

## Mediation-Arbitration in Ontario: Labour Relations, Human Rights, and Beyond?

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*In this paper, we examine how administrative law decision-makers are combining adjudication and mediation to create an innovative, hybrid model of dispute resolution. While at first glance, a combined mediation-adjudication function appears to conflict with fundamental administrative law principles such as fairness and impartiality, the model has achieved tremendous success in the field, in a range of administrative law proceedings. We consider the implications of mediation-adjudication and how decision-makers have addressed these fundamental administrative law principles to develop a viable, fair, and expeditious dispute resolution process. This paper focuses on the use of mediation-adjudication in grievance arbitrations in Ontario and how that model has been adapted by the Human Rights Tribunal of Ontario (“HRTO”) in adjudications under the Ontario Human Rights Code.<sup>1</sup> These examples suggest that mediation-adjudication may be well-suited to a range of administrative law proceedings, particularly where (as we discuss in more detail, below) one or both parties are facing some level of uncertainty and a range of possible outcomes at adjudication.*

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*Dans cet article, les auteures examinent comment les décideurs en droit administratif combinent l'arbitrage et la médiation, afin de créer un modèle hybride et novateur de règlement des différends. Même si à première vue, une fonction combinée d'arbitrage et de médiation semble entrer en conflit avec les principes fondamentaux du droit administratif, comme l'équité et l'impartialité, le modèle a connu énormément de succès sur le terrain, dans une gamme de procédures en droit administratif. Les auteures considèrent les implications de l'arbitrage et de la médiation et la façon dont les décideurs ont abordé ces principes fondamentaux du droit administratif pour élaborer un processus de règlement des différends viable, équitable et rapide. Elles se concentrent sur l'utilisation de l'arbitrage et de la médiation dans les arbitrages de griefs en Ontario et sur la façon dont ce modèle a été adapté par le Tribunal des droits de la personne de l'Ontario (“TDPO”) dans les sentences arbitrales rendues en vertu du Code des droits de la personne de l'Ontario. Ces exemples suggèrent que l'arbitrage et la médiation peuvent être bien adaptés à toute une gamme de procédures administratives, en particulier lorsque*

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<sup>1</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (“Code”).

(comme les auteures en parlent plus en détail ci-dessous), une ou les deux parties sont confrontées à un certain degré d'incertitude et à une variété de résultats possibles en arbitrage.

## 1. INTRODUCTION

Mediation-arbitration (“med-arb”) was first introduced in the labour relations context more than 20 years ago. Since that time, med-arb has become the dominant approach to grievance arbitrations in Ontario. It has effectively displaced the traditional labour arbitration model and become the norm in many other Canadian provinces.<sup>2</sup> The HRTO introduced mediation-adjudication (“med-adj”) in 2007 in anticipation of significant changes to its mandate, which would ultimately increase its caseload from less than 100 cases per year to more than 3,000. The success of med-arb has played a significant role in the HRTO’s ability to gradually institutionalize med-adj, giving parties before the HRTO an additional voluntary opportunity to attempt a resolution of an application just before, during or at the conclusion of a hearing.<sup>3</sup>

While there are significant similarities between med-arb and med-adj, they arise in two very different contexts which provide a unique set of challenges for arbitrators and members of the HRTO seeking to introduce mediation into the hearing process. Grievance arbitrations arise from the world of collective bargaining where the paramount considerations are maintaining ongoing and viable relationships between sophisticated parties and ensuring that differences are resolved effectively and efficiently.<sup>4</sup> By contrast, the HRTO is a public institution with a mandate to promote access to justice and ensure the fair, just and expeditious resolution of human rights applications.<sup>5</sup> Many of the parties

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<sup>2</sup> Michael Picher, “The Arbitrator as Grievance Mediator in Canada: A Growing Trend” in *Arbitration 2010 — The Steelworkers Trilogy at 50: Proc. of the Sixty-Third Annual Meeting of the National Academy of Arbitrators* 328 (Paul D. Staudohar ed. 2011) at 333.

<sup>3</sup> See Rule 15A, Rules of Procedure, the *Human Rights Code*, Part IV, R.S.O. 1990, c. H.19 as amended. See also Andrew Pinto, Report of the Ontario Human Rights Review 2012 (Toronto: Ministry of the Attorney General, 2012), online: Ministry of the Attorney General [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human\\_rights/Pinto\\_human\\_rights\\_report\\_2012-ENG.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/Pinto_human_rights_report_2012-ENG.pdf). (“Pinto Report”).

<sup>4</sup> See, e.g. for example, Kevin Whitaker, “The Development and Use of Mediation/ Arbitration in Ontario” in *Arbitration 2009 – Due Process in the Workplace: Proceedings of the Sixty-Second Annual Meeting of the National Academy of Arbitration 209* (Paul D. Staudohar ed. 2010) at 214; Picher, *supra*, note 2; James Hayes, “Grievance Mediation: Why Some Use It and Others Don’t” in *Arbitration 2009 – Due Process in the Workplace: Proceedings of the 62<sup>nd</sup> Annual Meeting of the National Academy of Arbitration 209* (Paul D. Staudohar ed. 2010); and Barry C. Bartel, “Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential” (1999) 27 *Willamette L Rev* 661.

<sup>5</sup> Art. 40, *Code*, *supra*, note 1.

appearing before the HRTO are self-represented, have little experience engaging with the legal system and no ongoing relationships to maintain.

In this paper, we explore the popularity and relative success of med-arb in the labour relations context and the prospects for med-adj to achieve a similar place in the work of human rights and other administrative tribunals. We begin by reflecting on the mediation-arbitration function and consider issues that arise where the decision-maker also plays the role of mediator. Secondly, we consider the evolution and rise of med-arb as a practice in labour relations in Ontario and discuss how some of the concerns about med-arb have been addressed in practice. In doing so, we look at how mediation-arbitration, an approach grounded in seemingly irreconcilably different roles, has nevertheless become the most popular way of addressing grievances in Ontario. Finally, we consider med-arb's more recent introduction to and growing acceptance in the work of the HRTO. We submit that the experience of the HRTO suggests that med-arb can be effectively exported from labour relations to other aspects of administrative law justice, particularly where settlement can deliver a resolution equal to or greater than what can be achieved through adjudication, or at least represent a fair bargain given the risks of proceeding to adjudication.

Indeed, the success of med-adj in the two very different contexts of labour arbitration and human rights adjudication suggest that med-adj may be effective in a range of administrative proceedings. Whether med-adj can be incorporated into something like a professional disciplinary process or an environmental assessment review will depend on a number of factors, including the mandate of the decision-maker, the nature of the dispute, the willingness of parties to engage in a non-traditional dispute resolution process, and the willingness of tribunal administrators to support such a process. Ultimately, the issue is whether med-adj enhances rather than detracts from the fairness of the process for the parties involved.

We recognize that settlement is not always a possible or desirable outcome and a hybrid hearing/mediation model directed at settlement will not always be appropriate. These cases may nevertheless benefit from a consensus-based approach to case management which draws on the techniques used in med-adj to narrow the issues in the dispute and provide information, which supports the effective participation of the parties in the process.<sup>6</sup>

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<sup>6</sup> David Wright, former Associate Chair of the HRTO and current Chair of the Law Society of Upper Canada Tribunal, uses “med-adj” techniques, where appropriate, in the pre-hearing conference phase of a disciplinary process which includes discussions about the possibility of settlement. The parties may then consent to having the pre-hearing panelist preside at the hearing. The value to the parties of this hybrid approach is that they gain a sense of certainty with respect to either all or part of the resolution of the disciplinary process. This is particularly important to a lawyer or paralegal who is facing discipline. See Rule 22.10 of the Law Society Tribunal Hearing Division *Rules of Practice and Procedure*. The panel is also obligated to accept a joint submission unless it is unreasonable: *Law Society of Upper Canada v. Henderson*, 2014 ONLSTA 43 (L.S. Trib. App. Div.).

While med-arb creates tensions between the role of the neutral and the principles of fairness, the experience of labour arbitrators and HRTO members demonstrates that this can be overcome. The costs and delays associated with litigation are strong incentives for the administrative justice system to consider novel, efficient dispute resolution processes, including med-adj. At the same time, all administrative decision-makers must balance efficiency with the values of justice and fairness. Parties also benefit most where they have access to a range of dispute resolution options. The experience of labour arbitrators and HRTO members suggests that with reflective practice, a med-adj model can enhance access to justice, an important principle for all administrative law decision-makers.

## 2. UNDERSTANDING MEDIATION ARBITRATION

What is mediation-arbitration? As its name suggests, it is an amalgamation of mediation and adjudicative functions, with the same neutral acting as both mediator and arbitrator. Med-arbs typically begin (and often end) with settlement discussions. If settlement discussions do not result in a complete resolution of the dispute, however, the mediator assumes the role of arbitrator. He or she hears the evidence and decides the case.<sup>7</sup>

Sometimes the mediation and arbitration phases of a med-arb are discreet and clearly delineated. The neutral enters the scene wearing a mediator hat and, if there is not a complete resolution, he or she sheds the mediator role and transitions once and for all into the role of arbitrator. In other cases, the neutral's role is more fluid and mediation discussions can occur throughout the arbitration process.<sup>8</sup> With this approach, the mediator-arbitrator switches hats more fluidly, often alternating between the two roles. Settlement discussions that began at the outset of the case sometimes bear fruit only once certain witnesses have testified or the arbitrator has determined preliminary issues, including procedural matters and points of law. For this reason, some mediator-arbitrators will reinstate settlement discussions after key evidence has been led or once a preliminary issue has been determined.

The success of med-arb may seem surprising because, in many regards, mediation and arbitration are fundamentally different, even incompatible, functions.<sup>9</sup> The role of the mediator is to facilitate discussions between the parties, with a view to helping them resolve the dispute. Mediators meet with the

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<sup>7</sup> Whittaker, *supra*, note 4.

<sup>8</sup> Whittaker, *supra*, note 4, at 209.

<sup>9</sup> See, for e.g., Brian A. Pappas, "Med-Arb and the Legalization of Alternative Dispute Resolution" 20 Harv Negot L Rev 157; Ellen E. Deason, "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review" (2013) 5 Penn YB Arb & Med 219; Lon L. Fuller, "Collective Bargaining and the Arbitrator" (1963) 23 Wis L Rev 8; Richard Fullerton, "Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals" 65 (2010) Disp Resol J 52; and Bartel, *supra*, note 4, at 686.

parties, often in separate caucuses, and they may receive information that the parties perceive to be confidential. Some of the information exchanged during mediation, although relevant to understanding the parties' interests and crafting an appropriation resolution, is not admissible at the hearing phase of the process.

In contrast, the arbitrator's role is to impartially determine the legal rights of the parties. The arbitrator must do so based only on the admissible evidence and in compliance with principles of procedural fairness, which include the parties' right to know and respond to the opposing side's case. They also include the right to have the matter determined by an impartial decision-maker, one who is open-minded and has not pre-judged the merits of the case.

The dual role of the neutral is both at the root of the med-arb controversy and at the heart of its success: it creates efficiencies, gives the neutral additional leverage<sup>10</sup> in bringing about a resolution, can offer ongoing settlement opportunities, and can provide finality and reduce uncertainty for the parties.<sup>11</sup> Yet much of the scholarly literature on mediation-arbitration focuses on the challenges presented by the neutral's contrasting roles, particularly in terms of confidentiality and impartiality.<sup>12</sup> The essence of the difficulty with mediation-arbitration seems to be reconciling the separate functions of the arbitrator-mediator with the principles of fairness. As one author explained,

Combining these processes creates several problems. First, the med-arbitrator has significant power and consciously or unconsciously may use the threat of the binding arbitral decision to coerce the parties during the mediation stage. Second, the neutral may become privy to confidential information in the mediation stage, thereby making an unbiased decision in the arbitration stage difficult. Finally, the neutral may have difficulty being a problem-solver at one stage and a decision-maker at another, or the neutral simply may not possess the very different skills needed to perform both functions.<sup>13</sup>

Indeed, the role of the mediator-arbitrator raises a host of questions. For example, can parties to a med-arb truly know and answer the opponent's case? Where the mediator has had private caucus meetings, parties may not know what information was shared with the mediator, they may not have an opportunity to respond to it, and they cannot know how or whether that information will influence the mediator-turned-adjudicator's assessment of the case.<sup>14</sup> Similarly, can a mediator-adjudicator be evaluative during the mediation phase, yet remain

<sup>10</sup> Hayes, *supra*, note 4, at 230; Picher, *supra*, note 2.

<sup>11</sup> Kristen M. Blankley, "Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case" (2011) 63.2 *Baylor L Rev* 317. As Blankley explains, the med-arb process is designed to provide finality, "an aspect missing if the parties simply attempted to mediate".

<sup>12</sup> See, e.g., Bartel, *supra*, note 4, at 679.

<sup>13</sup> *Ibid.*

<sup>14</sup> David C. Elliott, "Med/Arb: fraught with danger or ripe with opportunity?" (1995-1996) 34 *Alb L Rev*, at 166-167.

open-minded and impartial enough to ensure the parties receive a fair, unbiased hearing?

Scholars are not the only ones raising concerns about med-arb. Uninitiated parties and their lawyers are often reluctant to consider med-arb for many of the same reasons. Similarly, some neutrals are averse to stepping outside the role of a traditional adjudicator and attempting med-arb; they may be reluctant to take on what can feel like an uncomfortable and risky role.<sup>15</sup> Yet by all accounts, where it is used, med-arb has proven to be a popular and successful approach to dispute resolution.<sup>16</sup>

### 3. THE EVOLUTION AND SUCCESS OF MED-ARB IN LABOUR RELATIONS IN ONTARIO

#### (a) The Evolution of Med-Arb

While med-arb has become the norm in grievance arbitrations, when it was first introduced in Ontario and elsewhere, med-arb represented a revolutionary approach, one that was not always a comfortable or intuitive fit for parties, representatives and neutrals alike. Before the 1990s, grievances in Ontario were generally resolved by way of a full, formal hearing. The arbitrator acted as adjudicator and did not typically engage the parties in settlement discussions. As with other types of litigation, grievance arbitrations were costly and time-consuming processes, and backlogs grew. Arguably, the climate was ripe for the introduction of mediation-arbitration. In this section, we consider some of the characteristics of labour relations that explain why unions and employers were prepared to take this “tremendous leap of faith” and experiment with the novel approach that involved the arbitrator playing the dual role of mediator.<sup>17</sup>

Costs and delay may have been the most important factors behind the innovation in the labour context. While these are of concern to all litigants, they are particularly problematic in industrial relations where the parties need to have an ongoing and viable relationship and where they must work together pending the resolution of disputes. When grievances cannot be dealt with expeditiously, this can compromise the relationship between the parties and their ability to collaborate on other issues. As Kevin Whittaker explained, by the late 1980s and early 1990s, bargaining relationships were “locked into traditional full hearing models” and their relationships “began to collapse under the weight of the formal processes that had been constructed”.<sup>18</sup>

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<sup>15</sup> Fuller, *supra*, note 9. See also Sherry Landry, “Med-Arb: Mediation With A Bite And An Effective ADR Model” (1996) 63 Def Couns J at 265.

<sup>16</sup> See, for e.g., Picher, *supra*, note 2; Hayes, *supra*, note 4; and Whittaker, *supra*, note 4.

<sup>17</sup> Hayes, *supra*, note 4, at 225.

<sup>18</sup> Whittaker, *supra*, note 4, at 212. The author writes:

There was a growing realization that the outcomes were not good, that the cost and delay were unacceptable and out of control, and that there was little certainty of outcome in any event. These were institutional parties who were in a long-term relationship and used to a bargaining-based model where interests and positions could be accommodated through negotiation.

A second significant factor is the nature of the relationship between employers and unions. Labour relations generally involves sophisticated, institutional parties, who have longstanding relationships with each other. Unions and employers, although often adverse in interests, have a history of working together and both have a stake in maintaining viable relationships. Unlike other types of litigation, grievance arbitrations rarely involve one-off disputes between parties who will not deal with each other again. Unions and employers are accustomed to resolving their disputes through negotiating, either during collective bargaining or in the context of grievances and arbitrations.<sup>19</sup> In many instances, discussions with a view to resolving individual grievances are also part of a larger context, in which the union and employers are concerned about future negotiation strategies and balancing their respective interests. Indeed, the mindset in labour relations has generally been to promote dispute resolution through negotiation.<sup>20</sup> There has long been a focus on promoting negotiations between the parties and encouraging them to resolve their disputes before proceeding to litigation stages. Dispute resolution mechanisms in labour relations recognize the importance of the parties' ongoing relationship as well as the parties' own role in maintaining those relationships. Indeed, well before the emergence of med-arb, dispute resolution mechanisms in labour relations operated to help maintain industrial peace and foster viable relationships between the parties.<sup>21</sup>

It is also significant that, in grievance arbitrations, the parties have the ability to select their arbitrator. Unlike other forms of litigation, where the adjudicator is appointed and assigned to a particular matter, grievance arbitrators are selected by mutual agreement of the parties. Indeed, the idea that parties would have input into the selection of their adjudicator may seem incompatible with traditional notions of fairness and impartiality. Arguably, however, this may have been the thin edge of the wedge that made med-arb possible. While arbitrators selected by parties may lack the level of independence of other

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Others attribute the introduction of med-arb to Chief Justice Alan Gold and his arbitration work from 1968 to 1975 with the ports of the Saint Lawrence: see Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" at 1, available at [www.irc.queensu.ca](http://www.irc.queensu.ca).

<sup>19</sup> Whittaker, *supra*, note 4, at 211-212. But see Telford, *supra*, note 18, at 9, where she considers med-arb at Ontario's Grievance Settlement Board. While GSB adjudicators felt it can be helpful, they did not believe that an longstanding relationship between the parties is necessary for med-arb to succeed.

<sup>20</sup> Mediation and relationship building long part of labour relations: Whittaker, 210 Very early on in Ontario, after the initial passage of the Labour Relations Act (based on a Wagner Act model), there was an understanding that the civil trial model of adjudication was not appropriate as a way of resolving labour disputes.

<sup>21</sup> See, for e.g., the *Ontario Labour Relations Act*, R.S.O. 1995, S.O. 1995, c. 1, Sched. A ("OLRA"), ss. 16 and 17, which contemplate mediation and conciliation as part of the process of negotiating collective agreements. For a more detailed discussion of the use of med-arb in legislation, see David C. Elliott, "Med/arb: Fraught with Danger or Ripe with Opportunity?" (1995) *Alta L Rev* 34 (No.1) 163.

adjudicators, there are a number of important advantages to this approach. Parties can choose arbitrators whom they feel have the experience, knowledge or style that is suited to a particular case. This can bring about efficiencies, and the ability to select a mutually acceptable decision-maker may also enhance the parties' confidence in the system. The parties' experience in selecting their decision-makers suggests a certain level of comfort with the contextual nature and malleability of procedural fairness, including a sense that a fair and equitable proceeding may be achieved without strict adherence to administrative law principles (such as independence).

Sometimes those parties and their representatives have longstanding relationships not only with each other, but also with particular arbitrators. Arbitrators may be selected by the parties because of their expertise not only in the law, but because of their knowledge of the particular workplace or the actors involved. As Justice Whittaker explained, "parties had developed a stable of regular arbitrators who had a tremendous quantity of experience with their collective agreements, knew the history of bargaining, knew the counsel and their law firms and the relationships between counsel, and had dealt with the same types of recurring problems".<sup>22</sup> The relationships between parties and trusted arbitrators was key, not only to the introduction of mediation-arbitration, but also to its long-term success. Parties were receptive when a number of very skilled, innovative, and trusted arbitrators introduced the practice of mediation to their arbitrations.<sup>23</sup> Med-arb was appealing to the parties because of its expediency and cost-effectiveness, but also because the parties had confidence in the arbitrator's ability to be both an effective mediator and a fair adjudicator. Indeed, an informal survey considering the effectiveness of med-arb identified the respect the parties have for the neutral and his or her integrity as key to med-arb's effectiveness.<sup>24</sup>

While Ontario now has legislation that explicitly provides for med-arb of grievances, it is significant that the practice pre-dates this statutory authority.<sup>25</sup> In a sense, med-arb was a populist movement: it arose as a consent-based, efficiency-driven practice and it was the popularity of med-arb on the ground that prompted legislative reform.

### **(b) Explaining the Success of Med-Arb in Labour Relations**

Although it may have been in use before then in some cases, med-arb was introduced more systematically in grievance arbitrations in Ontario in the 1990s. Med-arb quickly became the presumptive approach to resolving grievance

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<sup>22</sup> Whittaker, *supra*, note 4, at 211- 212.

<sup>23</sup> *Ibid.*

<sup>24</sup> See, for e.g., Gerald F. Phillips, "The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, but Party Sophistication is Mandatory" (2008) 26 *Alternatives to the High Cost of Litigation* 101.

<sup>25</sup> OLRA, *supra*, note 21, at s. 50.



arbitrations, and most parties now expect to have an opportunity to pursue settlement negotiations at the hearing with the assistance of the arbitrator.<sup>26</sup> Although med-arb presents some conceptual difficulties, this does not seem to have impeded its popularity.<sup>27</sup> In fact, while scholars and others express concerns about the med-arb process, parties to grievance arbitrations in Ontario have demonstrated a clear preference for this approach.

Why is med-arb so popular? How has the practice of med-arb overcome some of the fairness issues, particularly those related to confidentiality and impartiality? Many of the factors that led parties to adopt the med-adj model have also contributed to its ongoing success. As noted, med-arb creates significant efficiencies in terms of both cost and time and these remain a driving force behind innovations to dispute resolution processes.<sup>28</sup> The grievance arbitration example suggests that unions and employers are willing to take leaps of faith and experiment with new, even seemingly imperfect processes to achieve these efficiencies. Indeed, these parties forgo the top-of-the-line fairness guarantees that come with a full hearing in favour of a fair, but often more expeditious and less costly process of med-arb.

While mediation-arbitration brings a number of advantages, (depending how participants see it) many of these come with corresponding disadvantages. For example, med-arb affords a less formal setting than a hearing. During the mediation phase, parties themselves can tell their story to the arbitrator. Although counsel or representatives generally present the evidence and make arguments at the hearing, the mediation phase gives parties an opportunity to speak to the decision-maker, which can be empowering and very satisfying for them. Moreover, the parties' discussions with the arbitrator are not constrained by the rules of evidence, nor are they driven by counsel's questions. At this stage, parties can often explain to the neutral what is important to them in their own words. It gives adjudicators insights into not only the relevant facts, but also the parties' underlying interests. This can be empowering and satisfying for the parties, and it can be a helpful step in the arbitrator's work to resolve the dispute.<sup>29</sup> As Jim Hayes, then counsel and now a respected arbitrator, explained:

[Parties] can speak candidly without artifice. The company wants to explain why it did what it did—even if a manager committed some disqualifying procedural error. The grievor wants to tell someone his or her tale of woe. The supervisor wants to tell someone why the grievor is untrustworthy. The beauty of mediation or med-arb is that any such catharsis, which may be needed, can be discharged in a one-party

<sup>26</sup> Hayes, *supra*, note 4; Whittaker, *supra*, note 4.

<sup>27</sup> Bruce P. Archibald, "Progress in Models of Justice: From Adjudication/Arbitration through Mediation to Conferencing (and Back)" in Ronald Murphy & Patrick A. Molinari eds *Doing Justice: Dispute Resolution in the Restorative Courts and Beyond* (Canadian Institute for the Administration of Justice, 2007) at 147.

<sup>28</sup> Picher, *supra*, note 2, at 335.

<sup>29</sup> Hayes, *supra*, note 4, at 230. See also Telford, *supra*, note 18, at 5.

setting. If it is only catharsis, then it is accomplished without driving the parties further apart.<sup>30</sup>

The fact that the parties, themselves, have a more significant role to play is part of med-arb's appeal. Again, to quote Jim Hayes:

There were far more union and management staff who felt more comfortable navigating the vagaries of mediation than the rules of arbitration and the challenges of examining witnesses. In a mediation setting, they were able to regain more control of their own labour relations from their expensive lawyer top guns. They could talk to neutrals in a normal adult fashion. They liked it. Mediators were actually interested in what they had to say.<sup>31</sup>

Yet this access to information ties into key fairness concerns raised by critics of med-arb. Will the information the med-arbitrator learned about the parties' interests factor into the decision-making? If so, how can the parties know that they have had an opportunity to respond to this information, including that which was exchanged during separate caucus meetings? Some counsel feel that it is helpful for the arbitrator to have an understanding of the parties' underlying interests. Not only can this help craft a settlement that is responsive to the needs of the parties, it gives them comfort to know that, in rendering the decision, the arbitrator had a full understanding of the circumstances and the underlying interests of the parties.<sup>32</sup>

Others view the arbitrator's access to information as one of the potential pitfalls of med-arb and are concerned that the med-arbitrator's access to information will interfere with his or her ability to appropriately decide the case. For example, although it may be cathartic for the parties to play a leading role in the mediation process, it may not always be in their interests to do so. Not all counsel will be content to turn the discussion over to their clients and, for strategic reasons or otherwise, counsel may wish to control what their client says, and how that information is sequenced or "spun". Depending on the circumstances, this control can be better exercised during the hearing rather than during mediation. For similar reasons, a party or its counsel may not want the arbitrator to have frank discussion with the opposing party.

Many of these concerns arise out of the conflicting roles of a med-arbitrator: a mediator explores the parties' interests and helps broker a deal based on what the parties want, while an arbitrator must determine the dispute based on the law and the collective agreement, and not necessarily as a function of what pleases the parties.<sup>33</sup> These functions and the skills required to do each of them well are distinct. One author has described mediation and arbitration as relating to

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<sup>30</sup> Hayes, *ibid.*, at 229.

<sup>31</sup> *Ibid.*, at 227.

<sup>32</sup> Hayes, *supra*, note 4.

<sup>33</sup> Fuller, *supra*, note 9.

“different moralities,” questioning whether the same neutral has the skills to distinguish between and perform both functions.<sup>34</sup>

A further feature of med-arb is the leverage or “muscle” the med-arbitrator can exercise during settlement discussions.<sup>35</sup> Many mediators and med-arbitrators take an evaluative approach; they help parties assess the relative risks of their case by sharing their impressions of the case or certain aspects of it. Some find this type of evaluation helpful because parties can then better assess the relative merits of their cases and gauge and respond to the arbitrator’s impressions and understanding of the matter.<sup>36</sup> A mediator-arbitrator’s impressions of the case can be particularly useful to the parties, given that he or she will ultimately determine the case. For many, this is one of the principal advantages of med-arb, it reduces uncertainty and allows for ongoing and more informed negotiations, which promotes settlement resolutions.<sup>37</sup> The flipside, of course, is the concern that the leverage may be misused, which can leave the parties feeling strong-armed into a deal. A mediator-arbitrator must, for example, be careful in communicating impressions about a case because it may jeopardize the perception that he or she is impartial and in a position to determine the issue fairly, based on the evidence presented. While the med-arbitrator’s impression may leave some parties feeling informed and better able to assess their case, others may feel the arbitrator has pre-judged the matter and is no longer impartial or legitimately able to determine the case. As Barlet suggests, the challenge for the med-arbitrator is to “maintain the respect, trust and confidence of the parties as he or she pressures and cajoles them during the mediation process”.<sup>38</sup>

It is significant that, in the grievance arbitration context, in particular, there are a number of steps the parties may take to mitigate any concerns they have about the duality of the neutral’s role. In grievance arbitrations, the parties maintain considerable control over the process, which may help explain why they were receptive to med-arb in the first place and why they have embraced it so whole-heartedly. Significantly, mediation-arbitration is a voluntary process. Rather than engage the arbitrator in settlement discussions, parties can always conduct bi-lateral settlement talks. If they want assistance, the parties can also initiate a separate and standalone mediation, where the neutral’s function is limited to the mediation. If that mediation does not lead to a complete resolution, the parties can proceed to arbitration and a fresh neutral will

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<sup>34</sup> Bartel, *supra*, note 4, at 679.

<sup>35</sup> Sam Kagel, “Combining Mediation and Arbitration,” 96 Monthly Lab Rev 62 (Sept. 1973).

<sup>36</sup> Hayes, *supra*, note 4, at 226.

<sup>37</sup> *Ibid.* See also Richard H. McLaren and John P. Sanderson QC, *Innovative Dispute Resolution: The Alternative* (Toronto: Carswell, 1994), p. 6-1.

<sup>38</sup> Bartel, *supra*, note 4, at 688.

determine the case. In sum, if a party believes it is in its best interests to insulate the arbitrator from the mediator function, it can do so.

Secondly, as already mentioned, an important feature of grievance arbitrations is that the parties have an opportunity to select the neutral by consensus. This is key to the success of a mediation-arbitration in that it allows parties to choose someone in whom they have confidence, and whom they trust to fairly deal with information and maintain impartiality. Arguably, the success of any dispute resolution method depends on the quality of the neutral selected.<sup>39</sup> Critics acknowledge that an experienced and capable mediator-arbitrator can effectively neutralize many of the parties' fairness concerns.<sup>40</sup> Indeed, neutrals who practise mediation-arbitration are alive to the issues that may flow from their dual role and they draw on their adjudicative expertise to ensure that fairness is respected. Assessing the admissibility and weight of evidence is at the very heart of the adjudicative function. Arguably, the role of the mediator-arbitrator is not significantly different from that of traditional adjudicators. It draws on the same skills, although given the dual role they play, med-arbitrators are called upon to hone those skills and apply them in different contexts.

Finally, parties who believe a med-arb process was unfair can make an application for judicial review.<sup>41</sup> While it may be difficult for parties to challenge a mediated settlement entered into voluntarily, the parties may certainly judicially review the arbitrator's decision if they feel it is unfair or somehow tainted by the mediation phase. While judicial review can be a costly and time-consuming process, it may comfort parties to know that the med-arbitrator can be held to fairness standards.

This overview of some of the key features of med-arb suggests that its beauty is in the eye of the beholder. For some, the fact that med-arb does not offer strict adherence to some administrative law principles is a deterrent to engaging in this process. However, others appreciate the advantages of mediation-arbitration and are prepared to contend with its disadvantages. To some extent, the success of med-arb depends on all of the participants understanding the "name of the game" and being willing to take a leap of faith.<sup>42</sup> When participants understand the med-arb process, they can better prepare and are more likely to be satisfied with the process.<sup>43</sup> Indeed, the popularity of med-arb in the labour relations context suggests that the theoretical difficulty with the med-arb role can be

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<sup>39</sup> Bartel, *supra*, note 4, at 686. The author posits that, "[p]erhaps the issue of the treatment of confidential information is simply a question of the med-arbitrator's competence".

<sup>40</sup> *Ibid.*

<sup>41</sup> See Ellen E. Deason, "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review" (2013) 5 Penn YB Arb & Med 219 for a discussion of the appropriate standard of review for hybrid dispute resolution models, including med-arb.

<sup>42</sup> Sam Kagel, "Combining Mediation and Arbitration", *Monthly Lab Rev*, September 1973, 62-66 at 62.

<sup>43</sup> Bartel, *supra*, note 4.

overcome in practice. To put it differently: med-arb works and, in Ontario, it is the preferred method for most parties to grievance arbitrations. The popularity of med-arb has transformed how grievances are determined in Ontario and it has changed the role of neutrals. The most active and in-demand arbitrators are those who have adopted med-arb and who have honed both their mediation and adjudication skills.

#### 4. MEDIATION-ADJUDICATION AT THE HRTO

The use of med-arb in the labour context has had a positive influence on the evolution of med-adj at the HRTO.<sup>44</sup> In 2007 the HRTO informally introduced med-adj, expanding med-arb beyond the boundaries of labour relations and into the institutional, public interest world of human rights adjudications. Since that time, med-adj has become a critical part of the process by which the HRTO brings applications to a final resolution.<sup>45</sup>

Med-adj and med-arb overlap in many of the ways we have previously discussed because of the inherent challenges associated with the dual role of decision-maker/mediator. However, there are significant differences between the labour and human rights contexts, which have had a direct impact on how med-adj has been incorporated into the HRTO's hearing process. The HRTO is a public institution with a public-interest mandate. The role of the adjudicator is affected by the high number of unrepresented parties who appear before the HRTO, their inexperience and the limits associated with fostering and maintaining relationships between the parties themselves and with their adjudicator. Given those differences, and others which we discuss in greater detail in this paper, med-arb could not simply be imported into human rights adjudications. The introduction and success of med-adj in the human rights context required the HRTO to re-think how med-arb could be adjusted to better align with the context of human rights disputes.

As is the case with all administrative decision-makers, the work of the HRTO is grounded in its enabling legislation, the *Human Rights Code* ("Code"). The *Code* has primacy over all other statutes in Ontario which conflict with the protections set out in the *Code*.<sup>46</sup> The rights embodied by the *Code* have long

<sup>44</sup> This is not surprising given the fact that the majority of applications heard by the HRTO arise from the employment context. Similar disputes, policies and complaints processes exist in both unionized and non-unionized work places. See the Annual Report of the Social Justice Tribunals Ontario 2013-2014: Employment related cases filed with the HRTO were 74% in 2013-2013, 77% in 2012-2013 and 76% in 2011-2012. <http://www.sjto.gov.on.ca/documents/sjto/2013-14%20Annual%20Report.pdf>.

<sup>45</sup> As is discussed in greater detail in this paper, the HRTO does not publish statistics on how many resolutions are achieved at the hearing stage as a result of med-adj. However, individual adjudicators report that consensual settlements achieved through med-adj account for the resolution of more than half of their scheduled hearings and in some cases, as high as 80%.

<sup>46</sup> *Human Rights Code*, R.S.O. 1990, c. H.19 ("Code"), s. 47(2).

been recognized as quasi-constitutional in nature. The HRTO is an independent, quasi-judicial Tribunal, which draws its authority from the *Code*, the *Statutory Powers Procedure Act* and the principles of administrative law.<sup>47</sup> It is a public institution with a mandate to provide fair, effective, timely and accessible dispute resolution under the umbrella of the Social Justice Tribunals of Ontario.<sup>48</sup>

The preamble to the *Code*, with its emphasis on the guarantee of equal rights and opportunities and the creation of a climate of understanding and mutual respect for the dignity and worth of each person, sets the context for the work of the HRTO.<sup>49</sup> Those principles combined with the Tribunal's Rules and the fundamental requirements of administrative law, including procedural fairness and impartiality, contribute to how the HRTO has developed and incorporated med-adj into its hearing process. The other important factor is that the Tribunal now processes more than 3000 applications per year, not all of which engage the public interest in the same way.<sup>50</sup> In a practical sense, this means maintaining a balance among the primary values that guide the HRTO's work, ensuring, for example, that fairness and cultural sensitivity are never overtaken by efficiency in the practice of med-adj.

Med-adj differs in a number of significant respects from med-arb. In addition to the overall public interest context within which the HRTO conducts med-adj, the parties themselves have challenges that are different from the labour relations context.<sup>51</sup> They are often self-represented, have no role in choosing their adjudicator and rarely draw on or seek to maintain long-term relationships with one another. Unless they have significant experience with the labour relations model, parties before the HRTO often lack a clear understanding of the differences between mediators and adjudicators and how those roles combine in med-adj. Even where either or both party has retained a lawyer or paralegal to act for them, that person may not specialize in human rights law. In some cases, this puts the parties at a disadvantage in negotiations that depend, at least in part, on an understanding of the risks and benefits of a hearing.<sup>52</sup>

<sup>47</sup> *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA").

<sup>48</sup> Mission statement of Social Justice Tribunals of Ontario <http://www.sjto.gov.on.ca/en/mandate-mission-values/>.

<sup>49</sup> *Code*, *supra*, note 46, Preamble.

<sup>50</sup> Human rights applications engage both private and public interests but they differ significantly in the extent to which broader public interests could be affected by a successful claim. In an employment case, where med-adj and med-arb most overlap, the dispute between the employee and the employer may engage a ground under the *Code*, but may also relate to other private employment related issues, none of which have any implications for the workforce or society at large.

<sup>51</sup> The *Code* also covers the provision of services and accommodation.

<sup>52</sup> There are clearly exceptions to this where parties retain lawyers who practise regularly in the area of human rights or where the applicant is represented by the Human Rights Legal Support Centre. But in general, it is not uncommon for a party and their representative to be unfamiliar with the Tribunal process and the principles of human rights law.

In the human rights context, it is not uncommon for applicants to develop a significant personal investment in publically vindicating their human rights and setting precedents for others. Both parties can also be entrenched in publically restoring their reputations. These goals can, and in some cases should, present barriers to making the kinds of compromises that are necessary to achieve settlements. While issues like this can arise in the labour arbitration context, grievance arbitrations tend to be characterized by more pragmatism. Not only are the parties to a grievance generally sophisticated and represented, but because unions have carriage of grievances, they can decide not to advance the matter if, for example, the grievor has declined a reasonable settlement offer. These factors, which can favour dispute resolution in grievance arbitrations, are not necessarily present in a human rights med-adj. The primary way in which labour arbitrations and human rights matters overlap, which is relevant to the success of med-adj, is the parties' desire to resolve differences in ways that are fair, but also more expeditious and less costly.

These differences do not render med-adj unsuitable for the human rights context, but they do reinforce the importance of practicing med-adj reflectively. The HRTO has a statutory obligation to adopt practices and procedures that offer the best opportunity for a fair, just and expeditious resolution of applications, including adopting alternatives to traditional adjudicative or adversarial procedures.<sup>53</sup> These provisions support the HRTO's efforts to innovate both its case management and dispute resolution practices. By using a form of med-arb with self-represented parties in a public interest context, the HRTO has taken the dual role of mediator/decision-maker to a new level. Ten years after the introduction of med-adj, the HRTO is still working on transforming its model as human rights disputes and stakeholder expectations change in complexity and focus.

In this section, we briefly describe the history of settlement negotiations under the *Code*, and reflect on how med-adj has evolved from that history over the past decade. We then consider the challenges of conducting med-adj in the human rights context and how the HRTO has addressed fairness concerns, particularly in cases involving self-represented litigants. Finally, we look to benchmarks that help assess the relative success of med-adj at the HRTO and query whether this practice could be adopted successfully in other aspects of the administrative justice system.

#### **(a) The Evolution of Med-Adj at the Human Rights Tribunal of Ontario**

The *Code* was first proclaimed in force in 1962, having found its genesis in both the *Universal Declaration of Human Rights*<sup>54</sup> and the widespread racial discrimination of the 1940's and 1950's.<sup>55</sup> When one considers the grievous

<sup>53</sup> *Code*, ss. 40 and 41.

<sup>54</sup> UN General Assembly, (1948), *Universal declaration of human rights* (217 [III] A). Paris.

<sup>55</sup> See Ontario Human Rights Commission website: Human Rights: the Historical Context.

nature of those early human rights challenges, neither mediation nor med-adj come immediately to mind as suitable methods for resolving issues of such public importance. Owen Fiss made precisely this point in his landmark paper *Against Settlement* in which he argued that the emerging alternative dispute resolution movement, with its focus on settlement, undermined the important role of the judiciary in delivering justice and advancing progressive social norms, particularly in cases of significant public importance.<sup>56</sup>

On the other hand, judicial decision-making in Canada in the 1940's had not necessarily delivered justice for acts of racial discrimination. Consider, for example, the case of Viola Desmond.<sup>57</sup> In 1945, *she* was prosecuted for tax evasion as a pretext for the otherwise discriminatory act by authorities of removing her from the "white only" section of a movie theatre. In the United States, it would be another decade before a judicial decision recognized the importance of desegregating the school system in *Brown v. Topeka Board of Education*.<sup>58</sup>

By the time the *Code* was enacted in 1962, conciliation and public education were conceived of as the primary methods by which wide-spread enforcement of the *Code* would be achieved. Of course, the ability to initiate a public hearing played an important role in establishing a context for these efforts. While settlement seems counter-intuitive given the primacy of human rights legislation, it is precisely *because* of the importance of the rights protected by the *Code* that voluntary assumption of remedies and prevention strategies has historically been preferred over forcing respondents into compliance by tribunal order. This is not to suggest that litigation has not played an important role in advancing the underlying values of the *Code*. Public decisions, particularly ones which engage with issues of systemic discrimination, can play an important role in establishing the norms which then provide the incentive to negotiate. However, it has always been the case that the number of applications resolved prior to or during a public hearing has far exceeded the number litigated before the HRTO or its predecessor the Board of Inquiry.

In *Restraining Equality*, authors Robert Brian Howe and David Johnson describe how the system for enforcing the *Code* relied primarily on conciliation,

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<http://www.ohrc.on.ca/en/teaching-human-rights-ontario-guide-ontario-schools/appendix-2-%E2%80%93-human-rights-historical-context> On June 15, 1962, Ontario became the first jurisdiction in Canada to "formally recognize the moral, social and economic consequences of discrimination by enacting a Human Rights Code and establishing a human rights commission." See also Andrew Pinto on the evolution of the *Code* in the 2012 review of Ontario's human rights system, *supra*, note 3.

<sup>56</sup> Owen M. Fiss, "Against Settlement" (1984) 93 Yale LJ 1073. This broad concern about settlement does not generally arise in the labour relations context. There, the relationships between the parties and the statutory scheme are predicated on the assumption that differences will generally be resolved rather than litigated.

<sup>57</sup> *R. v. Desmond*, 1947 CarswellNS 1, 20 M.P.R. 297 (N.S. C.A.).

<sup>58</sup> 347 U.S. 483 (U.S. Kan. S.C., 1954).



persuasion and education.<sup>59</sup> They cite Justice Walter Tarnopolsky, a pioneer in the development of human rights law in Canada, who described enforcement under the *Code* in 1968 as “the iron hand in the velvet glove”.<sup>60</sup> Complaints were investigated by the Ontario Human Rights Commission (OHRC) and strong but informal efforts by OHRC staff were made to reach an amicable settlement. Education was encouraged to overcome attitudes and acts of discrimination which were perceived as unintentional and based on unfounded, although often widely held stereotypes of people.<sup>61</sup> If conciliation failed, the OHRC would “put an iron hand in the velvet glove” recommending that a Board of Inquiry conduct a public hearing.<sup>62</sup> The OHRC took carriage of the complaint and responsibility for advancing the public interest at hearing.<sup>63</sup>

Even after referral for a hearing to the HRTO, most cases were resolved prior to a full hearing, which resulted in a relatively small number of final merits decisions each year.<sup>64</sup> As early as 1963, in *Khoun v. Rosedale Manor*, the first racial discrimination in housing case to be referred for hearing, the parties achieved a comprehensive settlement that “helped set a framework for future settlements and a trend toward conciliation.”<sup>65</sup> From the early 1960’s to 2008 when substantial amendments to the *Code* took effect, mediation and bilateral negotiation were encouraged and offered at all stages of the complaint process, even in cases of significant public importance. During that period, settlement occurred in a context where the watchful eye of the OHRC was always on the public interest. The OHRC then published the substantive details of settlements as a tool for establishing social norms which were more responsive to the values underlying the *Code*.

In 2007 when the HRTO first began offering med-adj, it was on the precipice of becoming a “direct access” model. By June 2008, applications were no longer screened by the OHRC but filed directly with the HRTO, increasing its caseload from fewer than 100 new applications per year to more than 3000.<sup>66</sup> That

<sup>59</sup> Robert Brian Howe and David Johnson, *Restraining Equality, Human Rights Commissions in Canada*, University of Toronto Press, 2000.

<sup>60</sup> Walter Tarnopolsky, “The Iron Hand in the Velvet Glove” (1968) 46 Can Bar Rev.

<sup>61</sup> *Restraining Equality*, *supra*, note 59, p. 11.

<sup>62</sup> Individual Boards of Inquiry and the Human Rights Board of Inquiry were the predecessors to the HRTO.

<sup>63</sup> *Restraining Equality*, *supra*, note 59, p. 11.

<sup>64</sup> This remains the case. The SJTO Annual Report of 2013-2014 reports the HRTO closed 3341 applications of which only 143 resulted in a final decision on the merits. See also Andrew Pinto, *supra* 3, who surveyed the five years prior to 2008 when direct access took effect and determined that about 9.4% of complaints completed by the Commission were referred to HRTO. He also reports that for 1998-2003 the comparable figure was 3.8%. These figures do not account for the number of cases that were then settled post-referral at the HRTO.

<sup>65</sup> Statement by the OHRC <http://www.ohrc.on.ca/en/book/export/html/8381>.

<sup>66</sup> For a more detailed discussion of the direct access model to human rights, see Flaherty,

impending workload demanded the creation of additional screening and dispute resolution tools on top of the traditional front-end mediation offered by the HRTO.<sup>67</sup> Without those additional tools, the HRTO's ability to fairly and effectively manage its new workload would be in jeopardy. The further result of direct access is that a significant number of unrepresented parties appear before the HRTO each year which represents both a challenge and an opportunity for resolving applications in a fair, just and expeditious manner.<sup>68</sup>

The initial med-adj sessions which took place prior to direct access, were conducted on the consent of the parties but without the formal underpinning of a specific provision in the *Code* or a set of rules and forms. At that time the OHRC was actively involved in almost every case the OHRC referred to hearing. Med-adj marked a significant departure from the separate mediation and adjudication processes offered by the HRTO to that point. OHRC lawyers played an important role in the evolving use of med-adj, actively participating, helping build confidence in the med-adj process, and bringing many applications to a resolution. Until the amendments to the *Code* took effect in 2008, settlements had to be approved by the OHRC to ensure that they were consistent with the public interest. In approving settlements, the OHRC considered whether the terms of the settlement, and the process by which the terms were achieved, were consistent with the public interest.

In June, 2008 the amendments to the *Code* came into force providing the HRTO with the statutory authority to adopt alternatives to traditional adjudicative or adversarial procedures, giving med-adj its statutory underpinning.<sup>69</sup> As the popularity of med-adj grew among parties, lawyers and adjudicators, the HRTO developed a rule and consent form, institutionalizing a practice which is now the primary method by which HRTO Vice-chairs resolve applications at the hearing stage.<sup>70</sup>

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Ontario and the Direct Access Model to Human Rights in 14 Arguments in Favour of Human Rights Institutions, Edited by Shelagh Day, Lucie Lamarche and Ken Norman.

<sup>67</sup> The HRTO also introduced tools such as preliminary and summary hearings in order to ensure that cases are properly screened prior to mediation and hearing, a function previously performed by the OHRC.

<sup>68</sup> Applicants appear more frequently without counsel than respondents, but there are times when both parties are unrepresented at hearing. The Human Rights Legal Support Centre provides representation to some applicants at various stages in the process. The Commission has a statutory right to intervene in applications, although that happens infrequently.

<sup>69</sup> *Code*, ss. 40 and 41.

<sup>70</sup> According to HRTO Vice-chairs who regularly conduct med-adj, somewhere between 50 and 80 percent of cases are resolved before or during a hearing. Cases are also resolved prior to hearing through the use of med-adj during preliminary hearings and in the case management phase as well as by private negotiations between the parties.

**(b) The Particular Challenges of Med-Adj in a Human Rights Context**

Unlike the context in which med-arb is practised in labour relations, there is no body of critical thinking and scholarly writing specifically on the practice of med-adj in the human rights context. There is, however, a significant body of academic literature and writing by mediation practitioners on both sides of the question whether human rights allegations and other public interest disputes *should* be settled by mediation or bilateral negotiation.<sup>71</sup> Despite the fact that the human rights system has relied heavily on conciliation for enforcing the *Code* in Ontario, there are still valid and important concerns about what it means to settle a human rights case. Settlements, particularly where the parties agree to standard contractual terms like confidentiality and no liability clauses, lack transparency and accountability, two values which are critically important to public interest institutions like the HRTO.

Words like “negotiation”, “compromise” and “settlement” and the exchange of quasi-constitutional rights for money and other private goods, can have a negative effect on the underlying goal of the *Code* to create a “culture of respect for human rights” across the province.<sup>72</sup> In a 2007 paper, Heather MacNaughton, the former Chair of the British Columbia Human Rights Tribunal, argued that criticisms of mediation in the human rights context are largely related to the public interest:

There is a public interest inherent in any human rights complaint and, unlike purely private disputes, it needs to be recognized that mediation (or any other private settlement process) requires adequate safeguards to ensure compliance with the statutory mandate. Indeed, it is the public nature of the mandate that drives criticism of mediation as inappropriate for human rights complaints. These criticisms include concerns that private settlements do not always protect the public’s interest in procedural fairness, nor allow for disclosure of dispute outcomes. Further, in settling an individual complaint, patterns of systemic discrimination may be neither revealed nor remedied. Complainants in human rights cases — often from marginalized communities or disadvantaged social and economic circumstances, could be further disempowered by a disparity in resources, knowledge and representation, potentially vulnerable to surrendering their human rights for less than their “true” value.<sup>73</sup>

<sup>71</sup> See for example, Fiss, *supra*, note 56 who was heavily critiqued as the economic benefits of mediation became more apparent and then revisited by feminist and critical race theory scholars who raised alarms about manipulation, power imbalances and bias in mediation.

<sup>72</sup> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, 2006 CarswellOnt 2350, 2006 CarswellOnt 2351, [2006] 1 S.C.R. 513 (S.C.C.) at para. 39.

<sup>73</sup> MacNaughton, Heather, *The Role of Mediation in Human Rights Disputes*. Doing Justice: Dispute Resolution in the Courts and Beyond, a collection of papers presented in Halifax at the 2007 CIAJ annual conference for practitioners, academics, judges and other professionals. Edited by Ronald Murphy and Patrick A. Molinari, p. 2-3.

Traditional mediation theory tends to position rights-based and interest-based mediation as if they are water-tight compartments: in the former the focus is on the legal rights of the parties and achieving resolutions that are consistent with judicial outcomes; in the latter the focus is on the underlying needs or interests of the parties and resolutions which satisfy those interests.<sup>74</sup> In fact, while the over-all context for dispute resolution at the HRTO is rights-based, direct access has created an emphasis on private, personal interests which can take on great significance in settlement negotiations. This gives rise to legitimate questions about who is now responsible for advancing the public interest, whether greater access to the HRTO leads to the settlement of more systemic claims of discrimination, and whether the HRTO should be reporting on those settlements.

At the same time, some government and other institutional parties are aware of and prepared to address systemic discrimination. In those cases, med-adj represents an opportunity to craft a remedy, which can be effectively integrated into the complex institutional dynamics known only or primarily to those respondents. In our experience, a collaborative process between an adjudicator who is well informed of the issues, an applicant who has personal experience of the effects of the respondent's conduct, and a respondent willing to introduce changes at the institutional level often have the potential to yield more effective remedies than the adversarial hearing process. The alternative, which is for the Tribunal to render a liability decision and then remain seized throughout a protracted, adversarial, remedial phase, is more likely to cause entrenchment rather than positive social change. In addition, broad public policy changes may affect constituencies of people who are not involved in the hearing before the Tribunal but who can be consulted in developing and implementing remedies. The remedial purpose of the *Code* is not only expressed in good outcomes, but also in fair and effective processes.

The HRTO's med-adj process has produced significant, non-confidential, public policy settlements that may be preferable from a public interest standpoint to what could be achieved through adjudication. In 2011, for example, the Ottawa Police Services Board ("OPSB") agreed through an HRTO mediated settlement to conduct a landmark study of racial bias in policing involving a two-year data collection project. The project was designed in collaboration with researchers at York University. The data was collected by officers and analyzed by the team at York University but also made available to any member of the public for further research. In November, 2016, the OPSB issued an open invitation to a public meeting with the research team as part of a six month engagement strategy to develop a multi-year action plan towards bias-neutral policing. The study examined data from more than 81,000 traffic stops. It clearly shows that Black and Middle Eastern male drivers are disproportionately affected with respect to traffic stops by police.<sup>75</sup> While the impact on concerns

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<sup>74</sup> See for example: S. Goldberg, F. Sander, and N. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes*, (Aspen Law & Business, 1992).

about racial profiling remain to be seen, the settlement and the data that was subsequently gathered has led the OPSB to publicly acknowledge the importance of addressing this issue.<sup>76</sup>

In 2011 a non-confidential agreement was reached at med-adj, the terms of which were set out in an order of the HRTO. The management and a public sector union parties agreed to take significant proactive measures to identify and remove barriers to the recruitment and retention of racialized persons. In 2014, an application against the City of Hamilton resulted in training and policy changes associated with transgendered washrooms.<sup>77</sup> In *Islam v. Helrit Investments Ltd.*,<sup>78</sup> a media release was incorporated into a consent order. The applicant alleged that as a newcomer to Canada seeking rental accommodation, he had frequently been asked to provide twelve months rent in advance. While the respondent denied the specific allegations made against it, the media release serves an important function in highlighting the broader issue and reinforcing the illegal and discriminatory nature of this practice. In 2013 a settlement was reached with the Ministry of Community Safety and Correctional Services, which required the Ministry to take steps to improve its treatment of prisoners with mental health disabilities. The settlement includes gender-based mental health screening for all prisoners when they are admitted; policy changes to prohibit the use of either disciplinary or administrative segregation for any prisoner with mental health disabilities, barring undue hardship; and ensuring that prisoners with mental health issues are provided with adequate information about their rights, among other things.<sup>79</sup>

How were these resolutions achieved using med-adj rather than traditional mediation? It is true that some parties are simply ready for settlement at a later

<sup>75</sup> The Commission issued a press release on October 24, 2016 which is available at: [http://www.ohrc.on.ca/en/news\\_centre/report-race-based-data-traffic-stops-ottawa-police-service-must-lead-action](http://www.ohrc.on.ca/en/news_centre/report-race-based-data-traffic-stops-ottawa-police-service-must-lead-action). The Commission acknowledged the importance of the project and the Ottawa Police Service for being “the first major police service in Canada to collect data on such a scale”.

<sup>76</sup> A subsequent settlement was achieved in 2015 in which the same respondent agreed to conduct a systemic gender-based review of its workforce demographics, policies and procedures with a view to ensuring that female police officers, particularly those who take maternity leaves and have family caregiving responsibilities, have equal opportunity to be represented at all levels and ranks. [http://www.ohrc.on.ca/en/news\\_centre/human-rights-settlement-aims-increase-gender-diversity-ottawa-police-service](http://www.ohrc.on.ca/en/news_centre/human-rights-settlement-aims-increase-gender-diversity-ottawa-police-service).

<sup>77</sup> The case received local and national news attention: <http://www.cbc.ca/news/canada/hamilton/news/hamilton-settles-human-rights-complaint-with-transgender-woman-1.3551584>.

<sup>78</sup> 2013 HRTO 390 (Ont. Human Rights Trib.).

<sup>79</sup> The full text of the settlement is available on the OHRC website: *Jahn v. Ministry of Community Safety and Correctional Services* is also described in the Submission of the OHRC to the Ministry of Community Safety and Correctional Services Provincial Segregation Review on the Commission’s website: <http://www.ohrc.on.ca/en/submission-ohrc-ministry-community-safety-and-correctional-services-provincial-segregation-review>.

stage or ready to build on their experience of a previous mediation session. In other cases, like the Ottawa police for example, a change in leadership will result in renewed efforts to resolve a complex application at the hearing stage. Other parties report that it made a difference to them that the person conducting the mediation would ultimately be their decision-maker. They cite among other factors for success at med-adj, that the adjudicator appears to be fully informed of the issues and evidence the parties intend to address at the hearing and better able to evaluate the likely outcome at hearing. Counsel also cite the fact that it can be useful in their efforts to convince their clients to resolve a case that the adjudicator echoes advice that they have previously given.

It is important to acknowledge that not every human rights application engages the public interest in the same way as the cases described above. When complaints were vetted by the OHRC under the pre-2008 provisions of the *Code*, only a small fraction were referred to the HRTO. The result of direct access is that the HRTO now processes the same broad spectrum of cases which were for the most part resolved or screened out by the OHRC. The cases fall somewhere along a continuum from purely private disputes to significant public interest complaints. Unless the OHRC intervenes, individual parties, not institutions, have complete control over whether and how a human rights case is resolved. Even where a case engages important public interest issues, not every individual applicant will choose to be a standard-bearer for that issue.

The wide range of applications that engage both public and private interests makes med-adj a very challenging exercise. HRTO members are required to bring a broad range of skills to the table to quickly identify where the application fits along that public/private interest continuum and identify those cases where something more might be required than the payment of a sum of money that the applicant is willing to accept. Ideally HRTO adjudicators will conduct med-adj with this in mind and encourage public interest settlements where the parties are willing. However, it is not the HRTO's role to interfere where the parties choose not to address the public interest dimensions of an application.

The result of removing the OHRC's role in investigating cases and approving settlements is that the HRTO must now grapple with questions about its responsibility to protect the public interest in the context of confidential dispute resolution. That and other thorny ethical questions continue to be the subject of lively debate among adjudicators at the HRTO as both the med-adj process and the skills of adjudicators evolve. For example, adjudicators and arbitrators are required to be impartial, which means that they must be even-handed, fair and open-minded. To the extent that neutrality means a lack of interest in the context for the dispute and its outcome, a lack of concern about the impact of the settlement on an unrepresented party and an unwillingness to intervene to correct power imbalances, HRTO adjudicators are not neutral. Their work is guided by the values underlying the *Code* and the ethical rules developed by the HRTO. At times those values will require an adjudicator to make certain interventions or even to bring a mediation to an end.

There are a number of other factors that distinguish the HRTO's practice of med-adj with med-arb in the labour relations context. We have already noted the presence of self-represented litigants before the HRTO and the challenges this can pose for the med-adj process. There are also significant differences which arise from the different institutional settings within which med-arb and med-adj are conducted. The relative independence of HRTO adjudicators, the broad range of social areas covered by the *Code*, the opportunity for mediation prior to med-adj and how the parties perceive what is at stake in a human rights application, present unique challenges and opportunities for HRTO adjudicators. From the relative security of an appointed position, HRTO members may take risks and provide directions that an arbitrator, who depends on consensual appointments, may be reluctant to do. On the other hand, HRTO members may be more constrained than labour arbitrators by the necessity to balance institutional values and the principles of fairness, justice and efficiency.

The broad range of social areas and prohibited grounds addressed by the *Code* means that, compared to the labour relations context, there are fewer cases aimed at salvaging an ongoing relationship. In some ways, although there may initially be less incentive to negotiate rather than litigate, the short-term nature of the relationship between parties in many human rights matters can make it easier to resolve these types of cases because they typically involve financial compensation and not the sometimes trickier issues that arise in relationship-building.

Many parties still opt for mediation at the front end of the application process with an adjudicator who will not be assigned to hear their case. A significant number of applications are resolved at this stage. Both forms of mediation work hand-in-hand at the HRTO. Where a front-end mediation does not result in a settlement the mediator can encourage the parties to take advantage of med-adj at a later stage in the process. Adjudicators who achieve a settlement through med-adj will often credit a previous mediator who laid the foundation for the agreement through an earlier mediation. What complicates screening and front-end mediation is that the strengths and weaknesses of an application are sometimes not revealed until the parties have completed their preparation for hearing. Unfortunately, by that time the parties have either participated in a failed mediation or not at all. They can be extremely entrenched and often unable or unwilling to initiate bilateral settlement discussions.

Applicants feel strongly that their fundamental human rights have been violated — individual respondents are deeply offended by accusations of discrimination, all of which has the effect of pushing the parties to have their “day in court”. Both parties tend to wed themselves to the blue sky possibility that the HRTO will find in their favour and they will be fully vindicated. At the same time, one or both parties may have received advice that circumstances have changed and the evidence which has been compiled and examined more closely, is unlikely to fully support their position at hearing. Where they are unrepresented or no longer represented, parties may be overwhelmed with

anxiety about presenting their case - they may be wishing they had agreed to mediation in the first place, or accepted an earlier offer that they had initially rejected. These are the parties who would benefit significantly from an intervention and an opportunity to consider whether adjudicating the application is necessary or desirable. This is the void that med-adj fills at the hearing stage.

**(c) Dealing with Challenges in the Practice of Med-Adj at the HRTO**

The core principle of med-adj at the HRTO is that it is voluntary and parties maintain their right to reject a settlement offer and have their matter adjudicated. Parties sign an agreement confirming their voluntary participation in the process. It is the responsibility of every adjudicator to ensure that each party makes a voluntary choice to accept or decline the invitation to participate, notwithstanding the fact that they may feel pressure to settle because of a variety of personal or structural factors. Litigation is stressful and expensive and in cases where parties are self-represented it can have the effect of taking over their lives. In our view, this is the most important factor in pre-empting the various fairness concerns associated with the dual role of the mediator/decision-maker.

There is no question that the med-arb model has assisted the HRTO in anticipating and dealing with challenges arising in med-adj. In both contexts, adjudicators have to determine how receptive the parties will be to receiving information about the strengths and weakness of their case. They have to remain open-minded and ensure that the parties retain confidence in the adjudicator's ability to fairly decide the issues at hearing if necessary.

While med-adj is most often initiated by the HRTO adjudicator, parties are increasingly expecting or asking the adjudicator to facilitate mediation discussions at the outset of the hearing. Med-adj can also be proposed at various stages in the hearing process. There are times when the adjudicator has an opportunity to raise med-adj as part of the case management process preceding the hearing of evidence. In those cases, parties have an opportunity to consider the implications of med-adj in advance. Most often, it is initiated at the commencement of the hearing, although the adjudicator may also propose med-adj after the applicant or other key witnesses have testified and in some cases, at the conclusion of all of the evidence. There is no HRTO-wide standard practice with respect to how and when med-adj is initiated. It is often a matter of personal style and it generally involves a close reading of the issues and the parties by the adjudicator. Consideration is given to a number of factors including whether the parties are represented; how complicated the factual and legal issues are; whether the parties have the capacity to understand and effectively participate in med-adj at the hearing, and whether there is a public interest in having the application adjudicated rather than settled through med-adj.

Successfully initiating med-adj often requires the adjudicator to first gain the trust and confidence of the parties. It is becoming presumptive, like med-arb, in



cases where lawyers or parties are familiar with the process and have had good experiences resolving previous cases. Where parties are not familiar with or initially amenable to the process, and the adjudicator may be meeting parties or counsel for the first time, more explanation and reassurance about the fairness of the process will be required. The adjudicator will also assess the capacity of a party to self-identify fairness concerns they are experiencing that require intervention in what is often a very time-sensitive context.<sup>80</sup>

One of the most important fairness concerns that overlaps directly between the labour and human rights contexts is the necessity to ensure that confidential information from the mediation phase does not affect decision-making where the mediation fails to produce a settlement. Adjudicators engaged in med-adj will likely have more work to do with the parties to ensure that they understand how we deal with confidential information, what is shared with the parties, why we might spend more or less time with one of the parties and why we might meet separately with their counsel where they are represented.

It is inevitable that parties will experience stress associated with participating in litigation. By the time the parties get to hearing, they are often experiencing litigation fatigue and significant anxiety about the hearing itself. Med-adj is not a vehicle for taking advantage of vulnerable parties who are fed up with the cost and time associated with participating in a human rights application. It is an opportunity to put struggling parties at ease and shift them into a place where they can actually make an informed decision about settlement. Making their supporters a part of the process from the beginning will help to prevent the negotiations from being derailed at a later stage by a well-meaning but ill-informed friend or family member.

Adjudicators conducting med-adj in the human rights context must also be mindful of what was described earlier in the paper as the use of “muscle” to break impasses and reach a final settlement. Most med-adj processes at the HRTO reach a stage where the negotiation can advance no further until the parties receive some credible information about the strengths and weaknesses of their positions. Weighing in on the likely outcome of the case is a delicate balancing act for adjudicators, who must maintain not just their impartiality, but also the perception of impartiality. It undermines the leverage that the parties retain to proceed to hearing if they fear that their adjudicator has lost his or her impartiality. When undue pressure is placed on litigants in the labour context, it can damage relationships — in the human rights context, the damage reverberates against the institution and can threaten its core mandate.

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<sup>80</sup> In most cases no more than one day is devoted to med-adj which often takes place on the morning of the first day of hearing. Exceptions to this general rule can include cases with important public interest implications where there are multiple parties and several days of hearing anticipated. In those cases the HRTO may devote more resources to a med-adj process which is likely to yield a positive public-interest result.

## 5. CONCLUSION

It may seem remarkable that a model entrenched in the private, contractual world of labour relations has emerged as a viable form of dispute resolution in the public interest world of human rights. In our view, there are at least three explanations for this.

First, as noted, there are inherent benefits to parties who participate in a well-managed mediation process by the person who will ultimately decide the case. An adjudicator who has done what is necessary to prepare for a hearing is in an excellent position to help the parties assess the strengths and weaknesses of their case and evaluate settlement proposals. Our experience at the HRTO is that whether a party is represented or unrepresented, they generally see med-adj as an opportunity rather than a constraint.

Second, there are significant institutional benefits to med-adj. An efficient direct access tribunal develops a variety of tools for resolving cases at various stages. Cases that settle at the hearing stage provide opportunities for adjudicators to spend more time on their writing and on cases that require more hearing days and intensive case management. The HRTO does not publish statistics on settlements that take place as a result of med-adj although the raw data exists because adjudicators are required to provide that information at the conclusion of every hearing.<sup>81</sup> The anecdotal evidence from the reports of our colleagues suggests that med-adj settlements account for a significant part of their hearing caseload, in some case over 80%.

Third, critics of human rights settlements may not appreciate the role that med-adj plays in making justice accessible to parties in a direct access system where human rights allegations are often framed as private disputes. Individuals have carriage of their own applications and may resolve them at any time on the basis of their own personal interests.<sup>82</sup> Many applicants lack the resources or interest to advance allegations with systemic implications. They also lack the resources to call experts and other evidence which would establish the systemic dimensions of their allegations even where they exist. Most important, many parties experience the hearing process as harmful, particularly where they have a desire to maintain their privacy. As a result, med-adj affords those parties who might be harmed by litigation with access to a fair and effective mechanism for resolving sensitive cases rather than having them adjudicated in a public forum.<sup>83</sup>

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<sup>81</sup> Pinto commented on the fact that the HRTO appears to have a lower settlement rate at mediation than the OHRC. However, a significant reason for that difference is the fact that the HRTO does not include its med-adj settlements in that number nor does it count applications which were resolved because of the mediation but at a later date.

<sup>82</sup> Where the OHRC was involved in screening and investigating allegations of discrimination the opposite occurred: the OHRC applied its expertise to consider the systemic implications of what might otherwise appear to be a private dispute. In the current system in Ontario, the OHRC has a statutory right to intervene in applications and does so where that is appropriate having regard to the OHRC's post-2008 mandate and its public interest priorities.

In the labour context the most obvious qualitative measure of the success of med-arb is that it is now presumptive and arbitrators are chosen over and over again to conduct med-arb by the same lawyers and parties. In the human rights context, med-adj is increasingly presumptive, particularly among those lawyers and parties who appear before the HRTO on a regular basis. In addition, the fact that self-represented parties voluntarily choose med-adj, despite having little or no previous exposure to med-adj, is a strong indication that the model is perceived as having inherent benefits that are not necessarily related to maintaining ongoing relationships. Adjudicators report that they receive unsolicited, positive feedback from the parties at the conclusion of their med-adj processes, whether or not they settle. Lawyers from the Human Rights Legal Support Centre, who are particularly attuned to the implications of conducting med-adj in a public policy context, support their clients' participation and sometimes initiate a request for med-adj.<sup>84</sup>

In addition, other human rights tribunals are now following the HRTO's lead and embedding med-adj as an institutional practice. The British Columbia Human Rights Tribunal now permits an adjudicator who has mediated a case to decide the case on the consent of the parties. The Canadian Human Rights Tribunal ("CHRT"), recently introduced med-adj with a confidentiality agreement and practice direction. The CHRT, which receives its case load on referral from the Canadian Human Rights Commission, also asks self-represented parties to obtain independent legal advice before participating in med-adj.

What we can say at this stage after almost ten years since the introduction of med-adj to the HRTO, is that the anecdotal evidence suggests that the process appears to be working. Any more sophisticated level of evaluation would involve some method for acquiring reliable data on a number of issues: whether the parties participate only because they are concerned they will be perceived as uncooperative; experiences of perceived or actual coercion in both agreeing to take part and participating in the process; whether med-adj simply provides a forum for an application which is otherwise "ripe" for resolution with parties who have put off their bilateral negotiations expecting to take advantage of the process; whether settlements arising from med-adj endure and whether the level of satisfaction among the parties grows rather than declines over time. In

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<sup>83</sup> Indeed, the very first med-adj conducted by the HRTO involved allegations of sexual harassment. The re-telling of that experience in a public forum was having significant emotional consequences for the applicant, as well as the respondent and his wife who was in attendance. The adjudicator intervened during the applicant's examination in chief to suggest an alternative to carrying on with the hearing. The parties resolved the case with the hearing adjudicator.

<sup>84</sup> The Human Rights Legal Support Centre ("HRLSC") is a publicly-funded independent *agency*, created under the *Code*, whose role is to provide legal services and support to applicants and prospective applicants in all stages of the human rights process. The HRLSC provides information on the website about med-adj and prepares its clients for that process

addition to engaging in a deeper analysis of the merits of med-adj, the HRTO may wish to consider why med-adj has a higher success rate than early mediation and whether settlement rates could be enhanced by offering med-adj at an earlier stage in the hearing process. Some cases will inevitably require the full pre-hearing work up before the parties are ready to engage in resolution discussions. However, given our extensive experience with the model over the past 10 years, we believe that many cases that may not settle through early mediation, would settle at an earlier place along the pre-hearing continuum through a combination of early assignment, case management and med-adj.<sup>85</sup>

Taken together, the labour arbitration model and the HRTO's experience show that med-adj is an effective dispute resolution tool that can be used successfully in a range of different contexts. Indeed, while the model may function particularly well with sophisticated, represented parties who have an interest in maintaining a good relationship, the HRTO's experience shows that these are not necessary preconditions to its success. In our view, med-adj has the potential to assist a range of adjudicators and administrative decision-makers to efficiently and fairly resolve a wide variety of disputes. Where settlement is not possible or is not a desirable outcome, med-adj can help the parties and the adjudicator manage the case, narrow issues, and develop helpful hearing management strategies. The key to successfully introducing med-adj is not just the nature of the dispute, but the fact that participating institutions, adjudicators, and practitioners are receptive to innovative approaches to problem-solving and reflective about the rights at stake in the process and whether settlement opportunities enhance the institution or decision-maker's overall mandate.

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<sup>85</sup> Pinto recommends devoting more resources to early mediation. We query whether it makes sense to add more resources to the same mediation model or to expand the options for early mediation to include med-adj.