CHAPTER 2

MEDIATION OF INTEREST DISPUTES

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I begin by quoting that prominent British jurist, the late Sir Norman Birkett, who was a frequent visitor to both Canada and the United States. Here is how he opened his address to the joint dinner of the American and Canadian Bar Associations in Washington, D.C., some years ago:

> [T]here is some danger, perhaps, that I might say something tonight that I have said before either in America or Canada, and I have debated with myself whether I ought not to begin, as a young and brilliant friend of mine began a lecture the other night in London to a most distinguished audience by saying: "Ladies and Gentlemen, I have delivered this lecture once before. It was to the prisoners in His Majesty's prison at Pentonville. I must therefore apologize in advance if any of my hearers have heard me before."[1]

The French say you should never discuss your wife with another man in case he knows more about the subject than you do. Nonetheless, I propose to discuss with you a subject that has been like a second wife to me, or perhaps more accurately, a mistress. I refer to "The Mediation of Interest Disputes," which I see as the way of the future in industrial relations. Indeed, the future is here now.

The dramatic decline in the manufacturing sector and the phenomenal growth of the service industries have not only reinforced but also greatly expanded the role of interest dispute mediation. This is not the time nor the place to tell you why and, in any event, you already know. Besides, this is an after luncheon address, not a doctoral dissertation.

What I have to tell you today is the fruit of my own experience but, like Monsieur Jourdain in *Le Bourgeois Gentilhomme,* who discovered to his astonishment and delight that he had been speaking prose all his life, I early on discovered that what I had learned has been said by others and, indeed, said better.

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[1]The Right Honourable Lord Justice Birkett (then Lord Justice of Appeal, English Royal Courts of Justice, England), *Law and Literature: The Equipment of the Lawyer,* 36 A.B.A. J. 891 (1950).

I will not burden you with elaborate footnotes of the source material that is easily available to you. I cannot resist, however, citing to you two texts written by members of the Academy: first, *Mediation and the Dynamics of Collective Bargaining,* by William E. Simkin[2] and *A Guide for Labor Mediators,* by Eva Robins and Tia Schneider Denenberg.[3] In addition, I wish to acknowledge my indebtedness to that remarkable book, *Getting to Yes, Negotiating Agreement Without Giving In,* by Roger Fisher and William Ury,[4] whose ideas, language, and examples I have borrowed freely and will cite from time to time.

I begin our journey together with some preliminary observations about the process:

1. The cardinal rule in mediation is that there are no rules except that you must never lose your integrity or, at least, not be found out.
2. All mediations are the same and all are different.
3. Don't expect the parties to be reasonable or logical or sensible, no matter who they are, and certainly not when basic principles are involved; although in my experience principle spelled "le" usually ends up by being a question of jobs, job security, profits, and productivity—in other words, money.
4. Don't forget Murphy's first law, "If anything can go wrong, it will."
5. Remember Callahan's corollary, "Murphy was an optimist."
6. Nothing I tell you today is necessarily true, not even what I tell you now.

Two sisters have a single orange to share and they cannot agree how to deal with it. What does the mediator recommend—that each take half? Is that what you would recommend? Think about it, and I will come back to this textbook case in due course.

The Mediator's Role

What is a mediators' role? What do they do? What should they do? How do they do it, and what makes them good at it? The role

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[2]Simkin, Mediation and the Dynamics of Collective Bargaining (Washington: BNA Books, 1971); 2nd ed., Simkin and Fidandis (BNA Books, 1986).

[3]Robins and Denenberg, A Guide for Labor Mediators (Honolulu: University of Hawaii, 1976).

[4]Fisher and Ury, Getting to Yes, Negotiating Without Giving In (New York: Houghton Mifflin, 1981; reprinted, New York: Penguin, 1983).

of a mediator has been defined a hundred times and more. My own favourite is found in the Edwardian language of our own (Canadian) Conciliation Act of 1900.[5] I guess this tells you as much about me as it does about mediation. The text was drafted by Canada's first deputy minister of Labour, William Lyon Mackenzie King, later Prime Minister Mackenzie King. (After reading his diaries, I tend to remember him as Wily Willie.) Here it is, and please note that conciliator and mediator were used interchangeably in those days:

> It shall be the duty of the conciliator to promote conditions favourable to a settlement by endeavouring to allay distrust, to remove causes of friction, to promote good feeling [I love that term!], to restore confidence, and to encourage the parties to come together and themselves effect a settlement. . . .[6]

You will be pleased to know that, according to an English 19th century statute, a Mediation Court is "composed of the most intelligent and respectable men in the community." Today the citation would read: "the most intelligent and respectable persons in the community."

But I have my own definition of the role of the mediator: It is to get the parties to do what they say they don't want to do; what, indeed, they may even believe they don't want to do, but what deep down in their hearts they really want to do; and in the end, with rare exceptions, what they should and must do. Sounds like seduction, doesn't it? Well, it is! And that's what I used to teach my class when I lectured on labour mediation in the hallowed halls of old McGill. I don't know whether the analogy made a lasting impression, but the word seduction uttered in those long past and more innocent times sure woke a few students up.

So seduction it is, nothing more, nothing less, and nothing else. Sounds easy, doesn't it? Well, it ain't, not in labour relations, and not for that matter in any other kind of human relations. Maybe it is under the criminal law or was long ago; I don't know. I do know that under the old Scottish law seduction must have been fairly easy, and thus common; otherwise, why was it defined as follows:

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[5]The Conciliation Act, 1900, 63 and 64 Vict., c. 24 (Canada). The legislation established the Department of Labour, which, apart from its general supervisory role in the administration of the new dispute-settlement system, provided for the gathering of employment statistics across Canada. This kind of statistical material, so essential in modern public policy formulation, had not previously been tracked with any consistency.

[6]*Id.*, section 5.

> any artful practices or false insinuations held out to entrap a resolute chastity; any deliberate plan to corrupt the principles or inflame the passions of an inexperienced female [replace that by person]; or *even any long and persevering solicitations after repeated repulse and resistance* (emphasis supplied).

But you will have noticed, I am sure, that there's a difference between what, for the sake of clarity, I will call sexual seduction and mediation. In sexual seduction all you have to do is convince one party to do what you want him or her to do. In mediation you have to convince both parties (sometimes many parties) to do likewise, and to do it together, with you watching to boot. What a challenge! But where else can you for a short time at least live out the fantasy of a *ménage à trois,* or at least a simple voyeur, and get paid for it?

Successful Mediation

There is a premise that underlies all mediation: its success or failure depends not so much on the process itself, not even on the credibility and the skills of the mediator, but on the parties accepting the worth and validity of the process. In a word, they must believe, or be led to believe at some point that, as the legal maxim goes, "the worst settlement is better than the best lawsuit."

The contending parties must accept that despite the hostility and hysteria of the moment, they are not mortal enemies locked in a war to the end, but are, willy-nilly, partners—yes, partners—in a joint enterprise with common interests, common goals, and with very little room to go their own ways. If not, it's the old ball-game all over again—strikes, lockouts, picket lines, hearings before an agency, board, arbitrator, or court using whatever comes to hand as the traditional weapons and hostages in disputes of this kind, with one winner and one loser in the end—which really means two losers.

Do I have to tell you that where the parties agree to settle their differences, they are committed (never mind *legally,* though that is so) *psychologically* to making the settlement work, and that's what counts in the end. On the other hand, an imposed decision or award by a court, agency, board, or arbitrator, no matter how fair (and we, of course, think they are all fair) leaves a winner and therefore a loser, real or imagined, with the latter dedicated to making the decision not work.

The first role of the mediator, then, is to make the parties believe in and accept the worth of the mediation process. The second is to obtain and maintain throughout the process the trust of the parties. If they don't trust you, you're dead. You might as well close up shop and go home.

Are you still with me? You will note that I have not dared to say, "Are you following me?" because in legal circles there is the story about a lawyer who, fearing that he was losing the attention and support of the judge said, "I hope your Lordship is following me"; to which the judge replied, "I am following you very closely, but where are we going?"[7]

Well, we are going to the next question.

The Mediation Process

What do mediators do and what should they do? If I had to put into a slogan what a mediator should do, I would take the safety slogan that we taught our children when first crossing the street, "Stop, look, and listen."

Stop means "Do nothing until you have learned." Don't rush in, sure that you know the answers better than the parties; you'll just prove to them what they may suspect anyway, that you're an idiot.

Look means "Identify the parties and the problems," in the hope of understanding how they can be dealt with. I will have something more to say on this later.

Listen, which is probably the most important of all, means simply what it says: "Listen to what the parties tell you." Equally important, listen to what they don't tell you because, as you know, there are many messages that are given to you in nonverbal terms, and they often are the keys that open the locked doors of the impasse. (I think I mixed a metaphor here.)

I return to trust in the integrity of the mediator, the cornerstone of the foundation upon which you build a settlement. What then are the bricks and mortar that go into the building? They are the facts of the case and here, as elsewhere, knowledge is power. So get the facts, and don't allow yourself to be sidetracked by false trails. Remember that without the true facts you

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[7]Part of an anecdote recounted by Lord Elwyn-Jones (Lord of Appeal, England, and formerly Lord Chancellor of Great Britain), in *The Law As Literature*, 47 Saskatchewan L. Rev. 341, 349 (1982–1983).

will remain a prisoner of the parties' own limited vision of the problem and their generally myopic views of the solution.

Above all, be patient; don't teach before you have learned and listen, listen, and listen, not only for the obvious but also for the message that is concealed. That great American writer, Eudora Welty, says that to know about human beings, "I had to grow up and learn to listen for the unspoken as well as the spoken—and to know a truth, I also had to recognize a lie." Remember, you cannot prescribe the remedy until you have diagnosed the disease. The medical analogy is a good one, for even where there is trust, as in the case of a doctor, the patient is not always willing, indeed not even able, to give the doctor the true facts in a simple way.

Like a good doctor, a good mediator must have a nose, a nose that twitches when it smells something good or bad, a gut feeling—what we judges call the judicial hunch. It is the intuitive leap that permits you to find the real issue, often consciously hidden, often unknown to the parties themselves. Here, unfortunately, the parties can let you down because, though it is their job to know, either they do not know or cannot bring themselves to reveal the real issues, or fail to warn you against the consequences of not dealing with them in a constructive way.

Which brings me to timing. Do I have to tell you that timing is crucial? There is a right time and a wrong time to make your move, and the truth, alas, is that one usually doesn't find out until it is done. As always, Shakespeare said it best:

> If it be now, 'tis not to come;
> if it be not to come, it will be now;
> if it be not now, yet it will come:
> the readiness is all.[8]

There is a time to speak and there is a time to be quiet. We lawyers know the dangers of opening one's mouth at the wrong time. We call it the "foot in the mouth" question—the question that should never have been asked.[9]

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[8]*Hamlet*, Act V, Scene II, lines 200–202.

[9]Let me give as an example the following story.

The case arises from a collision between a horse and buggy and an automobile. The driver of the horse and buggy sues the driver of the car, alleging personal injuries and damages. During the trial the plaintiff is examined by his lawyer who goes through the facts of the case, telling how the accident happened, the nature of his client's injuries, and the extent of his damages. In cross-examination the lawyer for the driver of the car begins as follows:

QUESTION (Counsel): Sir, is it not true that after the accident my client, the driver

There are times when you just have to wait until the idea you planted comes back to you as the party's idea. In interest disputes there are times when you have to let the parties strike or lock out and get it out of their system, letting things get worse in order to get better. In these special cases only then, and not until then, can mediation hope to succeed. Need I add that it is as bad to wait too long as it is to jump in too soon. Wait too long and you risk a hardening of positions where no one will make a move. Jump the gun and you scare them off. In some cases (rare enough, it is true, but they have happened to me) it is better not to get into the picture at all, but that is another story for another time.

So get the facts. Without them you simply cannot involve the parties in *principled* bargaining. (Try to remember that term, I will come back to it.) Without the facts you are not a mediator; you are a mere messenger carrying messages (and usually nasty ones at that) between opposing parties. Without the facts you cannot come up with a solution where everyone wins and no one loses.

Which brings me back to the example of the two sisters who have a single orange to share. (You remember, I promised to come back to it.) What are the facts in this case? They are simple enough: one sister wants to make orange juice, the other wants the peel to make a cake. Well, do you still recommend cutting the orange in half—what is known as a distributive compromise?[10] Or do you plump for the integrative[11] solution—one sister gets all the juice, the other, all the peel? Good, you got it. Go to the head of the class!

What are integrative solutions? Those that reconcile the parties' interests and yield a higher joint benefit. Here, I bring you a key message. We mediators must learn to avoid the traditional

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of the car, came over to you and said, and I quote, "How do you feel?" and you answered, and I quote again, "I feel fine, thank you, I am perfectly all right"?

ANSWER (Plaintiff): That is correct.

Here is where the lawyer for the driver of the car had everything he wanted and should have sat down. Instead, wanting to drive a further nail into the coffin as it were, he continued and asked this fatal question:

QUESTION (Counsel): Well, then, Sir, if as you say you were perfectly all right, why are you here now suing my client and claiming damages?

ANSWER (Plaintiff): Well, it is like this: After the accident, when I picked myself off the ground, I saw my horse bleeding, with two broken legs and making pitiful sounds. When the driver came up and said, "What is wrong with the horse?" I said, "You can see he is dying." Whereupon he went over to his car, opened the glove compartment, took out a pistol, came back and shot the horse, and came over to me with the pistol in his hand and said, "How do you feel?"

[10]Fisher and Ury, Getting to Yes, *supra* note 4, ch. 4, at 58 ff.; Ch. 5, at 84 ff.

[11]*Id.*

"fixed pie"[12] bias that we and, even more so, the parties bring to the process. In a word, we must overcome the long-held assumption that there is only a fixed amount of profit or gain in what is being negotiated, and that for one side to win something the other side must inevitably lose it. Oh yes, those of you who didn't come up immediately with the right answer for the sisters might consider seeking alternative employment. But what, you may ask, if one sister says: "I'll die before I let her get all the orange juice." What do you do then? That's for my advanced course in mediation—we don't have time today! But maybe there's a hint later on.

The Mediator's Method

We have seen what mediators are, what they do, and what they should do. How do they do it, is our next question. You may recall that we have already answered it in part in talking about integrative solutions rather than distributive ones. Shortly stated, the mediator's role is to ensure that the negotiating process is *principled*[13] and not hard or soft as we are used to seeing it.

In hard or soft[14] bargaining the goal is to win. In principled bargaining the parties act not as adversaries but as problem-solvers, seeking to reach a wise or, at least, an acceptable solution efficiently and amicably. To do this you must change the game and get the parties to negotiate on the merits, the real merits as you see them and not necessarily as they see them, certainly not as they first saw them. This means that:

1. You don't allow the parties to bargain over positions.[15]
2. You separate the people from the problem.[16]
3. You focus on interests, not positions.[17]
4. You invent options for mutual gain.[18] (This comes back to what I said about being innovative and looking for integrative solutions.)

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[12] *Id.* at 61.
[13] *Id.* at 86. Of course, it is a general tenet of all good mediation that it be principled.
[14] *Id.* at 13.
[15] *Id.*, Ch. 1, especially at 11. This, too, is a generally held principle of mediation. *See*, for an exhaustive treatment of the subject, Folberg and Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (San Francisco: Jossey-Bass, 1984).
[16] *Id.*
[17] *Id.*
[18] *Id.* at 12.

5. You seek, find, and insist upon the use of objective criteria,[19] just another way of saying get the facts—the *real* facts of the case.

6. You try to make the process nonadversarial—no losers, everybody wins. That's not easy. We're all geared to looking at everything in terms of winning or losing. Let me cite an example:

> In 1964 an American father and his twelve-year-old son were enjoying a beautiful Saturday in Hyde Park, London, playing catch with a Frisbee. Few in England had seen a Frisbee at that time and a small group of strollers gathered to watch this strange sport. Finally, one homburg-clad Britisher came over to the father and said, "Sorry to bother you. Been watching you a quarter of an hour. Who's winning?"[20]

I suppose that's inevitable. Who, of my generation at least, doesn't remember that "the battle of Waterloo was won on the playing fields of Eton."

I pause for a moment to reflect on the concept of focusing on interests, not positions. Here again I proceed by example:

Suppose two men are quarreling in a library. One wants the window open and the other wants it closed. They bicker back and forth about how much to leave it open: a crack, halfway, three-quarters of the way. No solution satisfies them both. Enter the librarian. She asks one why he wants the window open: "To get some fresh air." She asks the other why he wants it closed: "To avoid the draft." After thinking a minute, she opens wide a window in the next room, bringing in fresh air without a draft.[21] So much for that!

But please don't ask the obvious question. All right, ask it—it shows you're listening! What would the librarian have done if the next room had been occupied and the people there were not eager to have the window open? That, too, is for the advanced course.

The Good Mediator

We come now to the last question. What does it take to be a good mediator? One of my friends from the Academy has said

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[19] *Id.* at 84.
[20] *Id.* at 154.
[21] *Id.* at 41.

that to be a good mediator requires (1) the concentration of a Buddhist monk, (2) the nerves of a bullfighter, and (3) the staying power of a long distance runner.

As for me, I tend to answer the question in more classical terms. In my view to be a good mediator you have to have: (1) the wisdom of Ulysses, (2) the courage of Achilles, (3) the strength of Hercules, (4) the agility of an acrobat, and (5) the foresight of an ancient Hebrew prophet. Modesty forbids me from claiming the first four of these most admirable qualities, but I like to believe I inherited the fifth by direct descent.

Well, that's mediation in a nutshell. Now you know as much about it as I do, except, of course, for the things I haven't told you. Pablo Casals, I am told, never taught his pupils everything, either. On the other hand, if you promise not to tell them to anyone else, I will reveal some of my innermost secrets about the process. After all, everyone knows that experienced mediators have a private arsenal of secret weapons which they unleash upon the poor, unsuspecting parties at the appropriate time. I, of course, am no exception.

Thus, I have been accused of various low tricks. I hasten to add in my defence that desperate circumstances call for desperate measures. I refer to locking the parties in their rooms and not giving them food or drink, not even allowing them to go to the toilet for days on end, until, weakened, bloated, and delirious they are ready to do anything and sign anything just to get away. (That's one of the ways you might deal with the sister who won't settle.) Indeed, one former Minister of Labour believes to this day that my success is due to no more than the ability to keep both sides awake all night, night after night, each thinking that I am working with the other; when, in fact, I'm eating, drinking, and sleeping in my room, building up my strength and thinking up devious tactics and strategies to confound them during the next session. And there are even worse things, far worse, of which I am accused.

The truth, however, is that there are few tricks and secrets, if any, and most are myths about the old-timers in the so-called, good old days. True, I'm already an old-timer, so perhaps in the old days I had a trick or two up my sleeve; but, believe me, today there are no tricks. It's all bloody hard work, anxious days, and often sleepless nights (certainly if you are a worrier), and an awful lot of luck as well as unquenchable optimism. As I have

said elsewhere, you don't have to be crazy to be a mediator, but it sure helps.

And, of course, there are rewards. When we succeed we are called miracle-workers. Indeed, the unspoken subtitle of every speech made by a mediator, including this one, is "Miracles I have wrought, and how I did it all by myself with one hand tied behind my back!" The footnote is "The only time I failed and why it was not my fault."

As many of you have already learned, having jumped or been pushed into the arena where you can seldom tell the Christians from the lions, there are never any miracles. Well, "hardly ever," if I may borrow a line from *H.M.S. Pinafore*. Speaking for myself, I cannot remember the last time I parted the Red Sea. It must have been long, long ago!

Still, if you want to come close to making a miracle, here is my recipe. If you have been listening to me at all, you will not be surprised to learn that it is simply the recipe for good human relations and that, of course, is what mediation is all about. Here then is my recipe:

1. NEVER say never.
2. NEVER stop listening.
3. NEVER stop learning.
4. NEVER do anything to affect your credibility.
5. NEVER close a door completely.
6. NEVER allow anyone to lose face (even when you are alone together).
7. NEVER back anyone into a corner unless you have arranged an exit for him, in case he needs it.
8. NEVER lose control of your own emotions, unless contrived for a purpose, and then only with extreme care, and if you're a Laurence Olivier or a Sarah Bernhardt.
9. NEVER lose your objectivity.
10. NEVER lose your sense of humour; it may be the only thing that will keep you sane.
11. NEVER promise what you cannot deliver. ("Have it in your pocket before you offer it" is the jargon of the trade, as you know).
12. NEVER forget that when it's over—win or lose—you go home, but the parties must, as a rule, continue to deal with each other one way or another, and make the best of a bad job.

13. NEVER forget Murphy's first law, which I quoted earlier: "If anything can go wrong it will"; and of course, Callahan's corollary: "Murphy was an optimist."
14. NEVER, NEVER give up even when you know it's impossible. (Remember the Scottish definition of seduction, "long and persevering solicitations after repeated repulse and resistance." That's just the moment when a miracle may occur!)

One final word of comfort and advice to all mediators here and everywhere. Never forget that some mediations will fail, indeed must fail. The reasons are as evident as they are real. Some of them I have already touched upon:

1. The parties did not accept the premise that the process was worthwhile.
2. The parties were not ready.
3. The timing was wrong.
4. The parties were totally unreasonable and beyond help.
5. The mediator was not the right person for the job, didn't do the job, or botched the job.

In brief, total disaster! How does the mediator feel? Rotten, of course, and totally rejected! Well, I have a remedy which I will pass on to you. Read the letter that a Chinese publisher recently sent to an author whose work he rejected for publication. It will buck you up immensely, I promise.

Here is the letter from a member of that most polite and mannerly of peoples:

> Most esteemed Sir, or Madam, as the case may be:
> It is with the utmost regret that I return your most treasured and perfect manuscript in which every word is a gem, each sentence like a crown in literature's hallowed pages. The standard of excellence is so high that our poor and humble house, plagued as it is with the works of lesser mortals paling in your light, cannot possibly publish your work. We would be setting new standards of brilliance against which it would be impossible to publish any other work, thereby forcing our long-established but modest business to cease, throwing men out of work, driving women from their homes, and making children starve for lack of bread. So as a responsibility to our great and glorious ancestors this too magnificent work, of which we are not worthy, is enclosed.

Well, it's time to go. I would not want to overstay my welcome lest you say to me, as a famous Englishman said to a visitor who had stayed too long, "You must come again, my dear man, when you have a little less time."