

**APPROPRIATE CASE RESOLUTION,  
PRESERVING RIGHTS,  
and the  
MEDIATION MODEL:**

**A Suggested Methodology for  
Balancing Expectations**

*-and-*

**Fostering Confidence, Credibility, and Consistency,  
in  
Resolving**

**A Case of Human Rights**

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# Caveats and Disclaimers!

- Who I am when I Mediate
- Methods or Methodologies?
- Reference materials – a minute reflection of the some of the ideas in this presentation
- 15 Minute Challenge!

# Where to Start...

## What's in the Title to this Session?

My Original subtitle

Mediation and Resolution of Human Rights Complaints...  
Odd Couple or Soulmates?

But from the title...

Three Primary Things to Talk About:

- APPROPRIATE CASE RESOLUTION,
- PRESERVING RIGHTS,
- MEDIATION MODEL

# Preserving Rights...

## *The Saskatchewan Human Rights Code*

- What Rights?
- Key Words in the *Code*:  
Protected Rights/Responsibilities of the Parties

*...without discrimination on the basis of a prohibited ground*

*...suffered with respect to feeling, dignity or self-respect as a result of the contravention*

- Procedures and Remedies
- Reflection of the *Public Interest*

## *The Saskatchewan Human Rights Commission*

**Mission:** To promote and protect the individual dignity, fundamental freedoms and equal rights of Saskatchewan citizens.

The 4 Pillars...

The 3 R's...

**Restorative Justice/Systemic Approach for addressing Complaints using  
*Appropriate Case Resolution***

# Appropriate Case Resolution...

- Meaning what?... Process?... or Results?

1) Process? What's appropriate?

*Code:*

28(1) Where a complaint is filed with or initiated by the commission, the Chief Commissioner shall, subject to subsection 27(5) and section 27.1, do one or more of the following:

- (a) attempt to resolve the complaint by mediation between the parties;
- (b) attempt to negotiate a settlement of the complaint;...

2) Results? What's appropriate?

*Code:*

28(2.1) A complaint shall be considered settled for the purposes of this Act only if the Chief Commissioner has approved the terms of the settlement.

# The Mediation Model...

- What is it?
- Numerous Styles of Mediation/Mediators
  - The 3 Primary Styles
    - Evaluative
    - Facilitative
    - Transformative
- Numerous Mediation Themes
- The Mediation Agreement

# A Closer Look at the Concept of Mediation:

- The Fundamental Premises
  - 1) Self Determination
    - The Ikea Test
  - 2) Confidentiality
- Conundrums Regarding Confidentiality
  - 1) Enforcement
  - 2) *Code:*

28 (3) Where a complaint is settled for the purposes of this Act or a decision or order is made pursuant to section 31.3 or 31.4, the Chief Commissioner may, in his or her discretion, publicize in any manner the results of the settlement, decision or order.

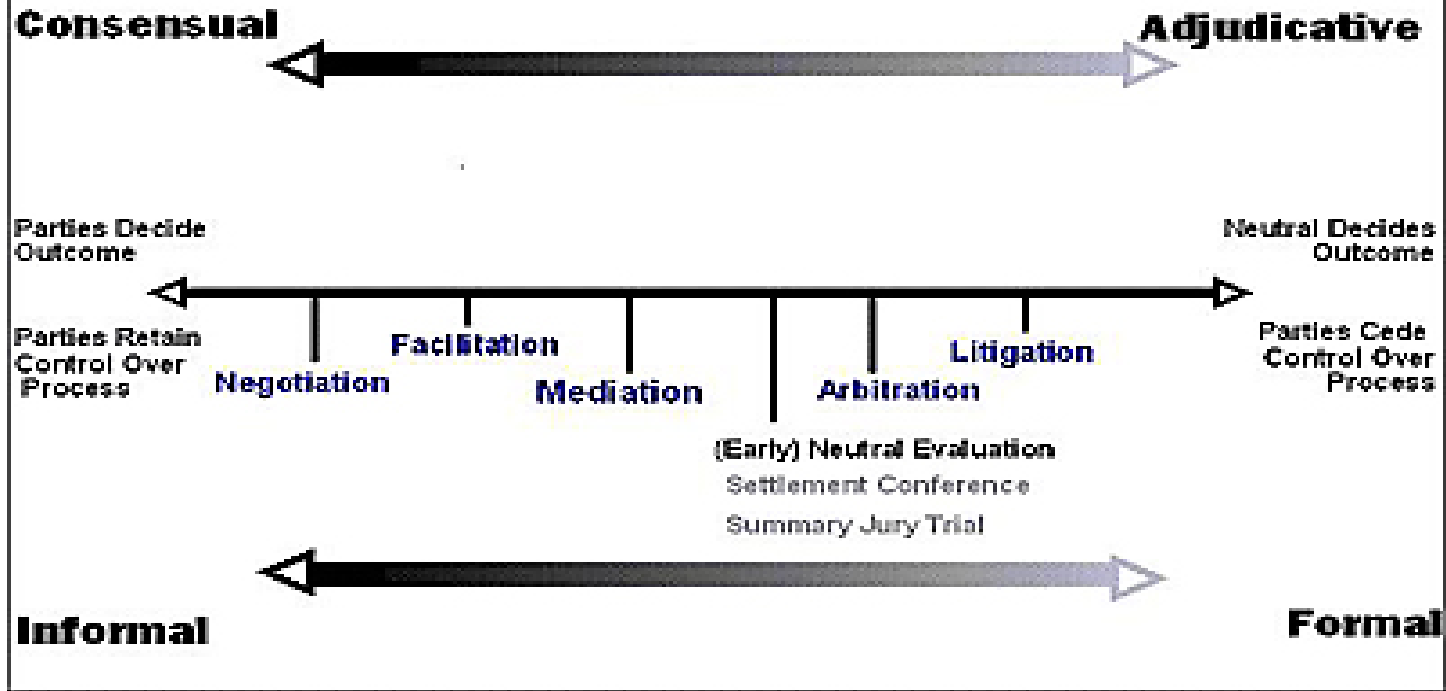
# Conflict Resolution Continuum

Source: [www.chs.ubc.ca/brazil/Outputs/dispute\\_resolution.ppt](http://www.chs.ubc.ca/brazil/Outputs/dispute_resolution.ppt)

<b>Approach</b>	<b>Who Decides</b>
VIOLENCE (fight)	the winner
NON-VIOLENT DIRECT ACTION	the winner
LEGISLATION	the Legislature
LITIGATION	the Court
ARBITRATION	the Arbitrator
MEDIATION	the parties
NEGOTIATION	the parties
AVOIDANCE (flight)	status quo maintained



# The ADR Continuum



Source:

[https://www.google.ca/search?q=dispute+resolution+continuum&rlz=1T4GPCK\\_enCA419CA449&source=lnms&tbn=isch&sa=X&ei=\\_ilzVYrbI5WoyASM24KwDg&ved=0CAgQ\\_AUoAg&biw=1251&bih=692#tbm=isch&q=dispute+resolution+continuum&peek=function\(\){return this\[this.length-1\]}](https://www.google.ca/search?q=dispute+resolution+continuum&rlz=1T4GPCK_enCA419CA449&source=lnms&tbn=isch&sa=X&ei=_ilzVYrbI5WoyASM24KwDg&ved=0CAgQ_AUoAg&biw=1251&bih=692#tbm=isch&q=dispute+resolution+continuum&peek=function(){return this[this.length-1]})

# The Human Rights Complaint Mediator's Challenge:

*Balancing Expectations,*

*-and-*

*Fostering Confidence, Credibility, and Consistency,*

*in*

*Appropriate Case Resolution, Preserving Rights, and the Mediation Model*

- Respecting parties' rights to self determination and confidentiality of a mediation process
- Respecting parties' rights to self determination of remedies
- Respecting the Commission's mandate under the *Code*, and its policies and objectives

# A Suggested Methodology to Meet the Challenge

Two aspects:

- Distinguishing Litigation from Mediation
- Adapting and Applying the Mediation Model to a Human Rights Complaint

# Distinguishing Litigation from Mediation...

## The Essential Differences:

- Litigation Mindset v. Mediation Mindset
- Procedures v. Processes
- Rights and Positions v. Interests
- Proper Parties v. Primary Parties
- Primary Issues v. Proper Issues
- Past v. Future
- Disputes v. Conflicts
- Retributive v. Restorative
- Remedies v. Reconciliations
- Precedents v. Benchmarks

# Adapting and Applying the Mediation Model to a Human Rights Complaint

- The Three Modes of Mediation in Addressing a Human Rights Complaint:

Evaluatory Mode

Facilitatory Mode

Transformative Mode

## *Keep in Mind:*

Conceptual Framework

Methodology...not Method

Process...not Procedure

Mutually inclusive...not Mutually Exclusive

# Pictures are Worth a Thousand Words!

- The Mode You Want to Avoid!



# The Evaluatory Mode

- The Primary Erroneous Assumptions of a Mediation Process:
  - 1) The parties know the meaning of mediation
  - 2) The mediator will have the answer for them
- Hence, the Importance of Pre-mediation discussions for:
  - Establishing and maintaining parties' Confidence in the Mediator and his /her role and in the Process
  - Coaching to ensure *Parties' Competency* in the process
- THINGS TO CONSIDER:
  - Distinguishing Mediation from Litigation
  - Clarity of Facts/Consideration of Relevant Legal Principles
  - Conflict v Dispute
  - Credibility of the players-Other Agendas, Mediation Ghosts, Pawns , and Scapegoats
  - Cultures in the Process
  - Capacity to Mediate
- The Three E's of the Evaluatory Mode
  - Education
  - Expectations-Complainant/Respondent/Commission
  - Empowerment...Ensuring Balance of Power amongst the players

Ultimately, everyone in the Process has to become a mediator of the case at hand

# The Facilitatory Mode

- Accommodations: Convenience, Comfort, and Safety
- Communication with Candor and Courtesy
- Cooperation
- Collaboration
- Constructiveness and Creativity...

Even thinking beyond the remedies in the *Code*



# The Transformative Mode

- Overrides Evaluatory and Facilitatory Modes  
Remediation of the Dispute  
Reconciliation of the Conflict
- Reflected in The Settlement Agreement as having  
Sustainable, Systemic, and *Restorative* Value...  
To the parties, and,  
In the Public Interest  
aka: *A Restorative Resolution*
- Closure

<b>MEDIATION PROCESS GRID FOR FINDING A WAY TO RESOLUTION</b>	<b>EVALUATORY MODE</b>	<b>FACILITATORY MODE</b>	<b>TRANSFORMATIVE MODE</b>	<b>PARTIES' SELF- DETERMINATION</b>
<b>SYSTEMIC</b>			<b>PUBLIC INTEREST</b>	<b>RESTORATIVE RESOLUTION</b>
<b>SUSTAINABLE</b>			<b>RESTORATION of DIGNITY</b>	<b>RECONCILIATION of the CONFLICT</b>
<b>REMEDIAL and RECONCILING</b>	<b>INTERESTS</b>	<b>ACKNOWLEDG- MENT / APPRECIATION</b>	<b>SETTLEMENT AGREEMENT</b>	<b>REMEDICATION of the DISPUTE</b>
<b>APPROPRIATE and ACCOUNTABLE</b>	<b>RIGHTS and RESPONSIBILITIES</b>	<b>SELF-DETERMINED SOLUTION</b>	<b>DIRECTED MEDIATION FORMAL OFFER / DISMISSAL</b>	<b>QUEEN'S BENCH PROCEDURES / RULINGS</b>
<b>EARLY and ENGAGING</b>	<b>WITHDRAWAL of COMPLAINT</b>	<b>MEDIATION</b>	<b>INVESTIGATION</b>	<b>DISMISSAL of COMPLAINT</b>
<b>CONFLICT / DISPUTE as per COMPLAINT /RESPONSE</b>	<b>EVALUATORY MODE</b>	<b>FACILITATORY MODE</b>	<b>TRANSFORMATIVE MODE</b>	<b>ARBITRARY DECISION</b>

# Back to the *Restorative Resolution*...

- Restorative of What?
- Relationships?
- Dignity?

From a mediation perspective,

*The Cause of a Human Rights Complaint is Rooted in its Remedy Under the Code.*

*Code:*

**31.4** The court may, in addition to any other order the court may make pursuant to section 31.3, order the person who has contravened or is contravening that provision to pay any compensation to the person injured by that contravention that the court may determine, to a maximum of \$20,000, if the court finds that:

(a) a person has wilfully and recklessly contravened or is wilfully and recklessly contravening any provision of this Act or any other Act administered by the commission; or

**(b) the person injured by a contravention of any provision of this Act or any other Act administered by the commission has suffered with respect to feeling, dignity or self-respect as a result of the contravention.[emphasis added]**

- The Foundation of Indignity-Humiliation
- The Best Anti-dote-Appreciation
- The Power of an Apology
- Meanings of Dignity

# The Last Word...

*If We Balance the Expectations,  
and  
Foster Confidence, Credibility, and Consistency  
in*

*APPROPRIATE CASE RESOLUTION,  
PRESERVING RIGHTS,  
and the  
MEDIATION MODEL,*

*The Results of Human Rights Complaint  
Mediations Will Speak for Themselves*

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