



# It Doesn't Have to be ALL or NOTHING! Embracing Possibilities in Mediation Beyond Binary Outcomes

By Charmaine Panko, L.L.B., C.Med., Q.Arb. | Lawyer and Mediator

October 2023

*The opinions expressed are those of the author. They do not necessarily correspond to the SDRCC position on any of the issues.*

In the realm of sport dispute resolution, finding common ground between parties embroiled in conflict can prove to be as formidable as the athletic competitions in which the athletes themselves engage. The Sport Dispute Resolution Centre of Canada (“SDRCC”) stands as an innovative role model to other organizations who face similar challenges, offering mediation and arbitration services (among others) to navigate the tumultuous playing field of disputes where passion and emotions run high. Often, these conflicts are multifaceted, with various sub-issues intricately connected to the main substantive matter that is in a dispute. Mediators at the SDRCC bring added value to the process when they help parties identify where progress can still be achieved, even if the central matter remains unresolved, and assist the parties in designing nuanced resolutions, diverging from the customary victory-loss dichotomy of an adversarial process.

Even in matters that might, on the surface, appear as “cut and dry” with little gray outside of a guilty or not guilty outcome, there exists much *below* the surface for parties to explore in order to reach a greater common understanding between them, which expands the pool of meaning to support creative brainstorming of options for resolution beyond the simple verdict of right or wrong. For example, a mandatory penalty could intertwine a suspension with an agreement to participate in education. This outcome moves the parties beyond retribution to achieve the mutual interests of the individual’s rehabilitation and prevention of a repeat offence. Applying a nimble framework that supports the possibility of non-binary outcomes disrupts the limitation of conventional outcomes and underscores the reality of the multilayered essence of disputes.

## The Role of Mediation and Resolution Facilitation

Mediation and resolution facilitation act as the initial steps in resolving sport disputes, aiming to foster dialogue, understanding, and ultimately, agreement between the parties. Underlying issues can span a wide spectrum (e.g., personal grievances, communication breakdown, differences of interpretation, the impact of behaviour and words absent of an accurate understanding of intention, etc.). It is essential to perceive these interconnected, and often latent unidentified concerns, as opportunities for constructive dialogue rather than dismiss them as distractions from the presenting objective of resolving the issue identified on the request form.

While parties will be tempted to exclusively focus on the main issue at hand during the mediation or facilitation process, disregarding underlying issues can lead to an incomplete resolution and lingering tensions. The art lies in recognizing that these issues are often contributing factors to the larger conflict and addressing them not only facilitates a more holistic understanding of the dispute, but can also pave the way for the ultimate resolution of the central matter. Moreover, successfully navigating underlying concerns to respond to interests and needs can lead to improved relationships between the parties moving forward.

## Infusing Interest-Based Negotiation and Non-Violent Communication in the Dispute Resolution Process

Supporting parties to reach creative solutions requires a mediator to transcend their role as mere facilitators and utilize skills learned through the study of theoretical models such as interest-based negotiation and non-violent communication. These models remind us that the central issue bringing the parties to mediation is more often just the tip of the iceberg, concealing an array of underlying concerns that contribute to the overall conflict.

Interest-based negotiation, grounded in the works of Roger Fisher and William Ury, suggests that disputants are often driven by underlying interests rather than strict positions. Mediators guide parties toward a more holistic understanding of



the interplay between their own needs and interests and the concerns of others. Integrating these interests into the resolution process can yield solutions that resonate more profoundly and are more sustainable than a conclusion reached following the debate on whose position is “correct”.

Non-violent communication, a theory espoused by Marshall Rosenberg, provides a model for working through disputes while fostering empathy and understanding. Parties are encouraged to articulate their grievances and aspirations without resorting to adversarial language. This approach changes the tenor of the discussions so that, rather than triggering an “amygdala hijack” by allowing the parties to engage in blaming and defending language, the mediator models and supports the use of genuine curious questions that create openness towards the sharing of observations and impact to lead to greater understandings of unmet needs. From there, the possibilities for previously unconsidered strategies to meet those needs is born.

At the heart of both these theoretical models is the belief that all human action is the pursuit of satisfying basic human needs. Supporting conversations that recognize the importance of status/identity, certainty, autonomy, and fairness leads to possible outcomes that honour individual closely held values while working together to accomplish the priorities and goals of the parties.

### **Translating Mediation Outcomes into Action: Reaching and Implementing Agreements**

Mediators are crucial in guiding parties towards resolution. Mediators are also able to impact and support the follow through of the resolution. An interest-based agreement can outline the rationale behind the decisions made, emphasizing how the resolution aligns with the parties' core interests. The use of non-violent language (in both style and approach) can infuse the agreement with a tone of empathy, acknowledging the emotional dimensions of the dispute while underscoring the shared pursuit of sports' integrity.

### **Conclusion**

The ability to empower parties to transcend binary outcomes is perhaps more akin to an art form than that of a technical skillset. For arbitrators and mediators, striking the right balance between addressing underlying issues and staying focused on the main appeal is crucial. Overindulgence in the sub-issues can lead to a loss of direction, prolonging the process unnecessarily. Conversely, disregarding them entirely can result in a resolution that lacks depth or may be a contributing factor for the continuation of the conflict, possibly into an adversarial process. Skillfully navigating this balance requires a deep understanding of the parties' dynamics, the nature of the conflict, and the nuances of the sporting world itself.

Within the sporting world, where teamwork, strategy, and unwavering determination reign supreme, these very principles find application in the mediation process. Here, all involved parties embrace adaptable perspectives and imaginative opportunities until the conclusive moment arrives, akin to the final whistle of a championship game. A unique instance in an athlete's career, where accomplishment transcends the confines of a binary win-loss scenario; an outcome that is so much more than an all or nothing.