



MEDIATIONSOPHILEX

**DIFFICULT MEDIATIONS:
ACQUIRING A MASTERY OF THE PROCESS AND ITS
PARADOXES TO DEAL WITH THEM**

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I - Introduction

A mediator's job is not an easy one. While mediation may be a flexible and more human approach to conflict resolution, it remains a more demanding process than a legal ruling. This is because, in mediation, the mediator works to bring the parties to claim justice for themselves. Should they fail to reach a settlement before the case goes to court, however, any mediation at this stage will carry one of characteristics of a "difficult mediation".

When speaking of a difficult mediation, the following question arises: given that the process belongs to the parties, that it allows them to appropriate the conflict and approach it based on their interests rather than their positions, to adopt a collaborative approach to the negotiation of creative solutions, does the theoretical ideal actually materialize in a litigation that drags on, is highly contradictory, and whose stakes are purely financial? Add to these initial difficulties the fact that the parties often cling to their positions and, mostly, to their rights. Then add emotions that run high, difficult personalities and the personal (often hidden) agendas of the negotiators present, and you have all the ingredients for a difficult negotiation. Throw into this mix a form of magical thinking where the parties expect the mediator to reduce the difficulties of the conflict. Then add to all of these complexities the process's intrinsic difficulties, i.e., the usual fears of the parties and their attorneys with regards to the mediation. The non-restrictive list of these fears warrants consideration, given that they are part of the difficulties of the process.

The participants (parties or attorneys) are afraid of:

- Showing signs of weakness simply by agreeing to go to mediation or being willing to collaborate on a solution
- Having to show one's cards and being penalized for it at trial
- Having to reveal their needs and appear vulnerable to their adversary
- Losing the benefit of one's attorney and his negotiating talents
- Leaving the possible outcome of the litigation up to an unknown third party

- Experiencing a process without defined rules, contrary to the familiar judicial process
- Fearing that mediation inevitably leads to compromise and to cutting the cake in two.

What can the mediator¹ do to give meaning to the theoretical ideal, given these very concrete difficulties? How can he approach them to help the parties? Is he an orchestra conductor or a one-man band? Should he be directive? And if so, when and how? What are his natural obstacles, his realistic objectives, his tools, his limitations? What belongs to the realm of the parties and not the mediator? What belongs to the mediator and not the parties? Does this reality reflect the expectations of the parties and their attorneys of the mediator's role?

Experience reveals a number of paradoxes related to these issues. A seasoned mediator must understand and master these paradoxes, which significantly increase the process's degree of difficulty. I would simply like to share my own vision of the concrete role of the mediator with regards to all of these difficulties and the theoretical model. This article presents an analysis, which provides a bridge between theory as it was taught to me in 1993 and its concrete application, as I have experienced it over the past few years, in hundreds of mediations in every field of activity. This analysis, which was presented in 2001 at the Quebec Bar's five-year seminar, *Récents développements en médiation*, addresses the many difficulties encountered at every stage of the mediation process, and identifies solutions for dealing with them more effectively.

It is important to emphasize at the outset, however, that this article is not intended to propose an absolute mediation model since we should never lose sight of the fact that mediation is, by definition, a flexible process in which the style and personality of the mediator play an important role and that each case carries its own characteristics and problems. In other words, in mediation, there's more than one way of doing things.

¹ In this document, the masculine form has been used for reading ease, and includes the feminine.

II The process of mediation under the magnifying glass

In my opinion there are three major stages in a mediation. Each one is as important and distinct as the other. Each has its own function in overcoming the difficulties and each also has its own inherent difficulties. These stages are:

- 1) the administration of the exchange of information and the understanding of the conflict
- 2) feedback to the parties and mediator, and
- 3) assistance in the negotiation.

The mediator must have a solid and unshakable understanding of his own role throughout these phases as the expectations of the parties and their attorneys do not always correspond to the theoretical model of the mediator's role. For most, there remains much confusion between what mediation is and what they believe it should be. Experience has shown that this confusion sometimes pushes the parties to want to short-circuit the steps and apply pressure to direct the debates, negotiate too quickly, minimize the work that can be done in caucusses, become discouraged by the gap between positions or the amounts offered, ask the mediator to negotiate for them, to convince the other party or to come up with a solution to the problem. In other words, the parties want a negotiated settlement, but do not have the patience to complete the process in order to achieve it. Yet, it is the process that maximizes the chances of arriving at a settlement, particularly in the case of difficult mediations.

1) The administration of the exchange of information and the understanding of the conflict

a) The paradox between the expectations of the parties and the necessity of this stage

Despite the fact that it is vital to the process, this step and its impact are misunderstood. This arises from some of the attitudes I have often seen at this stage.

Firstly, people say that everything is already contained in the Court file: the alleged facts, the experts' reports, the exhibits, the summaries of fact and law and even the names of the witnesses. They tell us or make us feel that "since the mediation is a different process, why waste time rehashing what everyone already knows". In a mediation scheduled to last one or two days, it is very discouraging to realize that half a day will be spent doing what appears to be a useless and redundant exercise when we came to settle! This is what I call the paradox of presumption. Why cover this stage when we presume to know everything about the litigation from both sides?

Secondly, another disappointment that arises at this stage stems from the realization that the parties' positions are still staunchly rooted and diametrically opposed, whereas their willingness to go to mediation has been interpreted as an openness to something else, which is clearly not happening. So many people have confided in me at this stage that they were wrong about the intentions of the other parties and feared that they had come to the table in bad faith, that they did not want to negotiate and that this exercise was a waste of time. I describe this situation as the paradox of polarization. How could polarization contribute to bringing the parties closer together or to an agreement?

Thirdly, there is the paradox of avoidance. This is where the parties in a conflict engage in wishful thinking. They think that because they have a mediator, something will happen to allow the litigation to be settled without going through this difficult stage or, in other words, without confronting the conflict itself. "Why talk about the conflict when they want to end it?"

When I first started my mediation practice, I lived through these paradoxes intensely. They often caused me to doubt the process, as it had been taught to me. It was experience that slowly but surely confirmed to me that this step was indeed required for conducting a mediation in good form and maximizing the possibility of finding avenues for settlement.

In fact, it is during a well-conducted plenary session that the mediator obtains two key elements for dealing with any difficulty that could arise in the case. On the one hand, he gathers, in a multidimensional manner, all elements that constitute the conflict. This allows the mediator to bring out the substance (factual or legal) of the conflict as well as its related emotions and interests. On the other hand, it will establish his credibility with his audience. Indeed, his ability to chair the session, manage tension, demonstrate his impartiality, show his understanding of the litigation, and his desire to resolve it, will instill confidence in the parties with regards to the process and the mediator. These will be essential to the other steps. A mediator who knows what he's doing, who works for all parties, and who is not threatened by the conflict inspires confidence and helps the parties move forward with him, despite any doubts and hesitations they might have.

Indeed, the fourth and greatest paradox in mediation is the following: even though, according to theory, mediation is a process, which allows the parties to express themselves concerning the conflict, to explore their true interests and related solutions, experience has shown us that without the well-directed and persevering help of a mediator, little is likely to happen. The mediator must therefore work hard to ensure that all participants appropriate the process.

b) The role of the mediator during the exchange of information

The mediator's role is key at this stage. In my opinion, he must take a dynamic and directive approach to his process and his interventions have considerable impact to resolve the paradoxes and obtain the basic components necessary to move the conflict to another level. To better define what I mean by directive approach to his process, it is important to understand the concrete objectives sought at this stage in order to obtain the basic components. There are a number of them.

i) Obtaining complete information

The mediator wants everyone present to have the same information. This applies as much to the parties as to their attorneys and their experts. Since each one has his own function in a litigation and because there are sometimes many individuals involved, we often find that the information is fragmented and it is only when we try to incorporate a complete exchange of information with all participants that we have access to all the elements for analysis. The exchange then becomes dynamic and efficient and gets away from the sterility of the paper file. The basic premises are defined and can be discussed. There is nothing worse than approaching the analysis of a litigation with selective and compartmentalized information.

An expert once told me, during an exchange of information on a very technical file that we had managed to discuss, in a single day, every aspect of the file, something that what would have taken two weeks of trial to achieve under the rules of evidence. Moreover, the dynamic nature of the exchange had made it possible to use the information to craft solutions that reconciled the concerns of all experts rather than favour one over the other.

ii) The definition of terms and the elimination of erroneous presumptions

Furthermore, in an effort to have the parties themselves define the various elements introduced, the mediator asks a number of neutral and open-ended questions. Too often, we see people using words or concepts while assuming the others around the table have the same definition. Also, people often use generalities to make innuendos and they presume that the other party will understand their message. They rarely succeed. Indeed, we all interpret things based on our own perceptions, which are guided by our own experience. It is even worse in the case of intense conflict.

From the moment we can define exactly what the other person has said, we can dispense with generalizations and one-sided conversations. Whether we concur with the objective sought by the other party or hold a divergent view and add the elements to support this difference, we will move forward because we will be speaking about the same things.

I remember a liability file where the parties used the terms “exaggeration” and “bad faith” when speaking about each other. I asked the parties to define these terms. The plaintiff fumed about the denial of liability contained in the proceedings. The defendant complained about the excessive monetary demand. They both better understood each other’s perspective and the remainder of the process helped to tailor a solution from these perspectives, which was not completely contradictory. Thus, step by step, an unsolvable conflict became a surmountable mountain.

iii) Unveiling all sides of the coin

It is fundamental to the process that even if a party disagrees with the other’s version or vision of the conflict, he should be aware of it, understand its basic premises and not only acknowledge its existence but gauge its intensity. This can allow for updates, factual agreements on certain aspects and the identification of the real points of discord. This can also allow for the realization that the facts are not necessarily in dispute but that the parties attach more importance to certain elements than to others. It can allow for a better understanding of the entire legal issue raised by the litigation. Here I am thinking about a file that was supposed to go before the Canadian Radio and Telecommunications Council. Each side had a compartmentalized vision of the issue that it would submit to the Tribunal. The mediation raised a more global issue, which could respond to both problems that were raised, whereas the paper file did not reveal it. The data was changed accordingly, and allowed everyone to see that a global approach by the Council could result in a very different situation than what they had anticipated. A negotiated solution was more advantageous to both.

iv) Obtaining a precise understanding of the divisive issues

The mediator does this by dissecting the entire problem, topic by topic, and item by item, if need be. He will organize the discussion allowing it to progress in a structured and constructive manner. He will be curious, listen attentively and concentrate on all that is said. When required, he will repeat in his own words what has been said to ensure that both he and

the others have fully understood it and that he has transmitted the information in a neutral manner.

Everything cannot be summarized as you go along or be systematically described on the blackboard. I have personally refrained from systematic reformulation. I prefer to give people my full attention, looking at them and taking personal notes. I choose not to intervene constantly afterwards. Interventions should be timely and relevant either to help the participants express themselves or to clarify their statements. I believe that the prudent mediator allows everyone to explain himself on a point before asking his own questions. This not only preserves his impartiality but, allows him to get everyone's perception of the question. However, if an element does not appear clear to him, it will most likely not be clear to the others around the table and he should not hesitate to intervene so that everything is clarified and discussed.

This applies as much to a mere intervention for clarification as to a warning that something appears to be incomprehensible to him. In this regard, I remember a mediation where, after a two-hour exchange of information among several experts representing two parties, I asked them if they were satisfied that they had properly summarized their positions. They were and declared that they did not have anything to add. I had to make them realize that even though I had listened to everything and tried to understand the problem, the discourse of one party was so general that it did not apply to the generalities of the other's. The result: even the impartial third party with the best intentions could not understand which of the plant's twenty-two pieces of equipment was defective, what had to be done or spent to correct the situation, and even less why each party held the other responsible for the defect. I suggested that they abandon this isolated dialogue, take one item of machinery at a time and invite each expert, party or attorney to succinctly describe its mechanical problem, its cause, how to repair it, the cost and why the other party was responsible for it.

The exchange enabled both camps to see that through the details, they were able to agree on numerous points. We were able to categorize the defects and repairs, agree on the costs and better distinguish the factual and technical premises used by each party to assign responsibility in each category. In this case, it was necessary to push each party to obtain a clear understanding of the problem before entering into any negotiations.

While the mediator must be directive in obtaining information, I do not believe that he should adopt that stance with regards to the answers being given. He should not choose his questions nor direct the debate towards what he would like to hear to facilitate the file or minimize the conflict. An impartial curiosity concentrates on all the questions that are raised in the debate, which spontaneously unfolds before him. This restraint should be exercised towards all the participants. The mediator seeks not to control the substance of the file, but rather to clarify it to enhance understanding and help move the parties forward.

v) Fair and respectful treatment of the parties

Regardless of the strength of the parties in terms of their numbers or the political and financial power plays at work, the mediator's role is key to ensuring that everyone can express himself fully, be heard and be respected. A conflict can be a painful and degrading experience under certain conditions. Mediation constitutes the first opportunity for a party to express both to the opposing party and to an impartial third party, his story and view of the matter and to be heard, perhaps even understood.

It also allows for perceptions. The perception that people have of what occurred is often more important than the reality itself. To be able to express one's perception and feel respected in doing so, to see that the other party is listening to you and that the mediator is interested: these ingredients are necessary for helping someone accept that there may be another side to the same coin and from there, move towards a settlement. We all know the expression "people want to have their day in court". Human nature being what it is, more often than not, it is impossible for someone to move towards a positive resolution to a

conflict until he is satisfied that he has been heard and understood. Experience has often shown me that people do not need a court judgment to experience this satisfaction. Mediation can provide it to them, notably at the “exchange of information and understanding of the conflict” stage, hence the importance of this stage in the process.

In short, the manner in which the mediator manages the debate, ensures that the individuals, their attorneys and their experts (as the case may be) actively participate in the discussion, manages dialogue in an effective, organized and balanced manner, comes back to someone by saying to him: “You wanted to say something earlier, and I asked you to wait, I am now listening to You”: all of these interventions will inspire everyone’s confidence in the mediator’s impartiality. The way in which he ensures an understanding of the technical, factual and legal questions and fosters a constructive exchange will further demonstrate his good sense and ability to understand the litigation, while attesting to his genuine desire to grasp all of the elements, which can lead to a resolution of the conflict. As a result, he will be simultaneously firm, soft, attentive, organized in his thoughts, fair, neutral in his language, curious, sincere and efficient. All these qualities and forms of interventions seek to ensure that the parties and their attorneys obtain the multidimensional raw material (substance, emotions, interests), which will maximize the possibilities of a settlement. He knows that these provide the foundation for the other stages such as the caucus, negotiation and progression towards an agreement. In my opinion, in this way, the efficient mediator is directive with regard to the process, which ironically hands the process to the parties.

2) The feedback to the parties and the mediator

It is in this area that I saw the greatest evolution in the role of the mediator. It results from yet another great paradox between theoretical teachings and the actual expectations of the parties.

On the one hand, the literature reminds us that the mediator is a person who, as an impartial administrator of the process, does not give his opinion, but rather seeks to identify the interests of

the parties and help them develop creative solutions based on their interests, and beyond the merits of their respective positions.

On the other hand, my experience of comments made by the parties, the attorneys and the experts, have confirmed for me that the mediator's impression of the merits of their positions is very important to them. In going to mediation, they expect, among other things, to have the opportunity to obtain, for the first time, *in vivo*, an impartial third party's impression of the entire conflict. They also expect to be able to respond to the mediator's impressions and to have a healthy discussion. When we think about it, it is true that what happens during the exchange of information is akin to what happens at trial (procedural formalities aside).

I quickly sensed this reality during my early days as a mediator. Initially, I favoured an approach according to which my idea of the litigation was not relevant to its resolution. Then over time, as I became more confident, I found my own way of reconciling these contradictory requirements. It allowed me to see that, while the mediator must direct the litigants to find solutions to the case based on their interests, the parties must be aware of the mediator's impressions of the merits of their positions in order to distance themselves from them. In caucus, they need to validate certain things and get a reality check on others. In short, they need the opinion of someone who has heard everything and enjoys a unique vantage point providing an objective and comprehensive view of the case, following the exchange of information.

However, I do subscribe to the principle that I am not there to give opinions, as it would be quite pretentious to do so without having examined both the file and the law in depth. The parties have their attorneys for that. Rather, my role as I see it, is to provide feedback solely on the basis of what I have heard and seen during the exchange of information, based on my experience and personal judgment. I have gradually developed a way of integrating this role while remaining true to the theoretical principles in this area. Here is how.

Following the exchange of information, I proceed to the confidential caucuses. In my opinion, it is imperative to first ask people for their own feedback. I also invite them to tell me

what may have been left unsaid in the plenary session and anything else they deem pertinent. I therefore give them the floor so as not to presume or prejudge anything and to be attuned to what they have to say. I do not seek to know their settlement objectives (unless they wish to discuss them) because this will be a part of the negotiation stage, which we have yet to reach. Instead, I try to explore their needs and interests, as they will discuss them in caucus. It is perhaps very appropriate to discuss the human aspect of the conflict: personality conflicts, feelings, lack of communication, missed opportunities, regrets, etc. The people, or their attorneys on their behalf, talk about what is important to them and try to validate many points with the mediator, whether they are substantive or emotional. I validate those with which I feel comfortable.

Then, if it appears relevant, I check to see if the parties are interested in any feedback I may have. The response is invariably positive. People want to know the questions and difficulties raised by their view of the case. I never present these difficulties as certainties because, with my limited knowledge of the case, they are not certainties to me. Instead, I share with them any interrogations I may have. I identify the elements or arguments that do not appear sure to me even if they do to them. I discuss the difficulties that I can anticipate with their file. I share these impressions or questions simply, confidentiality, and with total respect for their positions. I listen attentively and with an open mind to their arguments in response to my impressions. This discussion yields a realistic view of the file allowing us to validate and work on perceptions, to discuss the limitations that exist and lead participants to ask themselves what they really want and what they hope to obtain from a court judgment. The mediator's objectivity can support an attorney who may have used the same language with a client who proved to be less receptive to the one hired to defend him than to an impartial third party. It also allows an attorney to adjust his position when his client had very humanly given him only one side of the story.

During this exercise, I am neither complacent nor confrontational, but honest. This seems to be what people appreciate in an impartial third party. They want someone who tells it like it is, whether positive or negative, no more and no less. They want someone who has the ability to both understand and question them. It should be someone who appears fair and sensible to them

from the start of the process and who knows how to provide an objective point of view while being prepared to lend a helping hand.

Therein lies a key to breaking the deadlock. It is the adversarial process involved in a lawsuit that polarizes the parties. On the other hand, if they feel that they are engaged in a helpful process, they will subscribe to it in order to help themselves. I feel a genuine detachment with regards to what they do with my feedback, as my intention is not to convince them, but rather to know that I have provided them with all the elements for analysis required for making clear choices in the negotiation. It is the impartiality that I have shown from the start of the exchange of information that makes the parties receptive to my comments. Shedding new light on the file allows for greater objectivity, a necessary ingredient to open negotiations. It also allows the parties to distance themselves from their positions, helps them to better focus on their real needs and the solutions that would truly satisfy them.

3) Assisting with the negotiation

This stage introduces a new component in the mediator's work, one which everyone expects will bring the file to a satisfactory conclusion, which is to say, a settlement. The role of the mediator has also become well defined in this respect. Fifteen years ago, I felt there were many questions as to my role in this process, again because of further paradoxes which present themselves in the following way. Although mediation was a way for the parties to appropriate the process rather than have their case ruled upon by a third party, they and their attorneys easily and paradoxically shift responsibility for a settlement onto the mediator's shoulders! While the purpose of the process was to find solutions based on their needs, more often than not, I have seen people try to negotiate on their positions, without identifying or revealing their interests. Although the process is there to give the parties a voice and power, they would much prefer having the mediator do the work for them. In seeking to effectively and serenely steer a course through these paradoxes, I have come to understand that there are certain rules of navigation, which cannot be overlooked, regardless of the waters I am sailing, even the Bermuda Triangle!

a) Understanding that the responsibility of the mediator is to the process and not to obtaining a result

The mediator's responsibility to those who retain his services is not to obtain a settlement, nor to negotiate on their behalf. It is strictly to provide them with all the ingredients that can advance the process and which can open up avenues leading to a result. To paraphrase lyrics from a song by the famous Jean Gabin, the mediator "knows that he knows nothing", of the underlying causes of the litigation, the personalities nor the interests at play, the solutions to be arrived at, the hidden agendas, the strategies, nor anything else that awaits him in a mediation. "But this much he knows". He understands that during the negotiations as well, he plays a directive role with regards to the process and not its outcome. The conflict, the components, and the solutions that can emerge belong to the litigants while the process to achieve it belongs to the mediator. He will be delighted if the process produces results, but he will be satisfied that he fulfilled his mandate, even in the absence of results, if he knows that he has done everything possible to ensure an effective process and allowed the parties to benefit from all of its advantages.

This inner beacon that the mediator gives himself is essential because, in the field, many other forces are at play. People often tell us on the eve or the morning of a mediation: "I'd really like to see how you're going to settle this file." When I first started out, I took these comments very personally and felt an enormous responsibility. The serenity of experience now leads me to respond with "It is I who am eager to see how you are going to settle it!" If someone tells me "anyway, good luck", I respond "that it is something for me to wish you. My role is to bring you a process, which has been proven to be effective. I hope you'll benefit from it!"

At this stage, the mediator's role is two-fold. He must help the participants to fully understand their priority needs and interests and ensure that they negotiate them. He then focuses his energy on making the people work on these two points on their own.

b) Understanding simultaneously the importance and limitations of the quest for solutions based on the interests

The theoretical model has created an ideal in which mediation is seen as a way of tailoring creative solutions to a conflict based on people's respective needs and/or common interests. There are cases where this ideal has been attained. In many cases, I have seen the parties come up with creative solutions that met their needs in a very complimentary way. I have even seen the epitome of this ideal where everything was resolved in perfect collaboration, in the plenary session, based on personal and common interests. There are also cases that fall short of the ideal. Indeed, in the field, we encounter a mix of situations where the solution can be strictly monetary, where the only common interest is the litigation, where the spectrum of interests of the litigants is not only limited but contradictory, or even where the balance of power is unequal. In these cases, what role can the mediator play to achieve the theoretical ideal?

I believe that the mediator must always seek to ensure, in caucus, that the people have explored, in depth, their own interests and hypothetical solutions that could satisfy them. But I also believe that he must accept that this endeavour has its limits and he must know how to deal with what he has to work with. Allow me to explain:

Even if, at first glance, the raw material may appear to be limited, the mediator should not presume that it is. He must show the same sincere and impartial curiosity towards the litigants' interests and possible solutions as he did during the exchange of information. He must go beyond limits, which the parties appear to be setting, as they generally have a defeatist attitude with regards to the possibility of meeting their own needs. He must do so with the genuine intent of helping them to help themselves, rather than push them towards a predetermined outcome.

On the other hand, he must also be conscious of the fact that each participant will use the process to the best of his ability. Some will go quite far; others will not. Some will be open and proactive, while others will be firm and defensive. Some will be creative while others

will remain entrenched. Some will be thrilled to analyze their interests while others will be too wrapped up in the conflict to see them. Some cases lend themselves to creativity; others less so. This has nothing to do with the mediator. What is within his power is to make all the advantages of the process available to all parties, with all the confidence, perseverance and encouragement that he brings to it.

Let's illustrate this notion of the search for interests with the famous example of the orange, which I'd like to take further. Literature has presented the theoretical ideal of negotiation based on interests through, among other things, the example of the parent who catches two of his children fighting over the last orange. Instead of cutting the orange in two, which would otherwise be a fair, viable and expeditious compromise, he decides to solve the problem by questioning their needs. Discovering that one wanted the pulp to make juice, and the other wanted the peel to make marmalade, he crafts a win/win solution based on their needs. This example frustrates many when it is taught, and rightly so because, in reality, we usually want the orange for the inside! This is how many civil and commercial mediation files are presented to us. This is where the mediator must know that there is much he can do before allowing himself to be stalled by the rigid positions of the parties. Tenacious curiosity will allow him to uncover the conflict's underlying reasons and bring the parties to work on hypothetical solutions that can truly satisfy different types of interests. Let's allow our imaginations to run with the example of the orange as it illustrates quite well the kind of work a mediator can do.

i) Substantive interests

The mother discovers the reasons for the conflict by making the children talk. Laurence plays outside and her friend is eating an orange. She wants to do the same. Mariane wants the orange because she feels a cold coming on. She reminds her mother that she told her to eat oranges when she gets a cold for its vitamin C.

The mother explores the needs and solutions; maybe Laurence would like another fruit and her mother reminds her that her favourite pears are in the fridge. Or she could teach Mariane that there is vitamin C in grapefruits, which Mariane was unaware of. These are not compromise solutions, these are substitutive solutions based on the alternatives and/or additional information that can satisfy the real needs and settle a conflict, which looked like it could only be settled by a power struggle because the parties had lost sight of their real interests.

The conflict may have arisen from the fact that Mariane wanted a refreshing fruit and Laurence, who cannot find her third juggling ball, finds the orange to be a handy replacement. By facilitating a dialogue, the mother could bring Mariane to collaborate and tell where she'd seen Laurence's ball, something she had refused to do during the dispute. Why such willingness? Because, during the discussion, Laurence reminded Mariane that she had helped her find a CD that she needed. On the other hand, the parent could also make Laurence understand that an orange is not a ball and there is a better way to satisfy her need. The balance of power would then be reestablished and collaboration restored. Identifying the interests reveals the substance of the solution.

ii) Interests of principle or procedure

Pierre and Marc have started to fight over the orange. The father intervenes and discovers that Pierre cannot explain why he wants the orange. He bases his right to it on the fact that he got it first. Marc complains that this rule no longer applies because that very morning, when he was playing Nintendo first, Pierre didn't respect the rule and took the control from his hands. The exchange made the father realize that the problem stems from the fact that Marc is always on the Nintendo and thus the first user rule is useless. A discussion focused on solutions would bring the three to think of a more equitable alternative for accessing the Nintendo, thereby settling the source of the dispute over the orange, which has become a decoy. These are interests related to principles and process. One can respond to them with solutions of principle, procedure or even of substance. Let us imagine, in the latter case, that

Pierre exchanges his right to the orange for Marc's offer to lend him his portable CD player for his weekend school trip. Here is where priority of interests can come into play.

iii) Psychological interests

Melanie and Jean are fighting and screaming over the orange. A parent gets involved. He discovers that Jean believes Melanie has been harassing him and has been trying to pick a fight with him for several days. Melanie confides to her parent that she can't stand her big brother anymore because he made fun of her in front of her new friend. She therefore expresses her frustration over her inability to stop his offensive sarcasms. A good discussion should reestablish the respect that Melanie needs and the peace that Jean wants. Perhaps she could also make Jean realize that he is partly responsible for the conflict with the solutions that derive from it. Or perhaps she could allow Jean to explain that Melanie had misunderstood his comments and that he was, in actual fact, making fun of someone else who knows her friend.

During the negotiation, the trained mediator must be constantly listening for hints that could reveal interests and solutions, knowing that a conflict can consist of an infinite variety of these. He must also be comfortable working with the parties to help them analyze them. However, he must realize that despite all that work, it is possible that the two children want the orange for the same reason and that there is no substitute solution that they would find acceptable. The process would however have brought them to a better understanding of their respective strengths and a better appreciation of their reality. Perhaps this will make them realize that a compromise — cutting the orange in two — can be a just solution, which will settle the conflict, or that it would be better for a third party to decide who has the right to the whole orange. If there is a compromise, it will not be the result of an arbitrary decision imposed by a third party, but the fruit of a process, which would have convinced them that there is no better solution. In the latter case, the process would have helped the parties find and accept a negotiated solution. If there is no settlement, the process would have allowed

the parties to verify that no negotiated solution met their needs and confirmed the need to have their case settled by a third party.

What will satisfy the parties is of no concern to the mediator. His interest lies in ensuring that the parties have benefited from a process that allows them to become aware of what they really want. In bringing his experience to bear on the true interests, the mediator fulfills his mission. Much of this work is done with the parties in caucus, with options of all descriptions explored throughout the process. Discussing the options slowly unveils the interests, leading to the possibility of other options, and so on. The mediator's other mission at this stage is to ensure that the parties also have the opportunity to carefully weigh what they can realistically get and negotiate a satisfactory solution based on their interests. In this, the mediator's attitude with regards to the negotiation is an important part of his role.

c) Understanding the parties' needs for tenacious negotiations on their positions rather than interests

When the caucuses, which follow the exchange of information are over, the negotiations begin. Determining who will make the first offer is of little consequence since, in practice, you have to expect the other party to be upset. Even though everyone wants to settle, the settlement parameters developed are always poles apart. It is human and therefore necessary to the process for the parties to have the opportunity to negotiate strongly to their best advantage. In this way, they can test the determination of the others, they can test their own determination and they can face the realities and assess their real priorities. This exercise is not without effort, frustrations, hesitations or difficult choices. Both sides use strategy. It is laborious and requires a great deal of energy from everyone involved. It requires patience, intelligence and rationalization. This is the "labour" required to deliver a settlement and the mediator is not there to perform a caesarian or even administer an epidural. He is more like the midwife who helps both sides through the labour.

The mediator knows that this process of negotiation, which appears to be based on positions, will bring out the needs of the parties, possible solutions, the emotions to be

validated, the realities to be accepted, the choices to be prioritized and the true alternatives to be considered. He knows that the acceptable solution sometimes arises from the process of elimination, which is what negotiation is all about. He must thus give the parties and their attorneys the space required to apply their own negotiation strategies and to present their offers themselves. The attorney has a significant role to play in this respect. Personally, I favour having the attorneys present their offers and justifications, whether they choose to have everyone present or, in more sensitive cases, negotiate in caucus with the mediator and the other attorney. In these instances, we must give the other party the opportunity to go off with his attorney and the mediator before asking him to prepare and present his counter-offer in the same manner. This process goes back and forth. I do not see the role of the mediator as that of a peddler of offers and counteroffers, nor do I see him as an adviser on negotiating strategies. This is up to the attorneys and their clients and, in this respect, the contributions of both to the mediation are enormous. In this process, the parties are always assisted by their attorneys. The mediator must therefore feel comfortable and confident with regards to the need for rigorous negotiations in the final phase of his process.

Much of the mediator's role is therefore played out in caucus, between each offer, as follows:

- encouraging the parties to communicate the reasons, which justify their offers so that they can be better analyzed and discussed
- helping them to use the common denominators, which will have emanated from the exchange of information
- listening to their reaction to an offer and helping them focus on what they want rather than their anger at not receiving an acceptable offer
- congratulating them on their progress and encouraging them to keep negotiating
- sorting through the discussion to facilitate the negotiation
- offering hypothetical solutions to remaining obstacles
- giving confidence to the people by ensuring them that hard negotiations are part of the game

- without revealing confidential information, encourage them to pursue the process when certain elements lead him to believe that there are grounds for settlement despite the differences
- helping the parties become realistic while accepting that they have no wish to be
- if need be, helping them realize that their negotiating game is jeopardizing a possible settlement
- helping them understand their real needs and to work to satisfy them
- inviting them to communicate information, which they have no interest in keeping confidential, and which could help break a deadlock
- helping them assess their alternatives should there be no settlement.

Unconcerned with the result, the mediator helps the parties to move closer to a settlement. The confidence he will have inspired in the parties, his common sense, his understanding of all the dimensions of the conflict, his objectivity, his compassion, his consistent impartiality, his absolute respect for the confidentiality of the caucuses as well as for the value and intelligence of the people before him: all of these are tools that will enable him to help the parties help themselves. As long as he feels that he can sustain the process, he will say so and encourage the parties to keep working. When he feels that the process has been exhausted, he will say so as well so that nobody is deceived.

This is how the theoretical objective of a negotiation, based on the interests of the parties and their solutions, becomes entangled under cover of a negotiation in which the parties adopt staunch positions and constantly test each other's limits. Sometimes it will succeed in finding a creative and non-judicial solution such as the granting of a reduced lump sum amount for the future portion of a contested disability insurance claim. Sometimes it results in a financial settlement, which is not unreasonable given the difficulties of the case. Sometimes it allows for a redefinition of a business or work relationship, and sometimes it puts a definitive and much desired end to a relationship. It is possible that it will allow for the settlement of certain aspects of the case and make it possible to identify points that should be

submitted to the court. Regardless of the result or the difficulty of the negotiations, it is certain that if the mediator has steadfastly maintained the integrity of his process at this stage, interests of all types and the true solutions that could ensue will have been explored and weighed.

III - Conclusion

All mediations are difficult, since they involve cases, which the parties and their attorneys have failed to settle through bilateral negotiations, as is done in most cases. In addition, each case has its own inherent difficulties, relating to substance, complexity, the number of parties involved, the stakes, or tense relations among the parties. What helps the mediator deal effectively with all of these difficulties is, first and foremost, a good grasp of the mediation process and his trust in the benefits of each of its steps. He must have a clear idea of his role and that of the participants, despite all prevailing paradoxes. A mediation with well-structured stages directed by a mediator focused on the virtues of his process, can lead participants to assume responsibility for the work they must do in order to appropriate the conflict and its solutions. Consequently, the mediator is not a one-man band but rather an orchestra conductor whose job is to bring out the best in the group before him.