping the tribunal to deal more effectively with those cases that do end up being adjudicated. The second is that mediated resolutions may offer benefits to the parties (including such things as reduced legal costs; less stress; speedier resolution; privacy; greater remedial flexibility, including the availability of solutions that could not be achieved through adjudication; greater control over or party involvement in the process for resolving the dispute; greater acceptance of the agreed-upon resolution; and lower enforcement costs).<sup>11</sup> In some instances these benefits could be realized by the parties by negotiating a settlement themselves, but mediation may enhance the likelihood that these mutually acceptable resolutions and their attendant benefits will actually be achieved. In addition, it is worth noting that there may be settings in which these benefits are mutually reinforcing in particularly powerful ways. If

particular parties are engaged in ongoing litigation that uses up significant amounts of the tribunal's adjudicative resources (to say nothing of the resources of the parties themselves), it may be that an investment in mediation that has the effect of transforming the parties' relationship will be especially worthwhile. In contrast, it may be that many interactions between parties are essentially transactional and less of an investment in mediation resources may be justified, though even here there may be reasons for believing that some investment in mediation represents a worthwhile alternative to single-minded pursuit of adjudication as the only means for resolving disputes.

The potential disadvantages of the offer of mediation services in these settings are threefold. The first is that the workload reductions are illusory, either because the resources the tribunal puts into mediation outweigh the workload management advantages they produce, or because these advantages are produced at too high a price. A particular concern is the possibility that the tribunal's need to produce a high level of settlement in order to manage its workload will result in mediators putting improper pressure on parties to settle.

The second potential disadvantage is that rather than offering benefits to the parties, mediation exposes vulnerable parties to disadvantages flowing from inequality in bargaining power that systems of fair adjudication are designed, in theory at least, to overcome. There are a number of possible answers to this concern. First of all, it would be overly optimistic, in our view, to think that our system of administrative adjudication is capable of putting all parties on an entirely equal footing in the hearing room. Thus, it is not obvious that power imbalances create greater problems in mediation than they do in adjudication. Secondly, the reality is that many cases settle without the benefit of mediation, and it is difficult to see why placing settlement discussions within a more structured environment is likely to exacerbate issues of inequality of bargaining power that already exist in settlement negotiations undertaken by the parties themselves. Finally, there are techniques that mediators employ to address power imbalances, and while these techniques may not be a complete answer to this concern, they may go some way toward giving the tribunal comfort that the benefits mediation holds out will be realized by most of the parties who take advantage of this service. We do not reject out of hand the possibility that some types of cases may be inherently unsuitable for mediation, but in our view the range of cases that ought to be treated as inherently unsuitable for mediation is reasonably narrow, and should probably be confined to situations in which resort to

mediation would have the practical effect of perpetuating an abusive relationship.<sup>12</sup>

The third potential disadvantage of mediation in bi-party dispute resolution settings is that it may have the effect of distorting the tribunal's exercise of its statutory mandate. This may occur in two ways. One is that the work that may need to be done to achieve the voluntary resolution of a dispute may draw the tribunal outside the scope of its mandate. For example, a dispute before a human rights tribunal arising out of the dismissal of an employee who has a disability may involve both questions of whether the employer has met its duty to reasonably accommodate the employee's disability, and the assessment of disciplinary action taken by the employer in relation to conduct that was unrelated to the disability. The first issue would typically fall squarely within the jurisdiction of the appropriate human rights tribunal, the second typically would not. It may be that the voluntary resolution of the dispute would hinge on the ability of the parties to address both issues in a single settlement, but to what extent is it appropriate for a human rights tribunal to devote its resources to mediating the wrongful dismissal dimension of this case?

The second possibility is that mediated resolution of some disputes might prevent a tribunal from fully exercising its mandate. In particular, voluntary resolution may prevent the tribunal from fully carrying out its role of developing the law and policy related to the legislation it is administering and of providing guidance to other disputants through its reasons for decision. Of course, it is true that parties may decide to take this opportunity out of the hands of the tribunal in any particular instance by settling the dispute without the tribunal's assistance, but it does seem to us that, in at least some circumstances, tribunals may want to question whether they should be taking affirmative steps to facilitate this process.

## **2. Complaint-Based Regulatory Enforcement Agencies**

The potential benefits of mediation for complaint-based law enforcement or standards enforcement tribunals are similar to those enjoyed by bi-party dispute resolution bodies. Nevertheless, the distinction between the role of the complainant and the role of the regulatory body introduces complications that make agencies that perform this function deserving of separate consideration. In most instances, a complainant is at best a witness in a regulatory proceeding rather than a party to the proceeding. Complainants in these types of proceedings may

have civil remedies that are quite independent of the regulatory proceedings, and the agency may have regulatory objectives (notably its role in protecting the public) that are quite independent from its role in ensuring that a particular complainant goes away satisfied.

Those observations having been made, there may be many instances in which the public interest is best served by achieving a voluntary resolution of a complaint, and mediation by the regulatory body may prove instrumental in achieving that resolution. It is in situations in which the agency's dispute resolution and regulatory goals appear to be in conflict that difficulties are likely to arise. This is particularly problematic if the agency attempts to "shift gears" and move from dispute resolution to regulatory enforcement partway through the case. Equally difficult are situations in which different branches of the agency that have distinct responsibilities (or for that matter different individuals who may be involved with the case in various capacities) offer competing characterizations of the case and contradictory advice on the relevant balance between the agency's dispute resolution and regulatory enforcement goals in that particular context.

This is not to say that complaint-based regulatory enforcement bodies can never make good use of mediation. We believe, however, that the agency must have a strong commitment to the dispute resolution aspect of its mission and a clear understanding of when mediation is and is not appropriate if the use of mediation is to succeed in this setting. By way of example, in our study of early mediation at the B.C. Human Rights Commission, it was evident that in designing the early mediation initiative, the Commission had thought deeply about when mediation efforts might compromise the Commission's commitment to serve the public interest through the enforcement of the *Human Rights Code*.<sup>13</sup> The Deputy Chief Commissioner, who was responsible for this aspect of the Commission's "public interest" mandate, established guidelines indicating when his office would intervene in cases. Cases that met the criteria set out in these guidelines were deliberately screened away from the early mediation project, and mediation would not be offered in those instances.

### **3. Benefit or Entitlement Eligibility Regimes**

On the face of it, regimes that are designed to determine eligibility for statutory benefits or entitlements would appear to be poor candidates for the use of mediation, at least in situations in which the agency is faced

with a binary choice of concluding that the claimant is either entitled to the benefit being claimed or not. Mediation's aims of promoting mutual understanding and achieving mutually acceptable resolutions to disputes would seem to be difficult to reconcile with the agency's obligation to follow its own rules and provide benefits only to those who are eligible. This is not to say that it is undesirable to make use of ombudsmen, auditors or other external reviewers to ensure that claimants have been treated fairly and that claims are being assessed accurately. It is harder to imagine, however, that the exploration of interests, as distinct from rights and obligations, would play a prominent role in this process.

For mediation to be appropriate in a statutory benefit or entitlement regime, it seems to us that two conditions have to be satisfied. The first is that the benefits scheme must contain room for intermediate levels of claimant success that can form the basis for a mediated solution. For example, some kinds of disputed workers compensation claims may be resolved through the acceptance of a claim for a lower level or modified entitlement to benefits, whereas it may not be possible to achieve compromise resolutions to claims for many forms of licence or regulatory permission. The second condition is that the agency itself must be willing to accept the legitimacy of compromise solutions as a way of exercising its statutory mandate. An openness to compromise may be difficult to reconcile with an agency's commitment to consistency in the outcomes achieved by similarly situated claimants. In some instances, the agency's program goals may be undermined by its willingness to compromise its standards for benefit eligibility. Similarly, first instance decision-makers may experience frustration if they believe that their determinations are subject to negotiation or compromise at a review stage for reasons that they believe to be unprincipled.

On the whole, we are inclined to be cautious about recommending the use of mediation in tribunals called upon to make benefits assessments or to review the assessments made by decision-makers at an earlier stage. We suspect that in many instances there will be ample room for the use of case management techniques to narrow the focus of cases, and it may even be that non-binding early neutral evaluation could play a useful role in some cases. Nevertheless, we remain skeptical about the utility or appropriateness in this setting of the interest-based style of mediation that is typically practiced in bi-party dispute resolution settings. Where mediation is used, considerable care must be taken in designing the system to manage the tension between the potential advantages mediation

can bring in terms of caseload management and claimant satisfaction and other program goals.

#### **4. Policy or Rule-making**

Some of the most interesting uses of mediation in recent years have come in the field of multi-party exercises designed to fashion appropriate rules to address competing claims for the use of land or other resources. From the perspective of the agency bearing ultimate responsibility for the rule, these types of exercises are rarely promoted on the basis that they provide up-front cost savings to the agency in comparison to more traditional consultation processes used in setting regulatory policy. Instead, their potential benefits are usually linked to their capacity to generate greater stakeholder and public acceptability. Allied to this is the potential to eliminate or reduce later enforcement costs that may flow from the refusal of some part of the relevant community to accept a rule or policy that is imposed upon them rather than agreed to by their representatives.

As is the case with the differences between rule-making and adjudication, the differences between mediation in a rule or policy-making context and mediation in an adjudicative setting are sufficiently profound that it is sometimes difficult to think of them as examples of the same phenomenon. In particular, mediated rule-making raises two problems of agency not present in the typical mediation of agreements between individuals.

The first problem is that if the regulatory body simply accepts a rule or policy agreed to by representatives of different stakeholder groups through a mediated negotiation, it could with some justification be accused of sub-delegating authority granted to it by its enabling legislation. On the other hand, if the regulatory body reserves the right to exercise independent judgment in determining what aspects of a mediated agreement to implement, this may threaten the credibility of the mediation itself, or at least reduce the mediation to an elaborate form of stakeholder consultation.

The second problem is that the representatives of stakeholders who come to the table in a policy or rule-making mediation are unlikely to have the same authority that agents in more traditional business settings have to bind their principals. A great deal rests on the willingness of those who are being represented to feel bound by the agreements entered

into by persons whose status as representatives and whose mandate may be open to challenge. Even before a mediation process is entered into, it may be difficult to identify all the relevant stakeholders, or to find people who will be accepted as appropriate representatives of the relevant interests. In addition, the representatives must be able to communicate effectively with their own constituencies, both in order to represent their views effectively in the discussions leading to the rule and in order to explain why certain compromises are necessary or desirable. The representatives also must be willing and able to communicate effectively with each other in order to come to an agreement. Finally, the representatives must have the ability to resist the temptation to withdraw support from an agreement because of pressure from dissidents within the constituencies they are representing.

Needless to say, there are ways to mitigate these concerns, and the benefits of achieving a broadly accepted rule or policy solution may be sufficiently great that the effort is justified. The ways of designing mediation systems that address these issues successfully are, however, sufficiently different from the solutions used by the designers of mediation systems in the bi-party dispute resolution and the complaint-based regulatory enforcement settings that we feel justified in setting them to one side for the purposes of this chapter.

## **B. Conclusion**

In our view, there is no obvious right or wrong answer to the question of how to balance the different considerations that are relevant to deciding whether or not a tribunal or agency should offer mediation services. Thus, it may be that tribunals that are superficially similar may have very good reasons for choosing different answers to the question of whether or not to offer mediation services, and if so, to what extent. Our point is that in deciding whether or not to undertake mediation activities, tribunals and agencies ought to identify the benefits and risks they associate with mediation in their particular setting. In our view, these bodies should also design their mediation systems in ways that consciously address the goals they want to pursue and the measures they will take to manage the risks they foresee. Ideally, the tribunal or agency should also evaluate on a periodic basis whether their systems are actually accomplishing what they want to achieve. Assuming that a tribunal engaged in bi-party dispute resolution (or, to a lesser extent, a complaint-based regulatory enforcement agency) has made the choice to engage in

mediation, we will now turn to the issues that seem to us to be most relevant in designing the system to be used.

### **III. Significant Mediation System Design Issues**

In our view, the key issues that need to be addressed in designing a bi-party dispute resolution tribunal's mediation system can be grouped conveniently into five categories. The first can be described as preliminary matters. They include the tribunal's mandate to engage in mediation and the selection of a process for designing the mediation system to be employed. The second category of issues concerns the question of which parties are going to take part in mediation and more particularly who decides whether or not a particular case is going to be mediated. The third group of issues concerns who is going to conduct the mediation and the mediator's role before, during and after the mediation process, especially if the mediation does not produce a settlement. The fourth category is concerned with the role of the parties in the mediation process and how the mediation system protects their interests. Finally, the fifth issue relates to the question of how we determine whether or not the mediation system is achieving the tribunal's goals. We will examine each category in turn.

It is worth noting that the Dispute Resolution Office of the British Columbia Ministry of the Attorney General has produced an extremely useful guide entitled *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems*.<sup>14</sup> Our focus is narrower than that of the authors of *Reaching Resolution* but we have drawn heavily on their insights and some readers may find their guidance particularly illuminating.

#### **A. Preliminary Matters: Mandate and Design Process**

Some would argue that because a voluntary mediation process does not require the exercise of authority by a tribunal, it is not necessary for the tribunal to have express statutory authority to offer mediation services. Obviously, this argument is more difficult to sustain if the tribunal wants to compel the parties to attend a mediation session. In their discussion of judicial mediation, Judge Hugh Landerkin, Q.C. and Professor Andrew Pirie have argued that the inherent jurisdiction of provincial superior courts, and in the case of courts exercising statutory

jurisdiction, the constitutionally protected right of judges to exercise administrative control over their own proceedings, authorizes judges to engage in mediation even in the absence of express statutory authority to do so.<sup>15</sup> Tribunals also have general authority to exercise control over their own proceedings, though their right to do so may not enjoy the same constitutional pedigree as that of the courts.<sup>16</sup> On the other hand, Landerkin and Pirie acknowledge that the authority of judges to engage in mediation in the absence of express authority is not free from doubt,<sup>17</sup> and this concern is likely to be even more acute in the tribunal setting. In several provinces the legislature has addressed this concern by enacting general legislation governing tribunal procedure that empowers tribunals to engage in dispute resolution activities, though the legislation sometimes requires to tribunal to create procedural rules governing this type of activity before doing so.<sup>18</sup>

Once the statutory mandate issue has been addressed to the tribunal's satisfaction, the other preliminary issue is the selection of a process for designing a mediation system that meets the tribunal's needs. In our view, this ought to commence with an assessment of what the tribunal wants to accomplish by offering mediation services and with a realistic assessment of the environment in which the tribunal is operating. Factors to consider include such things as the number and nature of disputes that the tribunal must address, the characteristics of the disputants who appear before the tribunal, an evaluation of the strengths and weaknesses of the existing system of dispute resolution employed by the tribunal and consideration of the possible barriers to the implementation of a mediation system that are likely to emerge.<sup>19</sup>

Armed with this knowledge, the people responsible for designing the tribunal's mediation system will also want to consider which types of stakeholders they want to involve in designing the system and in what capacity they ought to be involved. It is important to consider not only the interests of external stakeholders (interest groups, lawyers who appear before the tribunal, relevant government agencies) but also the interests of tribunal members and staff whose work will be affected by the use of mediation. An inclusive approach to system design can be useful not only to gather information and ideas, but also to build support for the mediation initiative, or at least to identify more precisely areas of resistance that need to be addressed. At the same time, we believe that care must be taken to manage expectations with respect to the roles of those who are being involved in the process and to respond appropriately to those expectations. For example, it is important not to leave the

impression that a particular group is entitled to a veto over some aspect of system design unless the consequences of the group's exercise of that power are acceptable. On the other hand, it is equally important not to leave the impression that consultation is simply a *pro forma* exercise. Most people understand that agreeing to consult someone is not the same thing as agreeing to accept that person's advice. At the same time, effective consultation requires the person who is doing the consulting to show that advice that was not followed was given serious consideration and was not just rejected out of hand.

## **B. Who Participates in Mediation?**

Mediation system designers typically have to address two questions in considering who will participate in mediation conducted under the auspices of a tribunal. The first is whether, and if so, to what extent, the parties have a choice in participating (sometimes described as the distinction between mandatory and voluntary mediation). And the second is whether, and if so, to what extent, the tribunal itself limits the availability of its mediation services.

Within each category there are variations. For example, a mediation system can be completely mandatory (both parties are required to participate); completely voluntary (the mediation will only proceed if both parties agree); or mandatory at the option of one party (if one party issues a notice to mediate, the other must participate, but there is no obligation on the part of either party to issue a notice to mediate). Similarly, a tribunal can deliberately screen some cases into or out of a mediation "stream" at an early stage in the proceedings, or it can treat all cases in the same manner. In addition, the tribunal may view mediation as a service that will be made available as long as the parties wish the mediation to continue, or it can limit the amount of time and effort that will be devoted to any particular mediation. The tribunal may also wish to reserve the right to withdraw its mediation services if continued conduct of the mediation would be inconsistent with the tribunal's policy goals.

In addition, mediation system designers may wish to exercise control over the timing of mediation, or the type of mediation services that will be offered at particular stages in the process. For example, the early mediation system employed by the B.C. Human Rights Commission offered mediation to selected parties on a voluntary basis prior to the

filing of a response by the respondent. The Commission also offered voluntary mediation on a selected basis later in its case management process. The B.C. Human Rights Tribunal has the power to screen cases into a “case-managed” as opposed to a “standard” stream. Within the “standard” stream, however, it does not screen cases for mediation. Instead, it offers the parties a variety of settlement meeting options, which include both “pre-response” mediation and mediation at a later stage in the proceedings.

### **C. The Role of the Mediator**

When one considers the role of the mediator from a systems design standpoint, a number of issues require attention. First of all, who will be doing the mediation? Will it be members of the tribunal, tribunal staff, outside mediators hired on contract, or a combination of the above? Typically the justification for using “in house” mediators, whether tribunal members or staff, is that the tribunal already has these resources and it does not have a budget to hire outside mediators. While this will be true in many instances, it may be a false economy if the “in house” mediators do not have the skills to mediate successfully. Another justification for the use of tribunal members or staff as mediators is that they are likely to have subject matter knowledge that the parties will find useful in assisting them to reach an appropriate settlement. This would suggest that an evaluative dimension is regarded as significant, even if the style of mediation is largely facilitative or interest-based. The choice of “in house” mediators may enhance the credibility of their evaluative assessment of the arguments advanced by the parties in the mediation. On the other hand, it may also put undue pressure on parties to settle, especially if the mediator has an interest in seeing that a settlement is reached in order to reduce the tribunal’s adjudicative workload.

Closely related to the choice of mediator is the question of what training or qualifications the mediators ought to have. Presumably, if the tribunal is retaining outside mediators through contractual or other arrangements, one would assume that appropriate mediation skills and experience would be a pre-requisite to selection. The more difficult situation usually arises when a decision is made to use, as mediators, tribunal members or staff who were appointed for reasons unconnected to their mediation skills or experience. In these situations, it will typically be important that some opportunity for training be made available to the individuals who will be doing mediation. As tribunals begin to make

more use of members and staff as mediators, one would anticipate that a candidate's mediation skills and experience will become one of the considerations taken into account in the appointment and staff selection processes.

This leads to another design issue –namely, what style of mediation should be employed by the mediators? Lawrence Boulle and Kathleen Kelly describe four models or styles of mediation: settlement (or results-based) mediation; facilitative (or interest-based) mediation; transformative (or therapeutic) mediation; and evaluative mediation.<sup>20</sup> Each of these is an archetype, and Boulle and Kelly acknowledge that “[m]ediations in practice might display features of two or more models.”<sup>21</sup> Nevertheless, it is useful to recognize that each model represents a different basic approach to assisting parties in the voluntary resolution of their disputes. Settlement mediation is designed to “encourage incremental bargaining towards compromise.”<sup>22</sup> In facilitative mediation, on the other hand, the objective is to encourage parties to understand their dispute in terms of their underlying interests rather than their strict legal rights, and to seek a resolution that amounts to a mutually acceptable accommodation of those interests. Transformative mediation goes one step further and seeks to enable the parties to understand the root causes of their difficulties and to find longer term solutions to problems through better communication and improvements in their relationship. Finally, evaluative mediation is designed to assist parties to reach a settlement based on a realistic assessment of their legal rights and obligations. Each style or model of mediation places the mediator in a slightly different relationship to the parties and may be characterized by the use of different mediation techniques. The choice among these models, or the degree to which they are pursued in combination, will depend on the tribunal's assessment of its objectives in providing mediation services, its sense of which approaches are compatible with its broader statutory mandate, and its view of which approach is likely to be most efficacious at an acceptable cost.

The choice of approach is also likely to influence the type of work that needs to be done to prepare the parties for mediation. In our view a mediator should be able to explain to the parties what to expect at the mediation, what the parties need to do to be prepared for the mediation, and what role the mediator will play at the mediation. One of the most difficult aspects of this explanation is clarifying the relationship between the mediator's duty of impartiality and his or her role in protecting the weaker party where there is a power imbalance. Mediators may also be

expected to assist the parties in reducing the terms of a settlement agreement to writing, and the tribunal may want to take the further step of making an order reflecting the terms of the settlement agreement or, more unusually, actually requiring tribunal approval of the settlement terms.<sup>23</sup> Typically, mediation systems offer protection to both the mediator and the parties by guaranteeing the confidentiality of what is said during the mediation, especially where the mediation does not result in a settlement,<sup>24</sup> and by guaranteeing that the mediator will have no involvement with the adjudication of the case if no settlement is reached.<sup>25</sup>

#### **D. The Role of the Parties**

While it is fairly obvious that system designers must identify the role of the mediator, in our view it is also useful to pay some attention to the expectations that the mediation system has of the parties. To some extent these expectations will be explained by the mediator or whoever is providing information to the parties to prepare them for the mediation, but in some instances it is useful to reinforce these expectations through the use of a mediation agreement.<sup>26</sup> In some instances, it will be necessary for the parties to exchange at least some information in advance of the mediation, and where this is likely to be the case, the mediation system should provide the arrangements that are necessary to ensure that this exchange takes place.

The other way in which system designers will want to take account of the role of the parties is in ensuring that the system offers protection to the parties from abuse of the mediation process by their adversaries. In some respects, the most powerful protection that mediation systems offer is that resolution can only be achieved through voluntary agreement of the parties. As noted above, this protection is typically reinforced by the requirements that information obtained in mediation remain confidential and that the mediator will play no role in hearing the merits of a dispute that is not settled unless the parties consent. It is worth bearing in mind, however, that it cannot be assumed that statements made during a mediation session have no significance if no settlement is reached. For example, even though direct evidence of a statement made during a settlement meeting may not be led in a subsequent hearing, typically there is no prohibition on the derivative use of the information obtained as a result of the statement to gather evidence that would be admissible in the hearing.

In addition, there is always a concern that the more powerful party in a mediation session will use that power to the detriment of a weaker adversary. Mediators have developed techniques to help redress power imbalances.<sup>27</sup> The tribunal will want to have sufficient confidence in the efficacy of these techniques that it is satisfied that its offer of mediation services does not reinforce or exacerbate pre-existing inequalities in a manner that calls into question the justice of the resolutions achieved with its assistance. Even where the tribunal is satisfied of the efficacy of these techniques as a general proposition, it may wish to reserve the right to withdraw from mediation in particular instances in which it concludes that one of the parties is abusing the mediation process.

### **E. Evaluation**

It could be argued with some justification that mediation initiatives undertaken by a tribunal are no more in need of ongoing evaluation than any other aspect of its operations. We are tempted to respond that this is better understood as an argument in favour of a broader commitment to reflection on the efficacy of the tribunal's activities than it is as a refutation of the need for evaluation of the tribunal's system of mediation. That observation having been made, however, we also recognize that government resources are limited and that a commitment to program evaluation necessarily entails the shift of some resources away from the delivery of services, and this shift of resources is not always easy to justify. Our argument for the special desirability of evaluation of a mediation initiative rests primarily on the proposition that, if mediation is undertaken in order to achieve specific program goals, it is important to understand whether or not those goals are actually being achieved. It may be that, as we gain more experience, the value of making mediation available will seem as self-evident as the value of adjudication by specialized tribunals. Until that time, we would suggest that building evaluation into the design of tribunal mediation systems should be seen as highly desirable, even if it is not absolutely essential. Having made that plea, we now turn to the preliminary results of our own evaluation of mediation as conducted by the British Columbia Human Rights Tribunal.

## **IV. The Mediation Process Before the B.C. Tribunal**

Mediation is a significant part of the Tribunal complaints process. During the 2004–2005 fiscal year—the year of our study—just over 20

percent of all cases were settled as a result of the Tribunal mediation process.<sup>28</sup> An additional 12 percent of cases were settled directly between the parties. If one excludes cases that were screened out at the initial screening stage, the figures increase to 27 percent and 16 percent respectively.<sup>29</sup>

As we have noted, the B.C. Human Rights Tribunal is best classified as a bi-party dispute resolution tribunal, and the system design issues applicable to such agencies deserve consideration. It does, however, have certain functions that do not neatly fit within this category, and we discuss the relationship between mediation and the public interest at the end of the chapter.

### **A Preliminary Matters: Mandate and Design Process**

There is clear legislative authority authorizing the Tribunal to conduct mediation. Section 27.6 of the *Human Rights Code* provides:

A member or a person appointed, engaged or retained under section 33 may assist the parties to a complaint, through mediation or any other dispute resolution process, to achieve a settlement.<sup>30</sup>

In addition, section 27.3(2)(h) authorizes the Tribunal to make rules regarding mediation and other dispute resolution processes.<sup>31</sup> The Tribunal has exercised this power to describe the process in considerable detail in its *Rules of Practice and Procedure*.<sup>32</sup> These are supplemented by a guide and policy statement.<sup>33</sup>

The Tribunal engaged in a consultation process prior to developing these rules. It distributed draft versions of the rules to all representatives who had appeared before the Tribunal previously. It also presented the draft at a symposium of the Continuing Legal Educational Society on human rights issues. In addition, it presented them to the Human Rights Subsection of the Canadian Bar Association and had them posted on the Association's web site. After the rules had been in effect, the Tribunal engaged in a second consultation with an invited group of people who had represented parties to human rights hearings and who had experience with the new rules.<sup>34</sup> Modifications were made after these consultations.

## **B. Who Participates in Mediation**

Rule 21 of the *Rules of Practice and Procedure* provides that the Tribunal will offer settlement meetings to the parties. The rules do not provide for any screening that would exclude certain cases from the mediation process. However, the mediator retains discretion to withdraw mediation services in certain circumstances, and parties are required to sign a mediation agreement containing terms specified by the Tribunal.<sup>35</sup> Mediation is voluntary. It is offered at all stages of the process, but the Tribunal divides mediation into two categories: Early Settlement Meetings, which take place before a response is filed, and Regular Settlement Meetings, which take place thereafter.<sup>36</sup> Just under one quarter of settlements during our study took place at the Early Settlement Meeting stage.<sup>37</sup>

## **C. The Role of the Mediator**

A majority of settlement meetings are conducted by one of the members of the Tribunal. The remaining meetings are conducted either by Tribunal staff lawyers or by outside mediators. Mediation constitutes approximately one quarter of the workload of tribunal members.<sup>38</sup> Thus, it imposes a considerable cost in terms of Tribunal resources. We discuss below whether, in the end, it saves Tribunal resources.

Most members of the Tribunal had prior mediation experience, though the degree of experience varied somewhat from member to member. Training is provided on an ongoing basis and now has been extended to all staff of the Tribunal who deal with the parties directly, whether or not they conduct mediations themselves. One reason for training staff members other than mediators is that they are often able to identify cases likely to be resolved through mediation early in the process. The training is also designed to help them to diffuse issues between the parties short of formal mediation.<sup>39</sup>

If a member conducts a settlement meeting, that member will not adjudicate the complaint except with the written consent of all parties, and a member assigned to hear a complaint will not take part in mediation except with such consent.<sup>40</sup>

The *Rules of Practice and Procedure* provide that settlement meetings can use any of the following approaches, or a combination of approaches.<sup>41</sup>

- interest-based mediation
- early evaluation or rights-based mediation
- structured negotiations between the parties, with more limited assistance from the Tribunal
- a final determination on the merits.

In practice, most mediation involves a combination of the first two of these options. The emphasis on interest-based or rights-based approaches varies somewhat with the circumstances and the mediator. However, mediators try to avoid outcomes that would be inconsistent with human rights principles. Indeed, Tribunal policy allows mediators to identify public policy issues not raised by the parties and to encourage them to take account of such issues, though they cannot be compelled to do so.<sup>42</sup>

Mediation generally takes place at the offices of the Tribunal or, in the case of mediations where there is no such office, at another neutral site. Some mediations are conducted by telephone, either because it is not possible to arrange a meeting in person or at the request of the parties. As is customary in mediation of bi-party disputes, the process is confidential and information received during a settlement meeting is inadmissible at the hearing except with the consent of the person who gave the information.<sup>43</sup>

#### **D. The Role of the Parties**

The *Rules of Practice and Procedure* set out the settlement meeting process.<sup>44</sup> They are supplemented by the Settlement Meeting Policy.<sup>45</sup> They require the parties to sign a settlement agreement stating that the party is willing to participate in the meeting, that any representative of a party has authority to settle the complaint and that the information obtained during the process will be kept confidential.<sup>46</sup> The *Rules* also specifically set out the confidentiality requirements.<sup>47</sup> As we have noted, the mediators can protect a party from abuse by various techniques during the mediation.<sup>48</sup> If such techniques fail, the mediator can terminate the settlement meeting.<sup>49</sup>

## **E. Evaluation**

Once a month, the Tribunal members meet to discuss their mediation experiences and to do an informal debriefing. The Tribunal is presently working with a consultant to develop a more formalized mediation evaluation tool.<sup>50</sup> The Tribunal also collects information about settlements that have a systemic component. In addition, as we have noted, our study was carried out in partnership with the Tribunal and was designed to assist the Tribunal in monitoring the fairness and effectiveness of mediation.<sup>51</sup> Our study has been described in successive annual reports of the Tribunal.<sup>52</sup>

## **V. Empirical Results**

### **A. The Methodology of Our Study**

Our study consisted of an examination of settlement meetings that took place between July 1 and December 31, 2004. At the end of a settlement meeting, the mediator distributed a questionnaire to the participants. One questionnaire was given to complainants, and a slightly different one to respondents. The questionnaires were relatively short, in order to encourage a high response rate. They consisted of 19 questions for complainants and 18 for respondents. They included questions about the nature of the parties, the information provided about the process to the parties, the mediation process itself, the outcome of the mediation and the degree of satisfaction with both the outcome and the process.<sup>53</sup> (The questions are set out in full in Appendix A of this chapter.) Parties were encouraged to fill out the questionnaire before leaving the premises in order to maximize the response rate. A locked box to which the Tribunal did not have access was provided in the waiting area near the rooms used for settlement meetings. However, some parties chose to fill in the questionnaires later and to mail them to us.<sup>54</sup>

Participation in the study was entirely voluntary, but we had a relatively high number of responses—approximately 122.<sup>55</sup> The response rate was high enough to give us considerable confidence in the result.<sup>56</sup> There are also indications that those who responded are relatively representative of all the parties who engaged in mediation during this period. Forty five percent of those who participated were complainants and 55 percent respondents. In addition, the percentage of cases that were successfully settled is in the same range as the percentage reported by the Tribunal in its Annual Report for that fiscal year.<sup>57</sup> The grounds of

discrimination alleged in the complaints we studied also seem to roughly approximate the distribution of grounds of all complaints, with the possible exception of race discrimination cases.<sup>58</sup>

We supplemented the information we collected through the questionnaires with interviews with Tribunal mediators and with lawyers and other advocates who have taken part in the human rights process. For purposes of this chapter, however, we rely mainly on information from our questionnaires and the Tribunal's data management system.

We should note three significant differences between this stage of the study and our earlier study of mediation conducted by the now defunct B.C. Human Rights Commission. The first is that the Commission study focused on early mediation—that is, mediation conducted before the response was filed. Our study of the Tribunal covered settlement meetings at all stages of the complaint.

A second difference is that our Commission study did not provide reliable information about party satisfaction with the results of mediation or the process. We intended to collect such information, but the response rate was so low that the results were not meaningful. A significant cause of the low response rate was that we were not permitted to contact the parties directly.<sup>59</sup> Instead, parties were given a letter explaining our research and asking them to contact us if they were interested in taking part. We circumvented this problem during the Tribunal stage of the research with the cooperation of the mediators, who distributed the questionnaire, rather than a letter of request, at the end of the meeting. As a result, we have reliable data about party satisfaction only for the Tribunal stage of the research.

The third difference is that the Commission study included an examination of the complaint files that were opened during the lifetime of the Commission's Early Mediation Project. Indeed, the file review turned out to be the central feature of our research of the Commission process. We have not conducted a similar review of Tribunal files. The consequence is that the data we collected at the Commission phase of the study raises no issues regarding the size or nature of the sample studied but the type of information available is limited in certain respects. In particular, the information does not include the reaction of the parties. In other respects, however, the information from the files is more detailed than that derived from our questionnaires about the Tribunal process. For example, the files contained more specific data about the amount of monetary settlements, since our questionnaire asked whether the monetary

aspect of the settlement fell into one of five ranges rather than the exact amount of the settlement.

Despite these differences, we believe that useful comparisons with our earlier study are possible. In some instances, the comparisons raise as many questions as they answer, but they at least suggest tantalizing hypotheses about how the different institutional settings influence the mediation process.

## **B. Outcomes**

In Part II of this chapter, we suggested that assessment of a mediation process should take account of the advantages and disadvantages of the process to both the agency conducting the mediation and the parties to the dispute. We stated that the interests of the agency and the parties may not always coincide. We also noted that some aspects of the human rights process do not fit neatly within the bi-party dispute resolution model and that it is appropriate to consider whether mediation is consistent with a human rights agency's role of developing law and policy in a manner that carries out the purposes of the legislation and that provides guidance to members of the public. In this section of the chapter, we first discuss our results in relation to the interests of the Human Rights Tribunal and then the parties to the mediation. We next turn to an assessment of the process in terms of the broader public interest.

### **1. Does Mediation Serve the Interests of the Human Rights Tribunal?**

The primary benefit of mediation to the Human Rights Tribunal is its potential to reduce the workload of the agency and thus to avoid backlogs. One criterion relevant to workload is the percentage of cases that are settled. Settlements prior to hearing save the resources used in conducting hearings, and even settlements during hearings tend to shorten the hearings. A second criterion is the stage at which the settlement takes place. As a general rule, the earlier the settlement, the greater the saving of agency resources achieved by mediation.

On the other side of the balance sheet is the cost of mediation to the Tribunal. Mediation inevitably has a cost to the agency, and if the only goal of mediation is managing agency workload, that cost can only

be justified if providing mediation saves more resources than it expends. It is also worth considering whether or not the same results would have been achieved without mediation, since some cases settle through direct negotiations between the parties. Unless mediation by the agency increases the rate of settlement of complaints or achieves settlement at an earlier stage of the process, no agency resources are saved. Nevertheless, mediation might be justified on other grounds discussed later in this chapter, such as the possibility that mediation led to settlements that were more just or that mediation increased party satisfaction with the process.

**a. Settlement Rate**

During the 2004–2005 fiscal year, 353 complaints were settled. The total number of files closed was 871. Thus, the settlement rate in comparison with the total number of cases closed was 40.5 percent. The Tribunal assisted in 221 of these cases, and the remaining cases were settled through direct negotiations between the parties.<sup>60</sup> Clearly, these settlements cumulatively had significant effect on the number of cases that otherwise would have gone to hearing.

It also appears that there is a relatively high settlement rate of cases that are actually mediated. Table A. below, which is based on our questionnaires, shows that 61 percent of those who took part reported that the complaint had been settled at mediation. If one includes cases that were partially settled, the rate is 66 percent. Moreover, our data may understate the success rate, since the Tribunal's Annual Report indicates a settlement rate of just over 65 percent.<sup>61</sup> The slightly lower rate of success that we found may be due to the fact that parties who were dissatisfied with the results might be somewhat more likely to take part in our study in order to document their dissatisfaction, but it may also be due to other factors.<sup>62</sup>

In any event, the figure is relatively consistent with the rate of settlement we found in our evaluation of the Human Rights Commission's Early Mediation Project during the first stage of our study (64 percent).<sup>63</sup> The Tribunal results are more impressive because of the fact that the Commission's project had screened out cases deemed unfit for mediation. The fact that the Tribunal achieved a roughly comparable result without such screening provides some evidence that the institutional setting within the Tribunal provides added incentive to settle.<sup>64</sup>

**Table A. Survey Results – Settlement Rate<sup>65</sup>**

<b>Settlement rate</b>				
<i>Identity</i>	<i>Settled</i>			
	Total cases	Yes, fully	No	Fully or Partially
Complainant – Number of cases reported	54	33	20	34
% of Complainant's Cases Settled	100%	61%	37%	63%
Respondent— Number of cases reported	67	40	21	45
% of Respondent's Cases Settled	100%	60.5%	32%	68%
Total Number of cases reported	120	73	41	79
Total Cases— Settlement rate (%)	100%	61%	34%	66%

The percentage of full settlements at the Tribunal was somewhat higher for early mediations (63 percent) than later mediations (57 percent). However, this difference is not large, and it disappears if one includes partial settlements (65 percent settlement at early settlement meetings versus 66 percent at later settlement meetings). Therefore, our findings do not support the conclusion that one stage or the other is more likely to be successful and tend to refute anecdotal information from advocates that the success rate at early mediation is quite low.

### b. Timing of Settlements

The following table gives the timing of settlement where that timing is known.<sup>66</sup>

**Table B. Timing of settlement**

<b>Stage (from early to late)</b>	<b>Percent of Settlements Where Stage Known</b>
Early settlement (before response filed)	28.74%
After response, before settlement meeting	4.60%
After settlement meeting, before pre-hearing conference	23.75%
After pre-hearing conference, before hearing	41.76%
At hearing	1.15%

As might be expected, the largest single category is relatively late in the process, when the pressure of an imminent hearing is greatest. However, over a quarter of cases settled before the response was filed and 57 percent were settled before the pre-hearing conference at which plans for the hearing are discussed.

We do not have numerical data about the timing of settlements unassisted by the Tribunal. Other evidence about the degree to which Tribunal mediation advances the date of settlement is somewhat ambiguous. Interviews with lawyers and advocates working for the Human Rights Clinic, an organization that represents human rights complainants, suggest that settlements between the parties often occur late in the process and that Tribunal mediation does lead to settlements at an earlier stage.<sup>67</sup> On the other hand, data about the average time between the filing of a complaint and settlements suggests a relatively modest shortening of the process. The average time for cases settled between the parties is 11.5 percent longer than the average time for cases settled with Tribunal assistance.<sup>68</sup>

These statistics are open to different interpretations. One is that the Tribunal's mediation services do not significantly reduce the time to settle a complaint. Yet, there are other possible variables. For example, if settlements between the parties occur more frequently in relatively straightforward cases, that fact might reduce the time required to achieve a settlement. Also, a comparison of the time to settle of cases with and without Tribunal assistance does not take account of the fact that some cases might not have settled at all without Tribunal assistance. If Tribunal assistance increases the rate of settlement, then one must take account of the Tribunal resources that would have been engaged in conducting the hearing and writing a decision. Therefore, conclusions based just on the average time to settlement may understate the degree to which mediation services saves Tribunal resources.

**c. Balancing Administrative Workload Costs of Mediation Against the Savings Achieved**

The mediation services provided by the Tribunal do take up a significant part of the time of members of the Tribunal. The general consensus of members is that they spend about 25 percent of their time on mediation, though some members gave a higher estimate.<sup>69</sup> From the point of view of Tribunal resources alone, mediation thus can only be justified if it reduces quite significantly the other costs of processing cases.

Unfortunately, we do not have sufficient data to provide a *quantitative* estimate of the net savings created by Tribunal assisted settlements. We do not have information about the amount of time spent by the Tribunal members with respect to each stage of a complaint. Thus, we cannot at present compute how many hours are saved if a settlement terminates a complaint at a particular stage. Even if we had this information, there would be other missing information that would hinder a quantitative estimate. For example, one would need to take account of the fact that some cases will terminate short of a full hearing even if no settlement is reached. A more intractable gap is information about the percentage of cases in which the parties engage in settlement efforts outside the tribunal process or the success rate of those unassisted settlement efforts. Since such settlements are private, no publicly available information exists about them other than the fact the settlement took place.<sup>70</sup>

Nevertheless, our *qualitative* evidence suggests that mediation is warranted, even on the basis of reduction in the administrative workload alone. This conclusion is supported by interviews both with members of the Tribunal who conduct mediation and with advocates at the Human Rights Clinic. The benefit of settlements during a settlement meeting is significant in itself, but both of these groups also believe that a “failed” settlement meeting frequently assists in achieving a later settlement. Though we do not have numerical statistics to confirm all of these opinions, neither do the statistics contradict these views.

We emphasize again, that mediation can serve goals other than reducing the adjudicative workload, such as the benefit it may provide to the parties. We discuss such alternative justifications below.

## **2. Does Mediation Serve the Interests of the Parties?**

### **a. Mediation and Party Satisfaction**

Data regarding party satisfaction can be used as indirect evidence of matters such as the fairness of the process and of the terms of settlement. Party satisfaction can also be considered a value in itself; resolving a dispute in a manner that the parties find satisfying is preferable to one that they do not find satisfying, even if the outcome is the same.

In our study, we asked parties to assess their satisfaction both with the results of the mediation and with the mediation process. Tables C. and D. summarize our findings:

**Table C.<sup>71</sup> Survey Results – Party Satisfaction with *Results* of Mediation**

<b>Party</b>	<b>Very satisfied</b>	<b>Satisfied</b>	<b>Neither</b>	<b>Dis-satisfied</b>	<b>Very dis-satisfied</b>	<b>Average score<sup>72</sup></b>
<b>Number of Complainants</b>	11	18	18	3	5	2.51
<b>Percent</b>	20%	33%	33%	5%	9%	
<b>Number of Respondents</b>	6	29	14	11	5	2.69
<b>Percent</b>	9%	45%	22%	17%	8%	
<b>Total Number</b>	17	47	32	14	10	2.61
<b>Percent</b>	14%	39%	27%	12%	8%	

Fifty three percent of parties were “very satisfied” or “satisfied” with the results, while only 20 percent were “dissatisfied” or “very dissatisfied” (the remainder were “neither satisfied nor dissatisfied”). Not surprisingly, satisfaction with the result was strongly correlated with whether or not there had been a settlement during mediation. Of the cases that did not settle, only 12.5 percent were “very satisfied” or “satisfied,” while 35 percent were in the “dissatisfied” or “very dissatisfied” category. Of the cases that settled, 78 percent were in one of the two satisfied categories, while 11 percent were in one of the two dissatisfied categories.

Process satisfaction was higher still, as shown by Table D.

**Table D. Survey Results – Party Satisfaction with *Process of Mediation***

<b>Parties</b>	<b>Very satisfied</b>	<b>Satisfied</b>	<b>Neither</b>	<b>Dis-satisfied</b>	<b>Very dis-satisfied</b>	<b>Score</b>
<b>Number of Complainants Reporting</b>	14	24	9	5	3	2.25
<b>Percent of Complainants Reporting per category</b>	25%	44%	16%	9%	5%	
<b>Number of Respondents Reporting</b>	7	41	7	7	4	2.39
<b>Percent of Respondents Reporting per category</b>	11%	62%	11%	11%	6%	
<b>Total Cases Reported</b>	21	65	16	12	7	2.33
<b>Percent of Total Cases Reported per category</b>	17%	54%	13%	10%	6%	

Just over 71 percent of parties were “very satisfied” or “satisfied,” while only 16 percent were “dissatisfied” or “very dissatisfied.” Even among the cases that did not settle, 54 percent were within one of the two “satisfied” categories, while 27 percent were “dissatisfied” or “very dissatisfied.” Within the cases that settled, 82 percent were in one of the two “satisfied” categories, while only 9.5 percent were within the “dissatisfied” categories.

These data suggest that mediation is perceived by the parties as promoting their interests. Even the relative dissatisfaction with results

when there is no settlement is, in our opinion, consistent with this conclusion. It is relevant that the responses were given just after the meeting that did not result in a settlement, not at the end of the human rights process. It is not at all surprising that the immediate reaction of parties who were hoping for a settlement is disappointment. In addition, the timing of our questionnaires did not allow the parties to take account of the fact that a “failed” settlement meeting may have contributed to a settlement later in the process. The very strong positive reactions of those parties who reached a settlement suggest that mediation can be a satisfying means of resolving human rights disputes.<sup>73</sup>

#### **b. Mediation and Fairness to the Parties**

The high level of satisfaction with the mediation process, described in the previous section, provides significant evidence of the fairness of the process. Certainly, it suggests that the process is perceived by most parties as fair. As we noted earlier, most mediations are conducted by members of the Human Rights Tribunal.<sup>74</sup> The training and background of the members makes them sensitive to issues of fairness and undoubtedly contributes to the favourable reaction of the parties.

Despite this evidence, some of our findings provide grounds for caution and for further investigation. One concern arises from evidence of disparities depending on whether or not a party is represented by a lawyer or other advocate during the mediation. There was some variation in the satisfaction with the process depending on whether or not a party was represented during mediation, though the disparity was perhaps not as great as one would have predicted. Among those parties who were represented, over 77 percent were “very satisfied” or “satisfied” with the process, whereas just under 61 percent of parties who were not represented fell within these categories.

Of greater cause for concern is a disparity in the average amounts of settlements, depending on whether or not a complainant was represented. The average settlement for complainants who were represented was just under \$7,000, whereas the average for those not represented was slightly under \$4,100.<sup>75</sup> Of course, factors other than a power imbalance or other unfairness may explain these results. The most straightforward explanation would be that complainants were less likely to be represented if their monetary loss was more modest. However, the disparity deserves further investigation.

A second factor of some concern is the varying rate of satisfaction between different grounds. Sixty one percent of parties in sex discrimination complaints were within the two “satisfied” categories regarding satisfaction with results. The figure for disability discrimination cases was 51 percent. It was only 33 percent for cases involving race and related grounds. As demonstrated by Table E. below, the disparities may be due in part to the relatively small size of the sample, particularly concerning discrimination because of race and related grounds, but the results encourage additional research.

**Table E. Party Satisfaction with Results of Mediation**

	<b>Very satisfied</b>	<b>Satisfied</b>	<b>Neither</b>	<b>Dis-satisfied</b>	<b>Very dis-satisfied</b>	<b>Total</b>
<b>Disability</b>	8	19	18	4	4	53
	15.1%	35.8%	34.0%	7.5%	7.5%	100.0%
<b>Sex</b>	5	17	7	5	2	36
	13.9%	47.2%	19.4%	13.9%	5.6%	100.0%
<b>Race/ related</b>	1	2	2	1	3	9
	11.1%	22.2%	22.2%	11.1%	33.3%	100.0%

The disparity was not quite as great with regard to satisfaction with the process, and that may indicate that the results reflect factors other than perceived fairness, as shown by the following table.<sup>76</sup> Also, the number of responses concerning complaints involving race and related grounds was again quite low, and it would be wrong to place too much emphasis on the data.

**Table F. Party Satisfaction with Process of Mediation**

	<b>Very satisfied</b>	<b>Satisfied</b>	<b>Neither</b>	<b>Dissatisfied</b>	<b>Very dissatisfied</b>	<b>Total</b>
<b>Disability</b>	7	31	7	4	4	53
	13.2%	58.5%	13.2%	7.5%	7.5%	100.0%
<b>Sex</b>	9	18	5	3	1	36
	25.0%	50.0%	13.9%	8.3%	2.8%	100.0%
<b>Race/ related</b>	1	3	1	1	2	8
	12.5%	37.5%	12.5%	12.5%	25.0%	100.0%

We also examined whether any of our results were different for male and female complainants.<sup>77</sup> This portion of our study did not just consider complaints of sex discrimination but instead examined gender data regardless of the ground of discrimination alleged. In our earlier study of the Commission's Early Mediation Project, we reported that some of our findings were consistent with the existence with a power imbalance, but others were more ambiguous and that the matter deserved further study.<sup>78</sup> An analysis of the questionnaires completed by complainants who took part in mediation conducted by the Tribunal contains some of the same ambiguities we reported in our earlier study.

It appears that women complainants are more likely to settle than men. In our Tribunal study, 54.5 percent of male complainants reported that they had reached a full settlement. The rate for female complainants was 68 percent. If one includes partial settlements, the rate for men remains the same but rises to 71 percent for women. In our earlier study of Commission mediation, we found a comparable gap between the settlement rate of male and female complainants, though the rate for both groups was lower than occurred during Tribunal mediation.

Taken by itself, this gap could be interpreted as indicating that a power imbalance placed undue pressure on women to settle. However, data concerning satisfaction with the results of the mediation point in the opposite direction. Just over 62 percent of female complainants were "very satisfied" or "satisfied" with the results, while the figure for men

was 41 percent. Only 6 percent of women were in one of the two dissatisfied categories, as compared with 27 percent of men.

Data concerning satisfaction with the process is somewhat ambiguous but does not provide convincing evidence of a power imbalance. A slightly higher percentage of men were “very satisfied” or “satisfied” with the process (73 percent versus 68 percent), and a slightly higher percentage of women expressed a degree of dissatisfaction (12.5 percent versus 9 percent). Because of the size of the sample, however, we are reluctant to draw firm conclusions from these relatively modest disparities.

Settlements gave men higher monetary compensation than women, but again the difference was not dramatic. The average for men was seven percent higher than that for women.<sup>79</sup> Based on all of this evidence, the existence of some degree of power imbalance cannot be ruled out, but it also cannot be confirmed.

### **c. Outcomes – Mediation Compared to Hearings**

Mediation and other “alternative dispute resolution” is sometimes characterized as inferior to a full hearing as a mechanism for resolving legal disputes, and it seems relevant to compare the results of mediation with the outcome of Tribunal hearings. If the results of mediation deviated from the results at hearing in a manner that could not be rationally explained, one could assume that mediation was not serving the interests of one or the other of the parties. Such a result could also be evidence that the broader public interest mandate of the Tribunal was not being fully served by mediation

We first compare monetary and non-monetary awards by the Tribunal at hearing with the terms of settlement agreed upon through mediation. We then examine whether mediation offers more remedial flexibility than Tribunal orders.

It would also be interesting to compare party satisfaction with settlement meetings as compared with hearings. Unfortunately, we do not have the data that would allow us to do so. Our study was limited to the Tribunal settlement process and to a review of Tribunal decisions after a hearing. Therefore, we have no information about party satisfaction with the hearing process. Future research into party satisfaction with hearings could be useful in assessing the relative merits of mediation and litigation.

**i. Monetary settlements**

The Tribunal does not keep data on the amount of monetary settlements, and the following figures are based on our questionnaires. These questionnaires do not permit an exact calculation of the average monetary settlement that was agreed to, since it asked parties to say whether their settlement came within one of five ranges. Table G. summarizes the results of those settlements in which there was monetary payment.

**Table G. Financial settlement Ranges**

	<b>\$0- \$500</b>	<b>\$500- \$3,000</b>	<b>\$3,000- 10,000</b>	<b>\$10,000- \$25,000</b>	<b>\$25,000 or more</b>	<b>Total</b>
<b>Number</b>	5	23	28	6	5	67
<b>Percent of total settlements</b>	7.5%	34%	42%	9%	7.5%	100%

Using the assumption that the average settlement within each range except the highest range was at the middle of the range, the average settlement was approximately \$6,800.<sup>80</sup> Since there was no information about the upper limit of the highest range it was impossible to compute a mid-point. Therefore, we assumed that each award in this category was \$25,000 (the minimum within the range) and thus have probably somewhat underestimated the average settlement amount.

From our review of Tribunal decisions over a period of several years, we have determined that the average monetary award was \$12,600.<sup>81</sup> Using this figure, settlements averaged only 56 percent of Tribunal awards. However, the figure is influenced substantially by two especially high awards and for that reason is somewhat misleading.<sup>82</sup> If we apply the same assumption about high awards that we used to calculate the average settlement amount (i.e. treat all awards of \$25,000 and over as being exactly \$25,000), settlements constitute 71 percent of Tribunal awards.<sup>83</sup>

One would expect that the settlement terms would be somewhat less generous than a complaint that was *successful* at hearing. There will

almost always be some doubt about whether the complaint would have succeeded at hearing, and it makes sense for a complainant to take account of that uncertainty in calculating an acceptable amount.<sup>84</sup> In addition, a complainant may rationally agree to an additional discount because a settlement provides the amount more quickly and with less cost, whether in terms of time, resources or emotional upheaval.<sup>85</sup> However, it is also true that a respondent might rationally pay somewhat more than the amount expected to be awarded at hearing to avoid additional litigation costs and publicity.<sup>86</sup>

Any conclusion about the adequacy of settlements in relation to Tribunal awards is somewhat speculative in light of the ambiguities in the calculations that we have described. Our tentative conclusion is that the average of settlements is consistent with a rational calculation by the parties about the likely results at hearing and that they do not indicate that the process is skewed in favour of either complainants or respondents. However, further research about this matter may be fruitful.

The monetary settlements or awards generally are comprised of two components: (1) lost wages and other monetary losses, and (2) injury to dignity and self-respect. For the purposes of this chapter, we have not made a comparative examination of the way these two elements are treated in settlements and Tribunal awards. The primary reason is that we have no reason to believe that the two different processes should give any inherent preference to one category of monetary award over the other. It seems more likely that any disparity between the two categories would be explained by the fact that compensation for loss of income is taxable whereas injury to dignity or injured feelings is not.<sup>87</sup>

One rather striking feature of our findings is that the awards were substantially above those that we found in our study of early mediation before the Commission. The average award in those settlements was \$4,210.61.<sup>88</sup> The fact that settlements at the Tribunal were over 60 percent higher does not seem due to any major change in the size of awards at hearing since the time of our Commission study (2001–2002). A more likely explanation is that the different institutional setting of the mediation plays a significant role. It seems likely that during the Commission mediation, the parties would take account of the fact that most cases would be dismissed by the Commission and never referred to the Tribunal.<sup>89</sup> Though the Tribunal dismisses a significant number of cases short of a full hearing, respondents probably perceive that there is a greater likelihood of a full hearing when the complaint is filed directly

with the Tribunal than was formerly true when a case was subject to screening by the Commission before referral to the Tribunal. That perception would encourage higher settlements.

**ii. Non-monetary settlements and the prevention of discrimination**

Non-financial terms of settlement were reported in 81 percent of cases that settled. Eight percent of responses reported a purely non-monetary settlement, while 73 percent reported both monetary and non-monetary terms of settlement. However, many of the non-monetary terms of settlement are not comparable to the results of a hearing. Most notably, in 16 percent of the responses reporting non-monetary terms, the only non-monetary term was a confidentiality agreement, and confidentiality agreements were included in another 27 percent of responses. Obviously, confidentiality agreements are not available in a public hearing. Another 27 percent of responses reported an agreement for an apology; in 4.5 percent of responses, this was the only non-monetary term. A mandatory apology makes little sense because it lacks the necessary sincerity, and such orders have become rare to nonexistent in human rights decisions.<sup>90</sup>

Other non-monetary terms of settlement are comparable to items that could be ordered by the Tribunal. One such term is a letter of reference, which was agreed to in 34 percent of settlements.<sup>91</sup> Another is to grant the complainant what had been denied (a job, promotion etc.), which occurred in three percent of settlements. An agreement to change a policy was contained in 15 percent of settlements. However, our questionnaires do not reveal the nature or extent of the change in policy.

In one sense, every Tribunal remedy contains a non-monetary term. Section 37(2)(a) of the *Human Rights Code* provides that if the Tribunal determines that the complaint is justified, it must order the respondent “to cease the contravention and to refrain from committing the same or a similar contravention.” It appears that there were more specific non-monetary orders of significance in 11 percent of Tribunal remedies over the period we examined. This figure is derived from summary information in the Tribunal’s data management system rather than a thorough review of decisions, and it may understate the frequency of such orders. Six percent of remedies ordered some change in policy. Only one order provided that the person should have the chance to obtain the job that had been denied.

This comparison of terms of settlement and Tribunal awards does not reveal any marked difference in what is granted in the two contexts with the exception of letters of reference. They seem to be a common feature of settlements but were not ordered in any of the Tribunal decisions. We do not have a good explanation for this difference.

### **iii. Remedial flexibility**

One of the potential advantages of mediation is that it may provide more remedial flexibility than an adjudicative remedy, and such flexibility could serve the interests of both parties.<sup>92</sup> Our short questionnaires did not provide enough information to test this view. Our interviews with mediators and with advocates at the Human Rights Clinic do support this hypothesis, however. Both groups felt that some options were available through mediation that either would not be possible at hearing or would be meaningless. One example is an apology which, as we have noted, does not make sense as part of a mandatory award. On the other hand, a settlement meeting may provide an opportunity for a sincere apology, either in the settlement agreement or in the course of the meeting, and that type of apology would sometimes have value for a complainant. Another example cited by one of the advocates at the Human Rights Clinic is a change in a job description.<sup>93</sup>

### **3. Mediation and the Broader Public Interest**

We have noted that human rights legislation has broader goals than just bi-party dispute resolution. One goal is to change patterns of inequality that disproportionately affect certain groups. Another is to eliminate the harm caused to society-at-large by discrimination. A third is to educate the public about human rights principles and to foster a more tolerant society.<sup>94</sup>

It is sometimes argued that mediation is inconsistent with these goals by its very nature. A voluntary settlement between the parties is likely to focus on their individual interests rather than on eliminating patterns of discrimination or reducing the harm to the larger society, it is argued. Indeed, it could incorporate terms that were contrary to human rights principles. In addition, the confidentiality of mediation seems inconsistent with the goal of educating the public about human rights principles.

There is some merit to these arguments. It takes a degree of altruism for a complainant to seek a settlement that will serve the public interest but will not be of personal benefit. Settlements are almost always confidential and do nothing to educate the public about discrimination unless information about them is disseminated in some manner. In contrast, a tribunal or court decision may achieve broad change by redefining human rights obligations even if the remedy in the case was limited to a monetary award to a complainant. The cases recognizing that sexual harassment is discriminatory provide an example.<sup>95</sup>

We do not believe, however, that these arguments militate against the use of mediation in the human rights process. We have described our findings that there is no dramatic disparity between the prevalence of provisions in settlement agreements that are designed to prevent future discrimination against others and similar provisions in Tribunal orders.<sup>96</sup> We have also noted that settlements have the potential to achieve more flexible solutions that may serve public policy interests. For example, the most recent annual report of the Tribunal describes a number of mediation settlements designed to achieve systemic change.<sup>97</sup> The inclusion of this information in the annual report, which is done in a way that does not reveal the identity of the parties, also illustrates the fact that there are ways to use settlements for educational purposes while preserving the confidentiality necessary to the mediation process.

It makes more sense to us to consider public interest goals in designing the mediation process, rather than in deciding whether to offer mediation services. For example, one option would be to exclude some cases from mediation because one can determine in advance that a complaint raises a type of public policy issue that mediation is unlikely to address. Another option would be for mediators to intervene if it appears that the parties are moving toward an agreement that violates human rights principles or that fails to address an important public policy issue.

The Tribunal does not engage in any express screening of cases eligible for mediation, but it reserves the right to withdraw from mediation if the mediator determines that the process is inappropriate.<sup>98</sup> The language of the Tribunal's rules is sufficiently broad to allow the withdrawal of mediation services if the results seemed likely to undermine broader human rights objectives. In addition, the *Rules of Practice and Procedure* provide for the streaming of cases into a "case managed stream," based on criteria such as the complexity of issues, the number of participants and the remedies being sought.<sup>99</sup> This provision

does not provide for screening, but it does give the Tribunal more scope for management of a complaint in a manner that may encourage consideration of public policy issues.<sup>100</sup> Finally, tribunal members use a mixture of interest-based and rights-based mediation techniques that allow for consideration of human rights principles. The Settlement Meeting Policy and Procedure explicitly provides:

To further the broader public goals of the *Code*, mediators may identify public policy issues, such as systemic discrimination or new applications of the *Code*, that may be raised by complaints filed with the Tribunal. The *Code* does not authorize the Tribunal to require that public policy issues be addressed; however, parties may be encouraged to explore public policy issues, and to formulate remedies that address them.<sup>101</sup>

The reality is that if every case had to be fully adjudicated, the result would be delay to the point of gridlock, given available resources. The resulting delays would themselves undermine the purposes of human rights legislation, including the broader public policy goals. In addition, some cases do not have great potential to change broader patterns of inequality or to educate the public about human rights. For example, a harassment complaint against a small employer that has facts similar to dozens of other earlier cases is unlikely to change patterns or to attract the type of attention that would educate the public, even if it went to full hearing. If such a case can be resolved through mediation in a way that is fair to the parties and that allows a human rights agency to devote its limited resources to cases having broader societal significance, the use of mediation can be viewed as consistent with the broader goals of human rights process.

## **Conclusion**

Our goal has been to use this specific study to provide information that would help inform a broader discussion of the use of mediation in the administrative process. However, it also reveals additional questions to be resolved and the need for further research. It certainly demonstrates the complexity of designing and assessing a mediation system and the need for careful design and implementation. That is particularly true of agencies such as the Human Rights Tribunal, which have a variety of responsibilities that do not fit neatly with any single categorization of administrative agencies.

We wish to acknowledge the outstanding cooperation we have received from the Human Rights Tribunal and the former Human Rights Commission, as well as our other community advisors. The study would not have been possible without the financial support of the Social Sciences and Humanities Research Council of Canada through a Community University Research Alliance grant, or without the outstanding efforts of our research assistant, Ms. Nicole Parton. We also owe a debt of gratitude to the parties who took the time to take part in our study. We could not possibly have carried out this study without their help. Tribunal members not only have assisted us with the mechanics of the study but have shared their views with us and made suggestions for improving our methodology. Lawyers and advocates at the Human Rights Clinic also made a valuable contribution. This is, and continues to be, a truly collegial effort.

### Appendix A – The Questionnaires Used in the Study

[Note: With three exceptions, the same questions were asked of complainants and respondents. The exceptions are reproduced in italics and we note which party was asked that question.]

1. Which form of settlement meeting did you attend today?  
 early settlement meeting       settlement meeting after  
the response has been filed
  
2. Did you have a lawyer or other advocate at the meeting?  
 yes       no
  
3. Have you filed your complaint on behalf of someone else? (asked only of complainants)  
 yes       no
  
4. How helpful were the conversations you had with the BC Human Rights Tribunal mediator before the settlement meeting?  
 very helpful     helpful     not helpful  
 of no help at all       no conversation
  
5. How satisfied are you with the results of the settlement meeting?  
 very satisfied     satisfied     neither satisfied nor  
dissatisfied  
 dissatisfied       very dissatisfied
  
6. Which phrase best describes how satisfied you are overall with the process of the settlement meeting?  
 very satisfied     satisfied     neither satisfied nor  
dissatisfied  
 dissatisfied       very dissatisfied

7. Which phrase best describes how likely you would be to try this form of settlement meeting again?

- very likely                       somewhat likely  
 not sure                           somewhat unlikely  
 very unlikely

8. How likely would you be to recommend this form of settlement meeting at the BC Human Rights Tribunal to someone else?

- very likely                       somewhat likely  
 not sure  
 somewhat unlikely               very unlikely

9. From whom did you receive the majority of information regarding the settlement meeting process at the BC Human Rights Tribunal?

- Human Rights Clinic               Tribunal staff  
 Tribunal website                   Lawyer  
 The Settlement Meeting Guide  
 Other (please specify) \_\_\_\_\_

10. How satisfied are you with the information given to you by that source?

- very satisfied                       satisfied  
 neither satisfied nor dissatisfied  
 dissatisfied                           very dissatisfied

11. At the meeting, did you settle the complaint?

- yes                       no                       partial settlement

12. If you did settle all or part of the complaint, what was in the settlement?

- financial terms                       non-financial terms  
 both

13. If there was a financial settlement, what was the amount? Please check the appropriate box.

- \$0-\$500                                   \$500-\$3000  
 \$3000-\$10,000                       \$10,000-\$25,000  
 \$25,0000 or more

14. If there was a financial settlement, what grounds were used to determine the amount? Please check all boxes that apply for your settlement.

- loss of income/expenses               loss to dignity/hurt feelings  
 total not broken down

15. If the settlement involved items other than money, what was it? Please check all boxes that apply for your settlement.

- change in policy                       apology  
 confidentiality agreement               reference letter  
 was granted what had been denied (e.g. job, promotion, service, etc)  
 other (please specify) \_\_\_\_\_

16. Please indicate the type of entity which you represent. (asked only of respondents)

- |  |  |
|--|--|
| <input type="checkbox"/> individual              | <input type="checkbox"/> small business  |
| <input type="checkbox"/> non-profit organization | <input type="checkbox"/> government      |
| <input type="checkbox"/> large business          | <input type="checkbox"/> medium business |

17. Please indicate your gender. (asked only of complainants; see note 53)

- male       female       other

18. What were the grounds of discrimination alleged in the complaint? Please check all boxes that apply.

- |  |                                |
|--|--------------------------------|
| <input type="checkbox"/> mental and/or physical disability               |                                |
| <input type="checkbox"/> sex (including sexual harassment and pregnancy) |                                |
| <input type="checkbox"/> race, colour, ancestry, and/or place of origin  |                                |
| <input type="checkbox"/> religion  | <input type="checkbox"/> other |

19. In what area did the discrimination alleged in the complaint arise? Please check all boxes that apply.

- |  |                                |
|--|--------------------------------|
| <input type="checkbox"/> employment (ss. 12, 13, 11)           |                                |
| <input type="checkbox"/> facilities and public services (s. 8) |                                |
| <input type="checkbox"/> tenancy (ss. 9 and s. 10)             | <input type="checkbox"/> other |

20. Is there anything else that you would like to add?

## Endnotes

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- \* Dean of Law, University of New Brunswick, Faculty of Law, Fredericton, New Brunswick.
- \*\* Professor Emeritus, University of British Columbia, Faculty of Law, Vancouver, British Columbia. An earlier version of this paper was originally prepared for the national roundtable for judges and tribunal members: *Standard of Review, Mediation & Dispute Resolution in the Context of Administrative Agencies* (Ottawa, June 17, 2005), hosted by the Canadian Institute for the Administration of Justice.
- <sup>1</sup> Philip Bryden and William Black, “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project” (2004) 37 *U.B.C. L. Rev.* 73 [Bryden & Black, “Mediation as a Tool”].
- <sup>2</sup> For information about the CURA program, see Social Sciences and Humanities Research Council of Canada (SSHRC), *Community University Research Alliance Program (CURA)*, online: <[http://www.sshrc.ca/web/apply/program\\_descriptions/cura\\_e.asp](http://www.sshrc.ca/web/apply/program_descriptions/cura_e.asp)>.
- <sup>3</sup> Bryden & Black, “Mediation as a Tool,” *supra* note 1.
- <sup>4</sup> *Human Rights Code Amendment Act*, S.B.C. 2002 (3d Sess., 37th Parl.), c. 62.
- <sup>5</sup> The abolition of the Commission was not necessary in order to provide for “direct access” to the Human Rights Tribunal, as demonstrated by the recent amendments to the *Ontario Human Rights Code: Human Rights Code Amendment Act, 2006*, O.S. 2006 (2d Sess, 38th Parl.), C. 30 (assented to Dec. 20, 2006, substantive provisions not yet proclaimed). In our view, the abolition has had a number of negative consequences outside of the litigation context, particularly in the area of human rights education.
- <sup>6</sup> Mediation is only one of an array of dispute resolution “alternatives” potentially available to tribunals. For our purposes, the key characteristic of mediation is that it involves the use of an impartial facilitator who assists the parties in reaching a mutually agreed upon resolution of the dispute. The tribunal may or may not play a role in facilitating the enforcement of the settlement by giving it the status of an order of the tribunal, but the mediation process itself does not require an exercise of authority by the tribunal. This distinguishes mediation from case management, pre-hearing conferences or other tools that facilitate the efficient use of the tribunal’s adjudicative resources. Part 5 of the British Columbia *Human Rights Tribunal’s Rules of Practice and Procedure*, online: <[http://www.bchrt.bc.ca/rules\\_practice\\_procedure/default.htm](http://www.bchrt.bc.ca/rules_practice_procedure/default.htm)> [*Rules of Practice and Procedure* or *Rules*] govern the use of what the Tribunal describes as “settlement meetings,” at which four different types of dispute resolution alternatives are made available: “interest based mediation” (*Rules of Practice and Procedure*, r. 21(1)(a)); “early evaluation,” which is a non-binding neutral assessment of the case (*Rules of Practice and Procedure*, r. 21(1)(b)); “structured negotiations,” in which mediation services are made available but the parties take primary responsibility for the process of fashioning a settlement (*Rules of Practice and*

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*Procedure*, r. 21(1)(c)); and mediation/adjudication, in which the parties agree to allow the mediator to render an authoritative decision with respect to all or part of the case (*Rules of Practice and Procedure*, r. 21(1)(d)).

- <sup>7</sup> Examples of this type of activity include most of the adjudication done by labour arbitration panels, labour relations boards, human rights tribunals and residential tenancy arbitrators. This type of dispute resolution is not necessarily restricted to disputes between two parties, though as the number of parties is multiplied the resolution of the dispute may take on more of the characteristics of what we describe below as a policy-making or rule-making activity.
- <sup>8</sup> The activities of professional regulatory bodies in enforcing standards of professional conduct and competency are examples of this type of activity. To the extent that enforcement of environmental, occupational health and safety and land use regulation is driven by complaints, the bodies that resolve those disputes fall into this category as well. It could be argued that human rights commissions, as distinct from human rights tribunals, perform this type of function since they are typically empowered to investigate complaints and, if the circumstances warrant, bring the matter before a human rights tribunal for adjudication. Since the remedy sought from a human rights tribunal normally involves redress for the person who brought the complaint rather than a the imposition of a penalty on the respondent, human rights commissions often place as much emphasis on the resolution of disputes that involve human rights issues as they do on the enforcement of human rights laws.
- <sup>9</sup> Examples of this type of activity include determinations of entitlement to benefits or permissions such as social assistance, employment insurance, drivers' licences, occupational or professional licences, workers' compensation or immigration and refugee status. The types of agencies and procedures used for making these determinations are quite varied. The characteristic that they share that is relevant for present purposes is that in most instances the agency determines that the claimant either receives the benefit or does not receive it. Depending on the type and complexity of the benefit scheme, there may be little or no scope in these types of regimes for the sorts of compromise solutions that are characteristic of mediated agreements.
- <sup>10</sup> Examples of this type of activity include explicit exercises of rule-making authority, such as changes to rules governing professional conduct or broadcasting standards. We would also include the resolution of multi-party land use planning and environmental disputes in this category, at least where the dispute has a significant public interest dimension. See Matthew Taylor, Patrick Field, Lawrence Susskind and William Tilleman, "Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices" (1999) 22 Dal. L.J. 51.
- <sup>11</sup> For a convenient list of the general advantages and disadvantages of mediation in comparison to other dispute resolution mechanisms, see Andrew J. Pirie, *Alternative Dispute Resolution: Skills, Science and the Law* (Toronto: Irwin Law, 2000) at 87–88.

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- <sup>12</sup> *Ibid.* at 188–191.
- <sup>13</sup> *Human Rights Code*, R.S.B.C. 1996, c. 21 [*Human Rights Code*].
- <sup>14</sup> British Columbia, Ministry of Attorney General, Justice Services Branch, *Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems* (Victoria: Ministry of Attorney General, 2003), online: <<http://www.ag.gov.bc.ca/dro/publications/guides/design.pdf>> [*Reaching Resolution*]. Another useful source of advice on mediation systems design is Julie Macfarlane, *Dispute Resolution: Readings and Case Studies*, 2d. ed. (Toronto: Emond Montgomery, 2003) c. 7.
- <sup>15</sup> The Honourable Hugh F. Landerkin, Q.C. and Andrew J. Pirie, “Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?” (2003) 82 *Can. Bar Rev.* 249 at 289–293.
- <sup>16</sup> See *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781 at paras. 23–24.
- <sup>17</sup> Landerkin and Pirie, *supra* note 15 at 292–293.
- <sup>18</sup> See, for example, British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 11(2)(b), 28(1); Ontario *Statutory Powers Procedure Act*, R.S.O. 1990, c. S-22, s. 4.8; Québec *Administrative Justice Act*, R.S.Q. c. J-3, ss. 120–124.
- <sup>19</sup> See *Reaching Resolution*, *supra* note 13 at 5–10.
- <sup>20</sup> Lawrence Boulle and Kathleen Kelly, *Mediation: Principles, Process, Practice* (Toronto: Butterworths, 1998) at 31.
- <sup>21</sup> *Ibid.*
- <sup>22</sup> *Ibid.*
- <sup>23</sup> See *Reaching Resolution*, *supra* note 13 at 20–21.
- <sup>24</sup> Subsection 29(1) of the British Columbia *Administrative Tribunals Act*, *supra* note 17, states: “In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose (a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a dispute resolution process, or (b) a statement made by a party in a dispute resolution process specifically for the purpose of achieving a settlement of one or more issues in dispute.” Pursuant to Subsection 29(2) of the *Administrative Tribunals Act*, this provision does not apply to a settlement agreement. See *Reaching Resolution*, *supra* note 13 at 16–17.
- <sup>25</sup> See, for example, section 28(2) of the British Columbia *Administrative Tribunals Act*, *supra* note 17, which states: “(2) If a member of the tribunal is appointed under subsection (1), that member, in addition to assisting in a dispute resolution process, may make pre-hearing orders in respect of the application but must not hear the merits of the application unless all parties consent.”
- <sup>26</sup> See *Reaching Resolution*, *supra* note 13 at 17.
- <sup>27</sup> *Ibid.* at 20.

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- <sup>28</sup> The majority of the remaining cases were dismissed, withdrawn or otherwise terminated short of a full hearing.
- <sup>29</sup> British Columbia, Human Rights Tribunal, *Annual Report 2004–2005*, online: <[http://www.bchrt.bc.ca/annual\\_reports/Annual\\_Report\\_2004-2005.pdf](http://www.bchrt.bc.ca/annual_reports/Annual_Report_2004-2005.pdf)> at 6, 9 [*Annual Report 2004–2005*].
- <sup>30</sup> *Human Rights Code*, *supra* note 13, s. 27.6.
- <sup>31</sup> 27.3 (2)(h) reads:  
Without limiting subsection (1), the tribunal may make rules as follows:  
(h) respecting mediation and other dispute resolution processes, including, without limitation, rules that would permit or require mediation of a complaint, whether the mediation is provided by a member or by a person appointed, engaged or retained under section 33.
- <sup>32</sup> *Rules of Practice and Procedure*, *supra* note 6.
- <sup>33</sup> British Columbia, Human Rights Tribunal, *Guide 4 – The Settlement Meeting*, online: B.C. Human Rights Tribunal <[http://www.bchrt.bc.ca/guides\\_and\\_information\\_sheets/default.htm](http://www.bchrt.bc.ca/guides_and_information_sheets/default.htm)> [*Guide*]; British Columbia, Human Rights Tribunal, *Settlement Meeting Policy and procedure*, online: B.C. Human Rights Tribunal <[http://www.bchrt.bc.ca/guides\\_and\\_information\\_sheets/default.htm](http://www.bchrt.bc.ca/guides_and_information_sheets/default.htm)> [*Policy*].
- <sup>34</sup> See *Annual Report, 2004–2005*, *supra* note 29 at 2; additional information supplied by Heather MacNaughton, chair of the B.C. Human Rights Tribunal
- <sup>35</sup> See *Policy*, *supra* note 30 at 5. Mediation services can be withdrawn if a party violates the terms of the Settlement Mediation Agreement or if the mediator deems the process unfair, unproductive or abusive. It should also be noted that the *Rules of Practice and Procedure*, *supra* note 6, provide a separate case-managed stream for complex cases, and this case management may provide the opportunity for greater management of the mediation process. It does not, however, provide for formal screening of complaints.
- <sup>36</sup> The *Guide*, *supra* note 30 at 3, states that to be classified as an early settlement meeting, the meeting must take place within 17 weeks of delivery of the complaint to the respondent.
- <sup>37</sup> The exact figure is 23.4%.
- <sup>38</sup> British Columbia, Human Rights Tribunal, *Annual Report 2005–2006*, online: <[http://www.bchrt.gov.bc.ca/annual\\_reports/Annual\\_Report\\_2005-2006.pdf](http://www.bchrt.gov.bc.ca/annual_reports/Annual_Report_2005-2006.pdf)> at 1 [*Annual Report 2005–2006*]. This annual report does not state what percentage of cases settled during the year.
- <sup>39</sup> *Ibid.* at 1–2.
- <sup>40</sup> *Rules of Practice and Procedure*, *supra* note 6, r. 21(3); *Policy*, *supra* note 30 at 5.
- <sup>41</sup> *Rules of Practice and Procedure*, *supra* note 6, r. 21(1).
- <sup>42</sup> *Policy*, *supra* note 30 at 1.
- <sup>43</sup> *Rules of Practice and Procedure*, *supra* note 6, r. 21(8).

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<sup>44</sup> *Ibid.*, Part 5.

<sup>45</sup> *Policy*, *supra* note 30.

<sup>46</sup> The Settlement Agreement Form is contained in Attachment 1 of the *Policy*, *ibid.*

<sup>47</sup> *Rules of Practice and Procedure*, *supra* note 6, r. 21(7).

<sup>48</sup> For example, mediators will sometimes conduct shuttle mediation in which most of the mediation consists of meeting with the parties separately. In addition, mediators regularly inform the parties of their obligations at the beginning of the settlement meeting.

<sup>49</sup> Section 5 E of the *Policy*, *supra* note 30, empowers the mediator to terminate the meeting if a party is not following the mediator's directions or "if, in the mediator's view the settlement meeting process is unfair, unproductive or abusive."

<sup>50</sup> This information was provided by Heather MacNaughton, Chair of the Human Rights Tribunal.

<sup>51</sup> Though our project was designed to assist the Tribunal in evaluating its mediation process, our research agreement does not limit our independence in publishing our findings.

<sup>52</sup> British Columbia, Human Rights Tribunal, *Annual Report 2003–2004*, online: <[http://www.bchrt.gov.bc.ca/annual\\_reports/Annual\\_Report\\_2003-2004.pdf](http://www.bchrt.gov.bc.ca/annual_reports/Annual_Report_2003-2004.pdf)> at 3 [*Annual Report 2003–2004*]; *Annual Report 2004–2005*, *supra* note 28 at 3; *Annual Report 2005–2006*, *supra* note 35 at 2.

<sup>53</sup> The only differences between the questionnaires for the two parties are that complainants were asked whether they had filed the complaint on their own behalf or on behalf of another and also to indicate their gender. Respondents were asked to state what type of entity they were (individual, small or large business, etc.). Our reason for asking complainants, but not respondents, their gender, was that often the respondent is a corporation, and the person filling in the questionnaire may or may not have been involved in the alleged discrimination or in the final decision as to whether to settle or the terms of settlement. Thus, an analysis of gender differences among respondents would be unreliable.

<sup>54</sup> In the case of telephone mediations, the questionnaires were mailed to the parties.

<sup>55</sup> We say "approximately" because there were different numbers of responses to different questions.

<sup>56</sup> According to data concerning the number of cases scheduled for settlements during the period of our study, the response rate appears to be 35%. Because not all scheduled settlement meetings actually take place, the response rate could be even higher (we do not have data on the actual number of meetings). But other data in the Tribunal's data management system suggests a higher number of settlement meetings and hence a lower response rate. In any event, both the total number of responses and the response rate suggest that our sample is relatively reliable.

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- <sup>57</sup> The settlement rate indicated by our questionnaires was four percent lower than that considered in the *Annual Report 2004–2005*, *supra* note 29 at 6. The slight disparity may be due to the fact persons dissatisfied with the process may be somewhat more predisposed to take part in the study than those who are completely satisfied.
- <sup>58</sup> Comparing our results with *Annual Report 2004–2005*, *supra* note 29 at 8, it appears that disability complaints were overrepresented in our sample and cases of sex discrimination were somewhat underrepresented. However, the number of cases in both categories gives us confidence that our results are fairly representative of all cases. Race discrimination cases were significantly underrepresented, and the total number of cases was low. Therefore, we are less confident about our findings concerning these cases.
- <sup>59</sup> This limitation was imposed by the U.B.C. research ethics standards rather than the Commission.
- <sup>60</sup> The number of cases settled was provided by the Human Rights Tribunal, using its data system. The number of files closed is from *Annual Report 2004–2005*, *supra* note 29 at 8.
- <sup>61</sup> *Ibid.* at 6.
- <sup>62</sup> We note that because our questionnaires were distributed at the end of the settlement meeting, our results do not take account of settlements that occurred later, in part as a consequence of the settlement meeting.
- <sup>63</sup> Bryden & Black, “Mediation as a Tool,” *supra* note 1 at 98.
- <sup>64</sup> The fact that the Commission could not itself grant an order in favour of a complainant, together with the fact that it dismissed two-thirds of complaints without sending them to the Tribunal, gave respondents little incentive to settle at that stage of the proceedings; *ibid.* at 77.
- <sup>65</sup> The first column identifies whether the report comes from a complainant or respondent. As we have noted, in some cases, both parties will have responded and the result will have been double-counted. Though this fact could result in a minor change in the numbers, we do not think it affects them enough to make the trends misleading.
- <sup>66</sup> Six percent of cases that settled with Tribunal assistance did not show the time of settlement in the Tribunal’s data management system.
- <sup>67</sup> Interview with advocates at the Human Rights Clinic, Oct. 12, 2004. This conclusion was also supported by the mediators (interview with mediators, Oct. 29, 2004).
- <sup>68</sup> This information is based on the Tribunal’s data management system. It is based on those cases filed directly with the Tribunal and excludes cases referred or transferred by the Commission when it was abolished, since we do not know with respect to the latter cases how much of the time occurred while the complaint was before the Commission rather than the Tribunal.
- <sup>69</sup> Interviews with mediators, Aug. 3, 2004 and Oct. 29, 2004. The *Annual Report 2005–2006*, *supra* note 35 at 1 states that mediators spend about 25 % of their time conducting mediations.

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- <sup>70</sup> One possible avenue of future research would be to analyze data collected by the Human Rights Clinic about such settlement efforts. We do not know at present if such data exists.
- <sup>71</sup> For Tables C, D, E and F, “Neither” indicates “neither satisfied nor dissatisfied.”
- <sup>72</sup> Average score is based on very satisfied equalling 1, satisfied 2, etc.
- <sup>73</sup> We do not mean to say that mediation is superior in all circumstances to a final determination of the dispute at hearing. Sometimes the complainant’s primary goal will be to establish a principle or precedent or the respondent’s goal will be to publicly vindicate its actions. But we think our results demonstrate that mediation can in many circumstances serve the interests of the parties and that it need not be justified purely in terms of reducing the adjudicative workload.
- <sup>74</sup> A minority of mediations are conducted by staff lawyers or mediators on contract.
- <sup>75</sup> As with previous computations of average settlements, these figures are approximate, since our questionnaires asked parties to place their settlements within one of five ranges of settlement rather than to give us the exact amount of the settlement. Our computation is based on the assumption that all settlements within a range were for the amount at the mid-point within the range, except that all settlements of \$25,000 or more were assessed at \$25,000. Using that assumption, the exact amount of the calculation for those who were represented was \$6,972, as compared with \$4,077 for those not represented.
- <sup>76</sup> Seventy-five percent of sex discrimination cases, and 61 percent of disability discrimination cases came within one of the two “satisfied” categories. The figure for cases involving race and related grounds was 50 percent. In addition, 37.5 percent of race cases fell within one of the two “dissatisfied” categories, whereas the figures for disability and sex discrimination cases falling within those categories were 16 percent and 11 percent, respectively.
- <sup>77</sup> As noted earlier, we did not consider the gender of the respondent because often the respondent is a corporation, and the person filling in the questionnaire may or may not have been involved in the alleged discrimination or in the final decision as to whether to settle or the terms of settlement.
- <sup>78</sup> See Bryden & Black, “Mediation as a Tool,” *supra* note 1 at 107–110.
- <sup>79</sup> We again note that our questionnaires asked parties to say whether the settlement came within one of five ranges, and our averages are computed on the assumption that the average of settlements within a range was the mid-point of the range, except for the highest range, which was assessed at \$25,000. In addition, two questionnaires said that there had not been a settlement but that they had received compensation. If these two anomalous reports are included, the gap is 9 percent.
- <sup>80</sup> The exact result of this calculation is \$6,769.00. We should note that two other settlements reported “no settlement of any issues” and were apparently

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included as a result of incorrectly filling in the questionnaire. If they were treated as \$0.00 settlements, the average would be \$6,572.00

<sup>81</sup> This figure is based on a review of awards between July 2000 and April 2005. In order to obtain a meaningful number of cases, this period is longer than our mediation study but includes the time that the study took place. The exact figure is \$12,605.08.

<sup>82</sup> If one excludes just the highest award, settlements climb to 66% of the remaining Tribunal awards. If the two highest awards are excluded, settlements are 72.5% of the remaining awards.

<sup>83</sup> Though the assumption undoubtedly understates high awards in both contexts, it has the advantage of comparing apples with apples.

<sup>84</sup> If one includes Tribunal decisions in which the complainant lost and received no monetary award, the average award lowers to \$5,927.00. If one similarly includes Tribunal mediated settlements that failed and resulted in no monetary settlement, the average is \$3,892.00, or 66 % of the former figure.

<sup>85</sup> There is a Human Rights Clinic that represents complainants without charge, but the Clinic does not represent all complainants, and in any event, a hearing would require many complainants to take time off from work or incur other costs.

<sup>86</sup> There is a separate clinic to represent respondents, but there is a means test that excludes most respondents.

<sup>87</sup> We do not mean to allege any misconduct on the part of the parties, but if both elements are subject to legitimate negotiation, the fact that one result serves the interests of one party and causes no detriment to the other party may lead, on average, to a more generous estimation of the non-taxable element.

<sup>88</sup> Bryden & Black, "Mediation as a Tool," *supra* note 1 at 104.

<sup>89</sup> Since we studied early mediation conducted by the Commission, one could expect this factor to be especially significant, since a rational respondent may have taken account of the fact that a more generous settlement offer could always be made if the results of a later investigation were unfavourable.

<sup>90</sup> See *Abrams v. North Shore Free Press Ltd.* (1999), 33 C.H.R.R. D/435 at para. 97, denying such an award on the ground it would be meaningless because it would lack the necessary sincerity.

<sup>91</sup> See *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038.

<sup>92</sup> Bryden & Black, "Mediation as a Tool," *supra* note 1 at 84.

<sup>93</sup> While it may be possible to order such a change, we did not find any such term in the decisions we examined.

<sup>94</sup> See *Human Rights Code*, *supra* note 13, ss. 3, 5.

<sup>95</sup> See *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

<sup>96</sup> As we have noted, the *Human Rights Code*, *supra* note 13, requires that every remedy order a respondent to cease the same or similar discrimination. As far as we know, however, the Tribunal does not monitor the implementation of

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such awards. Therefore, though this order may encourage some respondents to change policies or practices, we doubt that such orders do much to achieve changes in policy or practices that might avoid future discrimination.

<sup>97</sup> *Annual Report 2005–2006*, *supra* note 35 at 2. This is the first annual report to include a description of mediation outcomes. Admittedly, the educational effect is not as effective as a published judgment of the Tribunal, but that fact may be counterbalanced by the other advantages of mediation.

<sup>98</sup> *Policy*, *supra* note 30 at 5.

<sup>99</sup> *Rules of Practice and Procedure*, *supra* note 6, r. 17(4).

<sup>100</sup> *Ibid.*, r. 19.

<sup>101</sup> *Policy*, *supra* note 30 at Part 1 B.