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# Why Do People Settle?

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The author examines the assumptions and behaviour of participants in dispute settlement processes to develop a better understanding of why some disputes settle, and others do not. She argues that the disputants themselves and how they make sense of their conflicts are the most significant variable in outcomes, rather than the rational, predictive model emphasized by most legal scholarship. Applying a social constructionist analysis to numerous examples of actual conflicts drawn from her practice as a mediator, the author proposes three critical factors in dispute settlement: individual disputant expectations (shaped by personal experience, knowledge, and the support or absence of a strong reference group); whether the conflict is understood by the disputants as a principled struggle or more pragmatically as a fight over resources; and how far the disputants feel that the process of dispute settlement treats them fairly and with respect. She concludes that a deeper understanding of the sources and patterns of individual disputing behaviour implies a limited potential for generic settlement-enhancing design principles. Nonetheless, some key issues can be identified, including the need for face-to-face discussions that include disputants themselves and attention to the conditions of "ripeness" for settlement and resolution. Most important, preparation for negotiation should go beyond the conventional development of a legal case to include consideration of the factors she describes and their influence on disputants' willingness to settle.

L'auteur étudie les présupposés et le comportement des participants dans le processus de résolution des différends pour comprendre les facteurs qui déterminent la probabilité d'un règlement hors cour. Elle suggère que les parties en litige et leur façon de conceptualiser le conflit dans lequel elles sont impliquées sont les variables ayant le plus d'impact sur le résultat final, contrairement à ce que prévoit le modèle rationnel de prédiction adopté par la majorité des auteurs dans le domaine juridique. En appliquant une analyse de construction sociale à plusieurs cas de conflits qu'elle a rencontrés dans le cadre de sa pratique de médiatrice, l'auteur propose trois facteurs cruciaux dans le règlement de conflits : les attentes individuelles des parties (influencées par l'expérience et les connaissances personnelles et par l'appui ou l'absence d'appui d'un groupe de référence solide), la conceptualisation du conflit (comme une lutte de principe ou, d'une façon plus pragmatique, comme un différend portant sur des ressources limitées) et la mesure dans laquelle les parties se sentent traitées avec équité et respect dans le cadre du processus de résolution. L'auteur en arrive à la conclusion qu'une compréhension approfondie des sources et des types de comportement individuel dans des situations conflictuelles ne présente qu'un potentiel limité pour le développement de règles générales favorisant le règlement des différends. Certains éléments cruciaux peuvent toutefois être identifiés, dont la nécessité de discussions face-à-face impliquant les parties elles-mêmes et l'exigence de conditions de « maturité » (*ripeness*) pour le règlement du différend. L'auteur insiste sur le fait que la préparation de la négociation devrait aller au-delà de la méthode traditionnelle et qu'une attention particulière devrait être accordée aux facteurs décrits dans l'article et à leur influence sur la volonté de régler des parties.

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Revue de droit de McGill 2001

To be cited as: (2001) 46 McGill L.J. 663

Mode de référence : (2001) 46 R.D. McGill 663

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**Introduction: The Phenomenon of Late Settlement****I. Culture and Meaning Making in Conflict****II. The Role of Expectations****III. What's at Stake: Values and Resources****IV. The Need to Feel Fairly Treated****V. Rational Risk Appraisal****Conclusion: Some Implications for Systems Design**

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## Introduction: The Phenomenon of Late Settlement

*My client is not interested in settlement. She wants her day in court.*<sup>1</sup>

Both the expression and the sentiment are familiar. The reality, as settlement statistics demonstrate, is that few of these clients actually get that day in court, although the repetition of this mantra may keep lawyer and client toying with this idea until the last possible moment. We know that most cases filed within civil justice systems in Canada and the United States will not come to trial.<sup>2</sup> While the possibility of a judge-made solution continues throughout litigation, civil justice is more accurately described as a system for settling disputes than adjudicating them. Marc Galanter describes this system as “litigotiation”: “the strategic pursuit of settlement through mobilising the court process”.<sup>3</sup> Regardless of whether or not it is “better” to settle than to ask for adjudication by a third party, most cases will resolve themselves in this way.<sup>4</sup> As a consequence, a critical question for civil justice reform is the development of

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<sup>1</sup> Cited as a reason not to settle by innumerable legal representatives, as well as by G.R. Williams, *Legal Negotiation and Settlement* (St. Paul, Minn.: West Publishing, 1983). For a more thoughtful analysis of the meaning behind the sentiment, see S. Engle Merry & S.S. Silbey, “What Do Plaintiffs Want? Reexamining the Concept of Dispute” (1984) 9 *Just. Sys. J.* 151.

<sup>2</sup> An Ontario study by the author found that of a sample of 1,460 cases filed in the Ontario General Division between January 1991 and August 1995, 6.4 percent proceeded to trial. See J. Macfarlane, *Court-Based Mediation in Civil Cases* (Toronto: Queen’s Printer, 1995) [hereinafter *Mediation in Civil Cases*]. Similar rates of settlement before trial have been found in American studies; e.g. in 1991, just 4 percent of all cases filed in the U.S. Federal District Court were ended “at or during trial”. See M. Galanter & M. Cahill, “‘Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1994) 46 *Stan. L. Rev.* 1339 at 1340. The Civil Litigation Research Project conducted during the 1980s found that less than 8 percent of the sample of 1,649 cases went to trial. See D.M. Trubek *et al.*, “The Costs of Ordinary Litigation” (1983) 31 *U.C.L.A. L. Rev.* 72 at 89. Note that in these and other studies, cases that “settle” include those cases in which there was no statement of defence filed, as well as cases that resolved following other forms of judicial ruling short of trial. There is some evidence that the relative number of trials to filings is decreasing. See e.g. L.M. Friedman & R.V. Percival, “A Tale of Two Courts: Litigation in Alameda and San Benito Counties” (1976) 10 *L. & Soc. Rev.* 267.

<sup>3</sup> A combination of the words “negotiation” and “litigation”, this expression was first coined by Marc Galanter to describe the style of negotiation that takes place within the context of ongoing litigation. See M. Galanter, “Worlds of Deals: Using Legal Process to Teach Negotiation” (1984) 34 *J. Legal Educ.* 268 at 268.

<sup>4</sup> This article will not consider the normative question of whether settlement is a “good thing”, or somehow “better” than adjudication, either in individual cases or generally. However, it seems that if we knew more about why some cases settle—and in particular the factors that affect the decision to settle—we might be better able to answer this question. On the normative issue, see O.M. Fiss, “Against Settlement” (1984) 93 *Yale L.J.* 1073; more recently, D. Luban, “Settlements and the Erosion of the Public Realm” (1995) 83 *Geo. L.J.* 2619.

dispute processes that maximize the opportunities for expeditious, equitable, and informed settlement. This question becomes all the more pressing because statistics also demonstrate consistently that settlement generally takes place some distance into the life of a lawsuit, often on the courtroom steps.<sup>5</sup> But do we understand enough about why people do—and do not—settle their disputes to enable us to design processes that expedite settlement?

Many civil jurisdictions in Canada and the United States—particularly those with a significant backlog of cases waiting to be heard—are experimenting with changes in pretrial procedure in the hope of increasing the rate of earlier settlement, for example, by encouraging negotiations leading to settlement before, rather than after, extensive discoveries or pretrial motions.<sup>6</sup> Debate over the design of experimental programs has generally focussed on structural issues, such as timing, format, voluntariness, representative roles, and so on.<sup>7</sup> This reflects an assumption that disputants can be encouraged to behave rationally in resolving their disputes expeditiously if the “right” process format can be identified. Answers to questions about the effectiveness of innovative settlement processes are usually sought in statistics on the frequency and timing of settlement (and there is now data available indicating that earlier and higher rates of

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<sup>5</sup> A recent study of twenty judicial districts in the United States found median time to disposition to be twelve months for cases in the control group (ten districts) and eleven months in the pilot group (ten districts) that had implemented procedural reforms under the provisions of the *Civil Justice Reform Act 1990*, Pub. L. No. 101-650, 104 Stat. 5089. See J.S. Kakalik *et al.*, *Just, Speedy and Inexpensive?* (Santa Monica, Cal.: Rand, 1996). In the sample drawn for the 1995 Ontario study, median time to disposition in the Ontario General Division was 236 days for contract and tort cases, 466 days for wrongful dismissal cases, and 313 days for all other case types. See *Mediation in Civil Cases*, *supra* note 2 at 10.

<sup>6</sup> See *e.g.* the recommendations of the Ontario Court of Justice in R.A. Blair & H. Cooper, *Civil Justice Review: Supplemental and Final Report* (Toronto: Ontario Civil Justice Review, 1996), especially c. 5 (case management and alternative dispute resolution); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rr. 24.1, 77. Similarly, in both Alberta and Saskatchewan, mediation is mandatory shortly after the filing of the statement of defence, and therefore generally takes place before discovery commences. See *The Mediation Rules of the Provincial Court, Civil Division of Alberta*, Alta. Reg. 271/97; *The Queen's Bench (Mediation) Amendment Act*, S.S. 1994, c. 20.

<sup>7</sup> Among many see *e.g.* J.J. Alfani, “Evaluative versus Facilitative Mediation: A Discussion” (1997) 24 Fla. St. U.L. Rev. 919; B.C. Bartel, “Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential” (1991) 27 Willamette L.J. 661; Galanter & Cahill, *supra* note 2; S.R. Gross & K.D. Syverud, “Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial” (1991) 90 Mich. L. Rev. 319; K.L. Stuart, S. Smith & M.D. Planet, “Settling Cases in Detroit: An Examination of Wayne County's ‘Mediation’ Program” (1983) 8 Just. Sys. J. 307; C.A. McEwen & R.J. Maiman, “Small Claims Mediation in Maine: An Empirical Assessment” (1981) 33 Me. L. Rev. 237 [hereinafter “Small Claims Mediation”]; J. Pearson, “An Evaluation of Alternatives to Court Adjudication” (1982) 7 Just. Sys. J. 420.

settlement are being achieved in some of these programs).<sup>8</sup> However, these results tell policy-makers nothing about the impact that a particular settlement process (including how it is managed by the third party) might have on individual party attitudes towards settlement, or the relationship (if any) to outcomes in individual cases.<sup>9</sup> Quantitative studies are unable to take account of the many contextual factors that may critically affect the outcome in any one case. A few qualitative studies of particular settlement-process formats have probed somewhat more deeply into personal experiences, characteristically asking litigants about their satisfaction with both the process and the outcome, and thus providing some insight into the efficacy of these processes from the perspective of the disputants.<sup>10</sup> Whatever its methodological approach, however, program evaluation is primarily concerned with generating data on the overall impact of procedural experiments as a means of justifying (or not) further expenditures on these particular reforms. The evaluation of dispute resolution programs and any resulting recommendations to retain, modify, or eliminate the program under scrutiny must assume that disputing behaviour can be predicted if the “right” combination of structural elements is present—thereby either ignoring or conflating the complexity of individual decisions over settlement.

The more perplexing question that lies behind the evaluation of dispute resolution processes and systems is how we explain the phenomenon of settlement itself. What we have learned so far about effective systems that provide high-satisfaction outcomes provides us with a theoretical model for maximizing settlement, but tells us little about the broader and more impenetrable question of how, and why, individual litigants reach decisions on whether or not to settle. Why does settlement take place in some, even most, cases but not in others? How can we explain why disputants are sometimes able to reach agreements easily, even amicably, while others fight each other every step of the way? What factors predispose or persuade disputants to settle? Is there something observable and identifiable about cases that will settle before trial? From the perspective of the intervenor, this inquiry raises a host of further, highly practical questions. How can one foster the optimal conditions for an informed appraisal of settlement options? How can one anticipate or recognize a critical turning point in negotiation discussions that may mark the beginning of settlement? When is

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<sup>8</sup> See e.g. the evaluation of the Saskatchewan Mandatory Mediation Orientation Pilot and the evaluation of the Ontario Pilot Mandatory Mediation Program in *Mediation in Civil Cases*, *supra* note 2.

<sup>9</sup> Moreover, there is an obvious concern that a focus on settlement rates as a primary indicator of program success promotes a highly instrumental approach to settlement, and may even encourage the conditions for coercion, in which the third party puts pressure on the parties to settle. See e.g. F. Sander, “The Obsession with Settlement Rates” (1995) 11 *Neg. J.* 329; J.J. Alfani, “Trashing, Bashing & Hashing It Out: Is This the End of ‘Good Mediation’?” (1991) 19 *Fla. St. U.L. Rev.* 47.

<sup>10</sup> See e.g. “Small Claims Mediation”, *supra* note 7; C.A. McEwen & R.J. Maiman, “Mediation in Small Claims Court: Achieving Compliance through Consent” (1984) 18 *L. & Soc. Rev.* 11 [hereinafter “Compliance through Consent”].

the right time for effective intervention? While the elements of settlement may apparently be present in a particular case (for example, an apparently reasonable offer on the table, superficially courteous relations between the parties, and worsening consequences of continuing the conflict), it may nonetheless fail to settle. Placing such a case in a system that offers early opportunities for resolution, and using a process highly rated by participants, may enhance its chances for settlement—but it still may not settle. In other words, the structural analysis, evaluation, and implementation of dispute resolution processes are necessary but incomplete steps in the effort to understand why some cases settle, while others do not.<sup>11</sup>

Research and scholarship that inform civil justice reform tend to focus on the adjudicative system itself (and its agents, members of the legal profession), rather than the people using the system as claimants and defendants. These scholars and the policy-makers they influence assume that litigants themselves take the advice of their professional representatives. That advice reflects a model of rational risk appraisal in which evaluation (claimed to be “objective”) of likely legal outcome is the sole—or at least central—basis for decision making on settlement. Similarly, attempts to provide a model for understanding whether a case might settle have assumed a rational framework for decision making understood from the perspective of legal academics or practitioners.<sup>12</sup> Although they provide an interesting insight into how lawyers make assessments about settlement and how they explain these assessments to their clients, these studies do not consider what litigants themselves are thinking and feeling about the conflict and how that affects their orientation towards settlement. Each time a disputant makes an appraisal of whether or not to settle a suit, he or she is influenced by

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<sup>11</sup> Richard Haass makes a similar point in writing about the preoccupation of much of the negotiation literature with either technique or substance (via formulas) for resolving disputes. He describes these areas as “necessary and often useful. Neither, however, is sufficient ... [T]hey cannot and do not reveal ... why some agreements prove possible and others do not. For this, one must turn to ... context and, more specifically, the presence or absence of certain conditions in which any negotiation takes place.” See R. Haass, “Ripeness, De-Escalation, and Arms Control: The Case of the INF” in L. Kriesberg & S.J. Thorson, eds., *Timing the De-Escalation of International Conflicts* (New York: Syracuse University Press, 1991) 83 at 83.

<sup>12</sup> See e.g. the work of Priest and Klein in developing a predictive model which hypothesizes that cases that do not settle will be those that are “close calls”, where the legal outcome is not clear and one side gambles and loses. See G.L. Priest & B. Klein, “The Selection of Disputes for Litigation” (1984) 13 *J. Legal Stud.* 1. An alternate theory suggests that failure to settle is caused by hard bargaining strategies that, instead of achieving a great deal, actually cause the negotiations to fail. In each case litigants are understood as making a deliberate choice to take the risk that their strategy will pay off, but lose the gamble. See R. Cooter *et al.*, “Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour” (1982) 11 *J. Legal Stud.* 225. More recent work has focussed on providing a rationale for the patterns of demand and offer in settlement negotiations between lawyers by taking account of the influence of factors such as lawyers’ fee structures and insurance. See Gross & Syverud, *supra* note 7.

considerations independent of, and sometimes in tension with, the judgment of his or her lawyer and peculiar to that particular situation. Explanations for why a case settles—and when and for what—are sometimes quite separate (and sometimes remote) from the professional advice offered. Such explanations for settlement reflect the cultural, cognitive, and psychological or affective orientations of the disputants themselves, as much as the circumstances of the individual case, or the advice of their lawyer.<sup>13</sup> Asking the question *Why did they settle?* of the disputants themselves, and examining the cultural, cognitive, and affective frames shaping their consideration of settlement possibilities, is a different inquiry than asking about the effectiveness of a particular settlement process, or examining the outcomes of a group of cases. While some case-specific factors—for example, the extent to which the calculation of damages is speculative or future-oriented, the opportunities for negotiation discussions, how close the parties are to trial—may be significant in predicting the likelihood of settlement, I shall argue that it is the disputants themselves, and how they experience and make sense of their conflict, that are the most important variable. This hypothesis is developed directly from my experience as a mediator, which I shall draw on throughout this article, providing examples drawn from practice to provide both context and texture for my arguments.<sup>14</sup> I realized after the first dozen or so disputes that I was involved in as a mediator that making an accurate prediction in advance of whether a matter would settle in mediation was very difficult. Cases regularly confounded my expectations, either by being resolved easily where I had anticipated an unbridgeable gap between the parties, or by the parties' proving to be immovable on what I imagined would be an uncontentious point. Equally often, I was surprised by a sudden change in mood or direction when settlement would suddenly materialize, sometimes just at the point that I believed matters to be hopelessly mired.

A more sophisticated understanding of the factors that affect the decision to settle a dispute is important for a number of reasons. The first is that this knowledge has the potential to add a new and critical dimension to the design of structural solutions. This may include fresh insights into process formats and new ways to recognize when a matter may be “ripe” for settlement. Knowing more about why people settle may also enable other scholars to develop more complete answers to normative questions about the appropriateness of settlement, rather than adjudication. Finally, I am interested in enhancing the personal effectiveness of third party intervenors by identifying strategies for assisting the parties to evaluate the potential for settlement in any one dispute.

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<sup>13</sup> These types of explanations are of course of even greater significance where the client is unrepresented.

<sup>14</sup> I have mediated more than two hundred litigation matters over the past four years. All the examples provided for analysis in this article are taken from my own practical experience and drawn from my mediation journals.

## I. Culture and Meaning Making in Conflict

Disputants' choices over strategy and outcome, as well as their more unselfconscious preferences and intuitions, reflect how they "make sense" of their conflict on a personal level. This section is intended as a framework for the more detailed discussion of factors influencing settlement appraisal that follows. It argues that a better understanding of why people settle must begin with a recognition of the highly personal nature of meaning making in conflict.

An important body of scholarship and research attempts to relate different dispute resolution processes and outcomes to particular characteristics of disputants, specifically gender and ethnicity.<sup>15</sup> This work examines preferences for particular styles of process and format by members of different groups and illustrates the cultural context that pervades such choices.<sup>16</sup> The cultural background of the disputants—primarily their ethnicity or gender—is seen as a factor in preferring certain processes over others and setting particular goals (for example, community harmony, or individual recognition and reward).<sup>17</sup> Similarly, generalizable conflict orientations and bargaining styles have been described for certain groups, once again primarily distinguished in terms of ethnicity and gender.<sup>18</sup> Some work has also attempted to relate conflict style

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<sup>15</sup> For scholarship that explores the relationship between "macro" cultural characteristics and preference for disputing forum, see e.g. M. LeBaron Duryea & J.B. Grundison, *Conflict and Culture: Research in Five Communities in Vancouver, British Columbia* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1993); S. Ting-Toomey, "Toward a Theory of Conflict and Culture" in W. Gudykunst, L. Stewart & S. Ting-Toomey, eds., *Communication, Culture, and Organizational Processes* (Beverly Hills: Sage Publications, 1985) 71; T. Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale L.J.* 1545; K. Leung et al., "Effects of Cultural Femininity on Preference for Methods of Conflict Processing: A Cross-Cultural Study" (1990) 26 *J. Exp. Soc. Psych.* 373. See generally M. LeBaron Duryea, *Conflict and Culture: A Literature Review and Bibliography* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1992).

<sup>16</sup> This adds weight to the argument for providing choices of process to disputants. See M.P. Rowe, "Options and Choice for Conflict Resolution in the Workplace" in L. Hall, ed., *Negotiation: Strategies for Mutual Gain* (Newbury Park, Cal.: Sage Publications, 1993) 105.

<sup>17</sup> See M. LeBaron, "Intercultural Disputes: Mediation, Conflict Resolution, and Multicultural Reality: Culturally Competent Practice" in E. Kruk, ed., *Mediation and Conflict Resolution in Social Work and the Human Sciences* (Chicago: Nelson Hall Publishers, 1997) 315.

<sup>18</sup> Important work on conflict orientation and bargaining style related to gender and ethnicity includes D.M. Kolb, "Her Place at the Table: Gender and Negotiation" in Hall, *supra* note 16, 138; C.M. Rose, "Bargaining and Gender" (1995) 18 *Harv. J. L. & Pub. Pol'y* 547; P. Trubisky, S. Ting-Toomey & S.-L. Lin, "The Influence of Individualism-Collectivism and Self-Monitoring on Conflict Styles" (1991) 15 *Int'l J. Intercultural Rel.* 65. See generally J.Z. Rubin & B.R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975). See also the perspective of J.Z. Rubin & F.E.A. Sander, "Culture, Negotiation, and the Eye of the Beholder" (1991) 7 *Neg. J.* 249.

to socio-economic status, measured according to income and education.<sup>19</sup> What Neil Vidmar and Regina Schuller describe as an individual's "claims consciousness" appears to be affected by a range of factors including personality and socio-economic position.<sup>20</sup> The significance of this scholarship for the questions asked in this article is its recognition of the potential influence of cultural values and beliefs related to membership in broad cultural groups (for example, women, Japanese people, individuals with post-secondary education) on individual disputing orientations.<sup>21</sup> However, while preferences and tendencies may be generalizable across broad societal groups, this is only marginally helpful in understanding the basis of individual settlement decisions. Although macro-preferences and tendencies are sometimes important—especially where there is a clear difference in style, goals, or relative power—there is a great deal more to the cultural nuances of communication than membership in a particular ethnic or gender group. Meaning making in conflict draws on a complex and highly diverse web of influences. In practice, the limits of generalized trends and assumptions about cultural approaches are evident; for example, where two disputants, both first-generation West African-Canadians, sit down as vendor and customer to negotiate over allegedly unsatisfactory car repairs and discover they have strikingly different values and styles of expressing themselves. Or when two Canadian-born white males working side by side on the same production line as unskilled workers, making the same wage, find that they each hold very different assumptions about the ethics of a used car transaction. While knowledge of broad cultural differences in preferences for understanding and managing conflict are important and useful, they have a limited predictive value in relation to the personal reactions and aspirations of the individual disputant.

For this reason, "culture" in the context of conflict needs to be understood as more particularized and pervasive than broadly drawn distinctions based on ethnicity and gender. It needs to include all the values and beliefs that affect how each individual understands his or her experiences of conflict. The "cultural" component is that which connects that individual's values and beliefs to any set of people—which may be as small as immediate family members, co-defendants in a lawsuit, or a single church congregation, or as large as all mothers, all fathers, or all Catholics—who share the same accumulated knowledge and experiences. This includes each person's socialization and influence by family, peers, teachers, and others, as well as any ethnic, religious, nationalist, or other group culture that is important to his or her assumptions, preferences, and belief systems. All these characteristics might be de-

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<sup>19</sup> R.E. Miller & A. Sarat, "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1980-81) 15 L. & Soc. Rev. 525 at 551.

<sup>20</sup> See N. Vidmar & R.A. Schuller, "Individual Differences and the Pursuit of Legal Rights: A Preliminary Inquiry" (1987) 11 L. & Hum. B. 299 at 300-302.

<sup>21</sup> Examples drawn from cases in which I acted as mediator.

scribed as personal culture.<sup>22</sup> This understanding of culture means that so-called cultural variables are present in every conflict; as one writer describes it, culture is not a variable, but rather the “law of variation” in conflict analysis.<sup>23</sup>

Cultural consciousness inevitably shapes communication and is integral to the making of meaning. A constructionist perspective—articulated by early sociologists such as Peter Berger and Thomas Luckmann<sup>24</sup> and later by Sally Merry and Susan Silbey<sup>25</sup> and exemplified in dispute resolution scholarship by the work of John Paul Lederach<sup>26</sup>—sees people as active participants in the course of conflict who continuously construct and reconstruct meanings for and from their experiences. We make meaning as we “connect” experiences to what we already know by a process of implicit comparison. The meanings that we construct for these events reflect our most basic values, which are in turn shaped by our past experience. In this way the meanings constructed by individuals for events as they occur inevitably reflect their cultural history. Just as culture shapes the organization of our thinking and the construction of our social world, so it shapes the way we understand conflict and its resolution, “[b]ecause ways of dealing with conflicts are a part of one’s social world.”<sup>27</sup> The implication is that many of our reactions and responses to conflict, which might otherwise appear illogical, irrational, or even sometimes contrary to self-interest, can be explained as learned, albeit unconscious, cultural responses.<sup>28</sup>

As we attempt to make sense of the situations we encounter, we quickly and often unknowingly make assumptions—for example, that office is “always totally disorganized”, that person is “out to get me”, or that trade union representative is “just trying to stir up trouble”. These assumptions are the beginning of a “theory” of the conflict. Derived from societal, community, familial, or some other influences, these assumptions reflect our conscious or unconscious cultural understanding of the situation, including how we have learned to respond to conflict. Once made, these assumptions will drive our interpretations of future events and our responses to them.

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<sup>22</sup> J.P. Lederach, *Preparing for Peace: Conflict Transformation across Cultures* (Syracuse, N.Y.: Syracuse University Press, 1995); see also LeBaron, *supra* note 17.

<sup>23</sup> G. Faure, “Conflict Formulation: Going beyond Culture-Bound Views of Conflict” in B. Bunker, J. Rubin & Associates, eds., *Conflict, Cooperation and Justice: Essays inspired by the Work of Morton Deutsch* (San Francisco: Jossey-Bass, 1995) 39 at 53.

<sup>24</sup> P.L. Berger & T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.Y.: Doubleday & Company, 1966).

<sup>25</sup> S. Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990); P. Ewick & S.S. Silbey, *The Common Place of Law* (Chicago: University of Chicago Press, 1998).

<sup>26</sup> *Supra* note 22.

<sup>27</sup> W. Barnett Pearce & S.W. Littlejohn, *Moral Conflict: When Social Worlds Collide* (Thousand Oaks, Cal.: Sage Publications, 1997) at 50.

<sup>28</sup> Engle Merry & Silbey, *supra* note 1 at 156-60.

Months or even years into a lawsuit, they are harder than ever to shake. Assumptions also produce norms of behaviour—both how we act and what we expect of others.<sup>27</sup> Inevitably, we view the behaviour of others through our own cultural lens, feeling angry or affronted if that behaviour does not meet our expectations. Understanding the behaviour of another person from the mindset of one's own set of assumptions and cultural paradigm "almost guarantees that the judged will be found wanting in comparison to one's own."<sup>28</sup> The problem is even more acute when differences in personal culture rest on diverging moral views. Such differences are sometimes described as incommensurate<sup>29</sup> where they flow from entirely different paradigms of values and assumptions that cannot be "mapped onto,' expressed as, or reduced to the other."<sup>30</sup> In such situations, each side's assumptions about each other are continuously reinforced by the other's, sometimes incomprehensible, polemic. Considering possible solutions to conflict almost always threatens the security and inviolability of personal assumptions, especially those reinforced over time.

The way in which we build assumptions and "theories" to explain the behaviour or motives of others is further developed in communication theory in the work of Barnett Pearce and Vernon Cronen.<sup>31</sup> Pearce and Cronen suggest that human interaction can be thought of in terms of "episodes". The first "episode" of human interaction consists of meanings and rituals that in homogeneous or relatively homogeneous societies reflect a broad cultural consensus—for example, the appropriate way to greet someone. In more diverse societies, there is the potential for even the minimal level of interaction that occurs during the first episode—taking a place in a line, making eye contact, extending a greeting at the appropriate level of formality/informality—to cause offence or raise a conflict.<sup>32</sup> The second episode—the actual

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<sup>27</sup> "Where norms tell the actor how to play the scene, culture tells the actor how the scene is set and what it all means." See D.M. Schneider, "Notes toward a Theory of Culture" in K.H. Basso & H.A. Selby, eds., *Meaning in Anthropology* (Albuquerque, N.M.: University of New Mexico Press, 1976) 197 at 203.

<sup>28</sup> C. Chataway, "Paradigms of Conflict and Conflict Resolution: Requirements for Realizing the Value of Track II Diplomacy" in S. Arnold & J. Marshall Beier, eds., *(Dis)Placing Security: Critical Re-evaluations of the Boundaries of Security Studies* (Toronto: York Centre for International and Security Studies, 2000) 35 at 37.

<sup>29</sup> R. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* (Philadelphia: University of Pennsylvania Press, 1983).

<sup>30</sup> Barnett Pearce & Littlejohn, *supra* note 27 at 15.

<sup>31</sup> See W. Barnett Pearce, "The Coordinated Management of Meaning: A Rules-Based Theory of Interpersonal Communication" in G. Miller, ed., *Explorations in Interpersonal Communication* (Beverly Hills: Sage Publications, 1976) 17; W. Barnett Pearce & V.E. Cronen, *Communication, Action, and Meaning* (New York: Praeger, 1980).

<sup>32</sup> D. Guterson, *Snow Falling on Cedars* (New York: Harcourt Brace & Company, 1994), provides an apt example at 116 of the misinterpretation of body language. A Japanese-American man accused of murder sits expressionless in front of the jury. He understands himself to be demonstrating his

communication that follows next—is first interpreted internally by each of the participating individuals. For example, I hear an office manager tell me that my application for a position in the office has not been successful. As I listen to what she says, I make my own private interpretation of the manager's motives, degree of good faith, self-interest, competency, and so on. The third episode consists of further interaction in which the participants attempt to find a joint or shared meaning for what has taken place. I ask the manager to provide me with a rationale for her decision not to give me the job. We try to find a shared understanding of the reasons for her decision, as well as a mutual agreement on how much information she should now provide to me. Maybe we are successful. Equally likely, we are not. My internal judgment about her motives—of course I assume the worst—affects how I interpret everything she now tells me. At the same time, her internal judgment about me—perhaps she is affronted by my insistence on further information, interpreting this as a challenge to her decision—affects her interpretation of every question I ask her. It is obvious that the differences in meanings each of us ascribes to our communication during episode two will translate into difficulties in successful communication in episode three of our interaction. In fact, assumptions about meaning and motive made during episode two are often reinforced as the parties observe what they consider to be one another's inappropriate communication and behaviours during episode three.<sup>35</sup> So the office manager may become increasingly abrupt with me, wishing for the end of our conversation, which she regards as wasting her time or even threatening her authority. I, in turn, see this as evidence for my growing suspicion that my application was discounted for illegitimate and unfair reasons. And so the cycle continues and usually—without a conscious effort to unravel initial differences of understanding—escalates. Like any personal paradigm, the way that we make sense of interaction is highly resistant to change. That resistance is further strengthened when conflict occurs.

Conceiving of culture as the social construction of meaning in dispute analysis and processing has a number of important implications for the dynamics of effective intervention in disputing. First, any effort to resolve a dispute or move the parties towards a settlement, short of one side's capitulation, must begin from a recognition that the cultural assumptions and perceptions of the disputants represent the reality of how each party understands the conflict. It is critical that each side understand what has led the other to think and feel the way he or she does about the conflict, no matter how "unreasonable" or "inappropriate" they might consider those perceptions to be. Perceptions of how the conflict arises, what is at stake, and why a particular outcome is appropriate represent that person's version of social reality, no matter how irrational or baffling those perceptions might appear to others. Any attempt to change percep-

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calm, composed, proud assurance of innocence. The jury sees him as not taking the charge against him seriously.

<sup>35</sup> See Barnett Pearce, *supra* note 33.

tions about the conflict or to suggest alternate meanings for what has occurred requires that those perceptions be first recognized and comprehended. Persuading persons involved in a conflict to accept at least the existence of another social reality—that of the other side—demands that they step outside their own construction of the problem. Even more challenging, this requires disputants to acknowledge at some level that their own reality is socially constructed. It is futile for either an intervenor or another party to the conflict to tell someone that his or her perceptions are “wrong” or “stupid”. This merely runs the risk of the discussions sinking into what Pearce and Littlejohn describe as “reciprocated diatribe, in which each side rudely tells the other what is wrong with it.”<sup>36</sup> This is a familiar dynamic in settlement negotiations.

A second important implication of the constructionist perspective is that in the process of disputing, meaning is constantly made and remade. Because individuals are active participants in the construction of meaning, every conflict is dynamic, fluid, and ever changing. This is always evident in settlement negotiations, and shifting goals, needs, and meanings should be anticipated as inevitable. Settlement processes are themselves a continuation of the disputing drama. It is not unusual for disputes about the process or format of negotiation—or adjudication—to arise that are remote from the original substantive conflict.<sup>37</sup> The constant cycle of interpretation and reinterpretation of behaviour and motives further complicates attributions of cause and effect, often a sticking point in tough negotiations.<sup>38</sup> As a conflict develops and escalates, the disputants interpret one another’s behaviour in a way that “fits” their assumptions and theories about the conflict and resist any contrary information. Morton Deutsch describes this tendency as “dissonance reduction”.<sup>39</sup> It is reinforced by our ability to be highly selective—usually unconsciously—about what we choose to notice in the behaviour of the other party, and how we interpret it.<sup>40</sup> This dynamic is ob-

<sup>36</sup> Barnett Pearce & Littlejohn, *supra* note 27 at 14.

<sup>37</sup> See also the discussion at the beginning of Part IV, below.

<sup>38</sup> It is noteworthy that while most people would probably recognize that conflict is an intrinsically reactive process, attribution theorists have demonstrated that most of us finding ourselves involved in conflict assume that we are merely reacting to the other person’s behaviour, treatment, actions, etc. However, while we see our own behaviour as simply reactive, we view the other party’s behaviour as manifesting “stable” or innate characteristics (e.g. stubbornness, deceit, lack of compassion, etc.). These types of confusion and preconception over cause and effect are sometimes described as “punctuation” problems. See e.g. E.E. Jones & R.E. Nisbett, “The Actor and the Observer: Divergent Perceptions of the Causes of Behavior” in E.E. Jones *et al.*, eds., *Attribution: Perceiving the Causes of Behavior* (Morristown, N.J.: General Learning Press, 1971) 79; P. Watzlawick, J.H. Beavin & D.D. Jackson, *The Pragmatics of Human Communication: A Study of Interactional Patterns, Pathologies, and Paradoxes* (New York: W.W. Norton & Company, 1967).

<sup>39</sup> M. Deutsch, *The Resolution of Conflict* (New Haven, Conn.: Yale University Press, 1973) at 357. See also Deutsch’s discussion of the concept of “self-consistency”, *ibid.* at 37-38.

<sup>40</sup> See e.g. R.P. Abelson *et al.*, eds., *Theories of Cognitive Consistency: A Sourcebook* (Chicago: Rand McNally and Company, 1968).

servable when one party attributes a quite different meaning to a statement made by another in mediation than that understood by the third party, or other participants in the discussion. For example, following what appears to be a descriptive narrative recounting a sequence of events, the other party states angrily, "Did you hear her *blaming* me for that incident? She thinks it is all my fault." The listener hears what she has already understood to be the message, rather than what is said, or perhaps, meant. This extends to how we understand the words used. In one mediation, the defendant called a telephone number advertised as "Cash for Tires", assuming that he would receive a cash offer for some used tires in his yard. In fact, the phone line was shared by another company that recycled tires. The defendant's call was answered by the plaintiff who owned "Cash for Tires", who also took messages for the other company. When the plaintiff heard the defendant say the words "How much for fifty tires?" he assumed that this meant "How much do I have to pay you to collect and recycle my tires?" and not "How much will you pay me for my tires?" Clearly either meaning was plausible, and for the defendant, that he had called expecting the phone to be answered by a "Cash for Tires" representative meant that his question made perfect sense to him as "How much will you pay for fifty tires?" However, neither party was prepared to accept that the contrary interpretation was possible. By this point, the only way either side was able to understand the other's behaviour was as a deliberate and dishonest effort to distort "the facts".

The constant cycle of reinterpretation necessary to reduce or eliminate dissonance also makes it difficult to remain open and unprejudiced in appraising settlement options. Settlement offers are frequently reactively devalued since they are seen in the light of pre-existing assumptions and beliefs about previous behaviours. Any stereotype-incongruent information<sup>41</sup> is generally reinterpreted to minimize any perceived discrepancy with the current "theory".<sup>42</sup> In an already stressful situation, we act to reduce any uncertainty that would otherwise further increase our anxiety levels. Seeing only what confirms our previously held views dissipates the threat of uncertainty.<sup>43</sup> Ensuring that all information is made to "fit" also enables and enhances what Deutsch describes as our need for self-consistency.<sup>44</sup> All actions by the other party are understood only within the context of meaning that the individual disputant has established. This context is developed and established with astonishing rapidity as a dispute escalates.

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<sup>41</sup> Data that might challenge earlier assumptions about the character or motives of other individuals involved in the conflict.

<sup>42</sup> See L. Garcia-Marques & D.M. Mackie, "The Impact of Stereotype-Incongruent Information on Perceived Group Variability and Stereotype Change" (1999) 77 *J. Pers. & Soc. Psych.* 979 at 979.

<sup>43</sup> J.P. Folger, M.S. Poole & R.K. Stutman, *Working through Conflict: Strategies for Relationships, Groups and Organizations*, 3d ed. (New York: Longman, 1997) at 85-86.

<sup>44</sup> Deutsch, *supra* note 39 at 37-38.

I worked once with a group of approximately thirty people who worked together in a small organization and shared office space. There was a long-running conflict between two groups or “factions” within this organization, which had escalated to the point that a climate of mutual hostility and suspicion prevailed. At a party for one of the workplace members who was leaving to take up another job, each person was asked to bring a dish. One person involved in the conflict brought a salad. The salad was left along with the other dishes that had been brought to the party while drinks were served outside. On her return inside, the party-goer who had brought the salad noticed that someone had added green peppers to her salad. She later described this to me as “typical. They are just trying to control me, don’t you see? Putting peppers into my salad when I don’t even like green peppers ... and without asking me ... it was just a way of making me feel small.” She understood this act only in the context that she had developed for understanding the behaviours of her co-workers with whom she was in conflict. She attributed the act of adding peppers to her salad to one of the particular co-workers with whom she was in conflict and interpreted this action as malicious and deliberately designed to both humiliate and control her. It was difficult for her to imagine that someone else might have put the peppers into her salad or that it might simply have been a thoughtless act. She was caught up in the circle of reinforcement that all types of negative assumptions, whether related to interpretation of behaviour or speech, create. Experience of unpleasant conflict results in negative feelings about that person, which give rise to and justify feelings of hostility, which in turn give rise to and justify negative interpretations of his or her future behaviour, and so on.<sup>45</sup> The entrenchment of negative perceptions is especially characteristic of long-running conflicts where “[t]he original issues in contention may have become sub-merged so that the conflict persists based in part on the dynamics internal to each party, on misunderstandings and on mutual de-humanization.”<sup>46</sup>

Accepting the reality of personal meaning making and recognizing the characteristic patterns of the development and reinforcement of meaning require a readiness to deal with their impact on a party’s perceptions and feelings, and the consequences for a party’s orientation towards settlement. Understanding the dynamics of disputing in this way avoids wasting time on noisy repetition of positions and proposed but already rejected solutions, or on allegations of paranoia or defensiveness. Each of the next four sections describes a further dimension of personal meaning making that appears from my experience to be especially significant to understanding the underlying hopes, needs, and fears of parties in conflicts. Each offers some further explanations for why disputants think and feel about the conflict the way that they do. The final

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<sup>45</sup> J.Z. Rubin, D.G. Pruitt & S.H. Kim, *Social Conflict: Escalation, Stalemate and Settlement*, 2d ed. (New York: McGraw-Hill, 1994) at 100-102.

<sup>46</sup> L. Kriesberg, “Introduction: Timing, Conditions, Strategies and Errors” in Kriesberg & Thorson, *supra* note 11, 1 at 6.

section of the article considers some specific strategies for constructive interventions and for the design of systems that recognize the importance of these influences on disputant decision making.

## II. The Role of Expectations

*My client has expectations that are not recognized or met by the proposals of the other side.*

Enabling disputants to make a thorough and constructive appraisal of settlement possibilities requires a careful analysis of the expectations they bring with them, and that underpin their understanding of the conflict. The sources of individual expectations are both complex and highly diverse. Our expectations reflect our past experiences and the values we have formed as a result. They are also significantly affected by the prevailing "climate" of entitlement. Because expectations are highly personal, they are often implicit, rather than explicit, and felt, rather than known. They may not be capable of rational articulation. Yet the individual expectations of the parties—both the expectations that brought them into open conflict in the first place, and those they now hold for the outcome of the dispute—are a critical element in the internal dynamic of disputing. In a litigation model, the expectations and aspirations that individuals bring to their disputes are often hidden or obscured by the need to fit their personal accounts into a series of generic legal definitions of both injury and redress. Inaccurate or incomplete assumptions about the expectations of the other side are sometimes exacerbated by the "stock stories" of legal pleadings.<sup>47</sup>

I once worked with two parties disputing over a monetary holdback on a private residential property sale. The reason given for the holdback by the purchasers, the new owners of the property, was that they had found some water leaking into the basement after they took possession. At the time of the mediation, an offer had been made by the new owners to the vendors, a couple, representing most, although not all, of the holdback; however, the vendors would not even consider this offer. In private caucus the female vendor revealed a key event in the development of the dispute that had not been mentioned in the pleadings for either side, or in the earlier joint session. This was the destruction and removal by the new owners of a child's playhouse that had stood in the backyard of the property. Evidently the parties had agreed at the time of the sale that the vendors would return for the playhouse a few days after the transfer of ownership.

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<sup>47</sup> See e.g. L. Mather & B. Yngvesson, "Language, Audience, and the Transformation of Disputes" (1980-81) 15 L. & Soc. Rev. 775; C. Menkel-Meadow, "The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us" (1985) 2 Miss. J. Disp. Res. 25.

The playhouse had great sentimental value for the female vendor. Her spouse, though, had not reacted in the same way to its removal, and initially resisted “naming”<sup>48</sup> this as a grievance. For the female vendor, her expectation was that the purchasers of her old home would appreciate that the playhouse was important to her and would allow her to return to collect it, despite their disappointment with the state of the basement. When they did not follow through with their undertaking to allow her to remove the playhouse, this became a significant part of her grievance against them, and she felt unable to discuss settlement of the holdback without first raising this issue. Once the issue of the playhouse was formally added to the agenda, the substantive matter of the holdback settled quickly. The female vendor explained to the new owners the basis for her expectation and in return received the response she expected, a simple apology which acknowledged the sentimental value of this playhouse for her. The new owners—a childless couple—were also able to explain that they were unaware of the full significance of the playhouse, and that their expectation had been that the dispute was simply a monetary negotiation over the holdback. The reduction of individual expectations in this case to form pleadings had obscured what was for the female vendor a central part of her reality and a key issue in the conflict, making settlement difficult.

Expectations impact on both entry into, and exit out of, conflict. Individual expectations are critical to the decision to open hostilities. In the litigation model, this generally means the commencement of a lawsuit. While the legal system operates on the basis of a range of objective definitions for what constitutes an experience or injury or wrong (for example, claims in tort must be “reasonably foreseeable”), in reality there is no consensus about the objective meaning of experience, and hence no objective determination of what is, and what is not, an injurious experience. Even if it were possible to imagine two individuals undergoing exactly the same experience, individual responses to the same situation differ widely. As Miller and Sarat have put it, “Two people suffering an objectively identical injurious experience may not both label it as injurious or make the same attribution of cause or come to the same belief in entitlement to redress.”<sup>49</sup> Why then does one individual decide to pursue a grievance while another—apparently in the same or similar situation—does not? In their classic article on the transformation of conflict, Felstiner, Abel, and Sarat highlighted the significance of expectations in the progression of conflict from an “unperceived injurious experience” to a “perceived injurious experience”, through a series of stages they de-

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<sup>48</sup> See W.L.F. Felstiner, R.L. Abel & A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...” (1980-81) 15 *L. & Soc. Rev.* 631. This article describes three stages to the process of disputing. The first, “naming”, occurs where a person identifies an action or event as injurious to him or her.

<sup>49</sup> *Supra* note 19 at 549.

scribe as “naming”, “blaming”, and “claiming”.<sup>50</sup> At each stage, individual expectations about injury, blame, and entitlement are crucial in determining whether the conflict will be continued.

The varying responses of would-be grievors to widely reported events offer poignant examples of the varying responses of individuals to an experience of injury or wrong. When seven people died in a multiple-vehicle accident on Highway 401 outside Windsor on 3 September 1999, a Toronto law firm placed an advertisement in the local press inviting those with injuries to “know their rights”.<sup>51</sup> The search for a defendant who could be “named” and “blamed” for the tragedy had begun. Some of those involved in the accident had already signed up with this law firm. Others were affronted by the invitation to press a claim by joining a class action, expressing distaste for the monetarizing of their loss. Other victims likely made their decision on bringing a claim dependent on who would be named as defendant; suing the provincial government for failing to maintain the roads would probably represent a more acceptable attribution of blame than suing the surviving relatives of one of the involved drivers.<sup>52</sup> Another widely reported event that illustrates the complexity of the decision to dispute is the notorious Kingsville High School strip search, widely reported by news media in December 1998. Two teachers at the Kingsville Public High School in southwestern Ontario conducted a strip search of about twenty male grade-ten students in an effort to track down stolen money.<sup>53</sup> Some of the parents of the young people involved commenced legal action against the local school board. While there was widespread condemnation in the local community of the teachers’ actions as, at best, inappropriate and heavy-handed, there was a clear split of opinion among Kingsville (pop. 6,000) residents over whether a lawsuit was the right way to lay blame and whether a formal claim against the local school board was appropriate. Some parents

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<sup>50</sup> “Naming” has already been alluded to; see *supra* note 48 and accompanying text. “Blaming” is the point at which attribution of responsibility is made for the injury or wrong, and “claiming” is the point at which a formal assertion of claim or entitlement is made.

<sup>51</sup> *The Windsor Star* (10 September 1999) A10.

<sup>52</sup> The acceptability (as well as feasibility) of a potential defendant is often an important factor in the decision to pursue a claim. A poignant example is provided in the Atom Egoyan film *The Sweet Hereafter* (Atlantis Films, 1998), where the parents of children killed in an accident involving the local school bus were unwilling to take any action that would blame the bus driver. On attribution theory generally, see K.G. Shaver, *The Attribution of Blame: Causality, Responsibility and Blameworthiness* (New York: Springer-Verlag, 1985). On attributional style—the tendency to draw particular causal inferences from the behaviour of others—see *e.g.* G.I. Metalsky & L.Y. Abramson, “Attributional Styles: Toward a Framework for Conceptualization and Assessment” in P.C. Kendall & S.D. Hollon, eds., *Assessment Strategies for Cognitive-Behavioral Interventions* (New York: Academic Press, 1981) 13.

<sup>53</sup> R. Preston & V. Mandal, “‘Perverved, Sick, Disgusting’: Students, Officials React to Strip-Search at High School” *The Windsor Star* (8 December 1998) A1.

remained adamant in their refusal to join the lawsuit against the board, which settled a few months later.<sup>54</sup>

Lack of recognition or understanding of the other party's expectations in pursuing his or her grievance is apparent in many hard-to-settle cases. There is sometimes a chasm of incomprehension between the parties in relation to the "naming" of a particular event as injurious and the expectations that are raised as a result. Defendants and their representatives commonly assert that they cannot understand why the plaintiff would have formed the expectations giving rise to the claim; alternately or as well, they protest that they do not comprehend why the plaintiff would have chosen a lawsuit to address his or her complaint. While self-interested, this puzzlement is sometimes genuine and points to one reason why the conflict proves difficult to resolve. One side may have the perception that a particular behaviour or action by the other caused them injury and attribute certain motivations to this behaviour; consequentially, they see themselves as asserting a legitimate claim. The response of the other party is that they do not comprehend, recognize, or acknowledge the alleged injury. They may state, for example, "That's our usual business practice"; "I speak to everyone in the office that way, it was nothing personal"; or "You were informed at the time of sale that there might be a delay in getting the goods to you at this time of year." Settlement discussions need to tease out the basis of the plaintiff's expectations so that even if the defendant cannot accept this, necessary information is provided to enable some comprehension. In other cases, misapprehension and confusion centre on differing expectations over the appropriate source of "blaming". In one case I mediated, the contrasting expectations of the parties over responsibility taking for a contentious home extension in an upscale neighbourhood became the focus of their dispute, rather than how they would resolve the original conflict (for example, by disguising, modifying, or removing the extension and at whose expense). One side, a coalition of neighbours, blamed the local municipality for permitting the extension to be built, while the owner of the property believed that the conflict should now be resolved between himself and his neighbours. Unable to resolve this issue, the parties were unable to negotiate a practical resolution between themselves despite a number of apparently feasible proposals.

When it comes to "claiming", individual expectations are reflected in how each party understands a fair and appropriate outcome for the dispute. In some hard-to-settle cases, the biggest difference in expectations concerns not the original decision to dispute, but rather the remedy now sought. This is frequently articulated as "I acknowledge that there was a problem, but I don't see how she could expect that as a remedy." It is important to ask, Just how, and why, has the claimant formed his or her expectations of appropriate responses to their grievance? Settlement negotiations

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<sup>54</sup> D. Schmidt & T. Whipp, "Settlement Kept Mum" *The Windsor Star* (27 October 1999) A5.

sometimes founder because the explanation is framed as a positional statement of rights-based entitlement, with reference to legal principles, rather than information that is specific to this griever and his or her expectations. Ideally, an explanation should provide the other side with the necessary information to give him or her some real insight into the other's sense of entitlement.<sup>55</sup> Without a clear appreciation of the basis for an expectation of entitlement, it is difficult to visualize the type and range of outcomes that might meet those expectations and satisfy this disputant's needs. Expectations about outcome often encompass both a "best case" and an "acceptable" scenario. Each version reflects a different aspect of the personal values of the individual disputant. The best case scenario is the disputant's vision of a "just" resolution, which sometimes includes some form of rapprochement between the parties. An acceptable outcome, while closer to a "bottom line" approach than the ideal outcome, is nonetheless an accurate reflection of just what that individual understands to be at stake in that conflict, and how much risk he or she is prepared to accept.<sup>56</sup>

Expectations over outcome inevitably reflect the motivations that led to the original decision to dispute. These may include, for example, seeking a monetary remedy or looking for an apology; they may also include expectations of fair process.<sup>57</sup> Buried more deeply may be expectations that go beyond dealing with the substantive issues presented by the conflict and extend to changes in the future behaviour, lifestyle, or business norms of the other side. Where one or more parties expect the outcome of the conflict to include conformity to their own behavioural norms,<sup>58</sup> the process of dialogue becomes especially difficult and may raise issues that displace the presenting issues of the conflict. A landlord-tenant dispute in which I acted as mediator illustrates the barriers to the settlement of relatively simple issues created by incompatible expectations over acceptable behaviour. The presenting issues in this dispute were familiar ones. The landlady claimed rent arrears, and the tenants complained that the landlady had entered their home without their permission and violated their privacy.

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<sup>55</sup> In one landlord-tenant dispute the landlords were especially aggrieved about their tenant's falling into arrears of rent because this occurred shortly before their wedding day and caused them much additional stress. In a workplace conflict a worker could not understand why her union representative would behave with such a strong sense of entitlement around management; she saw her as overbearing and confrontational in this role. The union representative's story about how she first became involved with the union, following an experience of harassment by a manager in another workplace, provided context and meaning to her behaviour. Providing this explanation transformed her relationship with her co-worker.

<sup>56</sup> See also the discussion of rational risk appraisal at the end of Part V, below.

<sup>57</sup> See also the discussion of the need to be treated fairly at Part IV, below.

<sup>58</sup> In societies where there is a wide range of tolerable behaviours and norms (highly diverse societies), tolerance for differences is generally high. Where there is less diversity, or where the individual disputants are less accustomed to dealing with members of other cultural groups, the level of tolerance for different behavioural norms is much lower. See generally Ting-Toomey, *supra* note 15.

The landlady in this matter was a middle-aged Croatian woman, a first-generation Canadian. She lived with her son, who was about twenty years old and unmarried. The landlady's expectations for her son reflected values traditional to her cultural community, but increasingly challenged in contemporary Canada. She expected that he would engage in traditional courtship and would only marry once he had an established income that could support a wife and children. Children would come after marriage, and probably not until her son was in his mid to late twenties. In contrast, the tenants with whom this landlady was in dispute were a young unmarried couple with a very young child. Most important, they were both seventeen years old, unemployed, and dependent on income support.

While the presenting issues here were "stock stories" of landlord-tenant conflicts, these were symptomatic of a deeper mismatch of expectations and aspirations. The core of the problem between these parties was the lack of understanding over their respective life and cultural choices, and the expectations that both gave rise to and flowed from these choices. The young couple expected—demanded even—that the landlady treat them as adults. They had a child, they were committed to one another, and they wanted the landlady to take their lifestyle choices seriously and treat them with respect. The landlady made no secret of the fact that she could not do this, referring constantly to her own son and her very different expectations of him. Having made this judgment, the behaviour she saw (for example, that the tenants were in rent arrears), on the one hand, confirmed all her negative feelings about the choices they had made.<sup>59</sup> The tenants, on the other hand, saw their situation as "normal" and socially acceptable because they knew many other young people in similar circumstances. They regarded the landlady's attitude towards them with a mixture of resentment and puzzlement. They also constantly reiterated that "we are not here to talk about our lifestyle ... we're here to talk about the arrears."

In this case, the tenants' sense of empowerment came from a confidence that their lifestyle and the choices they had made were socially acceptable, while the landlady represented the mores of another era and culture. Their identification of themselves and their lifestyle choices as fully "mainstream" and socially acceptable was, of course, reinforced by the fact that their relationship and their status as parents were recognized by the state in the form of income support. This gave the young tenants a sense of empowerment when confronted by a person of significant resource superiority, the landlady, who chose to focus many of her complaints in the mediation on their lifestyle choices. This case also illustrates the manner in which individual expectations over entitlements to particular outcomes from disputes are powerfully affected by what might be described as an entitlement "climate" or an "ideology" of entitle-

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<sup>59</sup> See text accompanying note 55.

ment.<sup>60</sup> Since our expectations reflect our values about blame and entitlement, they are influenced by current societal norms as well as individual preferences and beliefs. These set an ideological context for our expectations, whether we choose to adopt the prevailing norms or to resist them. Social influence theorists point out that certain types of behaviour receive powerful widespread societal legitimation. Similarly, "claiming" in certain areas attracts strong societal legitimation, while other types of disputing behaviour are less widely approved or supported.<sup>61</sup> The "ideology" of entitlement present in society at any one historical moment is in a constant state of flux. For example, while smoking was once widely regarded as a harmless social indulgence, by the late 1980s it had become viewed at best as a bad habit, and at worst as dangerously anti-social.<sup>62</sup> In the 1990s class actions were brought against tobacco companies by millions of smokers. The Kingsville High School strip search incident demonstrated that standards of acceptance for the types of coercion exercised by a parent towards a child (or those *in loco parentis*, such as teachers) had changed significantly over the previous twenty years—that is, since the parents of the children involved were in school themselves. Although there were differences in the preferred strategies for dealing with this incident as a conflict, there was widespread agreement in the local community and among members of the school board that the actions of the Kingsville teachers were entirely inappropriate. Tellingly, the pupils themselves acted with a clear awareness of the potential of this incident to shock their parents and others, drawing attention to it by staging a "walkout" the following school day. The Kingsville incident, which received worldwide media attention, also illustrates that the role of the media is crucial in fostering and maintaining ideologies of entitlement. Media can provide information, offer invidious comparison,<sup>63</sup> and provide psychological support. In this way, media nurture a relationship between prevailing ideology and personal knowledge in the development of individual expectations.

What might account for the differences that arise in individual expectations, either entering or ending a conflict? In my experience, three variables appear particularly significant in understanding the basis of individual expectations. The first and most obvious factor in producing expectations is personal experience. Individual expecta-

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<sup>60</sup> See Felstiner, Abel & Sarat, *supra* note 48 at 643-44.

<sup>61</sup> See Miller & Sarat, *supra* note 19 at 562. See also M.J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (New York: Plenum Press, 1980) at 15-17, 94-101.

<sup>62</sup> See e.g. the landmark U.S. surgeon general's reports *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* (Washington, D.C.: U.S. Dept. of Health, Education and Welfare, 1964), linking cigarette smoking with cancer; *The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General* (Rockville, Md.: U.S. Dept. of Health and Human Services, 1988), identifying nicotine as addictive.

<sup>63</sup> Expectations also derive from our observation of the experiences of others (Are they being treated better than us? Are they even more powerless than we are?). See Rubin, Pruitt & Kim, *supra* note 45 at 18-23.

tions must be compatible with—or possibly derive from—the meaning that an individual makes of his or her experience of conflict. Expectations about injury and redress derive inevitably from our own past experiences, both good and bad. Kriesberg notes that “people draw lessons from past conflicts, and those lessons then affect their readiness to escalate or de-escalate a future conflict.”<sup>64</sup> While our expectations are also intimately connected to our intuitive orientations towards conflict, including our willingness to compromise or perhaps our preference to simply avoid conflict,<sup>65</sup> it is clear that our experiences of conflict affect our attitudes towards it. Sometimes individuals become ready to “take on” conflict and adopt a claiming stance after a series of experiences that have shaped their attitudes and enabled them to develop some expertise and personal self-confidence.<sup>66</sup> It is also evident that expectations can be radicalized or suddenly shifted as a result of key experiences; expectations are rarely static and often develop as experiences and events unfold. This is especially the case in the volatile climate of a conflict, particularly a public one. Expectations are sometimes shaped by the buildup of experiences of conflict, often representing systemic inequalities or unfairness.<sup>67</sup> Once again, individual responses will differ. A black woman who has felt marginalized in her workplace or believes that she has been overlooked for promotion may develop very low expectations of fair treatment, resigning herself to a discriminatory culture which she feels powerless to affect. Alternatively, she may decide that henceforth she will actively question every management action.

In this way, expectations reflect not only what has been positive in the party’s past experiences, but perhaps also what has been consistently denied, leading to a feeling that this is a legitimate expectation that must no longer be compromised. Expectations that develop around a series of experiences may be extended to other situations understood as similar. One plaintiff in a case that I mediated told me, “When I first came to Canada lots of people discriminated against me and now that I am in a stronger economic position I never intend to allow that to happen again.” This Asian-Canadian man had brought a suit against a construction company working on a property next door to his home. He felt that the workers on the site were not paying him sufficient consideration and respect because they left building materials in the alley between the two properties and made noise late at night and early in the morning.

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<sup>64</sup> Kriesberg, *supra* note 46 at 10.

<sup>65</sup> These orientations towards conflict may encompass a spectrum from “avoiding” through “accommodating”, “compromising”, “problem solving” to “competitive”. See K.W. Thomas & R.H. Kilmann, *Thomas-Kilmann Conflict Mode Instrument* (Xicom, 1974). See also I. Myers, *Myers-Briggs Type Indicator* (Palo Alto, Cal.: Consulting Psychologists Press, 1962).

<sup>66</sup> See *e.g.* the story of Nikos Stavros in Ewick & Silbey, *supra* note 25 at 120-28.

<sup>67</sup> See R.L. Kidder, “The End of the Road? Problems in the Analysis of Disputes” (1980-81) 15 L. & Soc. Rev. 717 at 719.

A second important variable in the development of expectations is the level and extent of personal knowledge of the parties themselves, and in particular, their knowledge of and access to structural opportunities for pursuing a claim. Personal knowledge is heavily dependent upon what type and how much data on any given topic is available, as well as opportunities to access this information. Twenty years ago cigarette smokers dying of lung cancer did not perceive themselves as having been directly injured by the cigarette manufacturers because they did not have access to information that would suggest that nicotine addiction was the cause of their illness. Today access to research findings regarding the causes of lung cancer is readily accessible to anyone with a television set or a connection to the Internet; warnings are even printed on the sides of cigarette packets.

Greater personal knowledge generally produces higher expectations and more claims. Research has demonstrated a correlation between willingness to claim, or enhanced grievance perceptions, and levels of individual educational attainment and experience of and contacts within the legal system.<sup>68</sup> This underscores the point that in the context of claiming, it is not knowledge alone, but rather the combination of personal knowledge along with access to structural opportunities for assigning blame and bringing forward a claim (for example, the development of a cause of action against cigarette companies, or legislation prohibiting racial or sexual discrimination), that are critical to generating expectations of remedy and redress. Structural opportunities for claiming reflect a new climate of public information and the recognition of new types of grievance. Institutionalized rights and remedies (for example, a new cause of action, an ombuds procedure, a tribunal process) both legitimate and enhance expectations. In a highly developed rights culture, awareness of the existence of a recourse mechanism, and a belief in its effectiveness, is critical to the development of expectations of redress. Where personal knowledge includes awareness of structural opportunities for redress, expectations are likely to be set higher and to be firmer.<sup>69</sup> There may also be an awareness that the mere initiation of a formal procedure will provide an impetus for settlement discussions, if these are wished for or sought.

Of course, personal knowledge is not always accurate or reliable. Apparently authoritative knowledge about structural opportunity and legal entitlements also gives

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<sup>68</sup> See Miller & Sarat, *supra* note 19 at 551.

<sup>69</sup> Sometimes, of course, greater knowledge derived from personal experience produces the opposite result—a skepticism about the utility of pursuing a claim. A good example of very low expectations is the small number of actions (approximately one-third) defended by tenants under the former *Ontario Residential Tenancies Act*, R.S.O. 1980, c. 452. Where the arrears were directly contested or there were counterclaims, tenants said that they did not show up in court to defend themselves against the claim because they had learned from their own experience or the experience of others that tenants rarely, if ever, win these cases. See J. Macfarlane, *A Mediation Alternative for Landlord/Tenant Disputes* (Toronto: Ontario Ministry of Housing, 1994).

rise to expectations about process and outcome that may make settlement both more difficult and less likely. The specialized nature of knowledge about claiming processes offers plenty of scope for misinformation and misapprehension. Sometimes expectations are based on a misapprehension of a right or remedy where the individual has either been ill advised or misadvised, or has developed an erroneous view based on something read, seen on television, or stated to him or her by another person. Such assumptions often prevail even in the face of contrary advice by legal counsel. Sometimes the misapprehension is more fundamental, resting on a belief that the institutional mechanism being used to pursue or defend a claim is capable of absolutely discerning truth. I have frequently encountered disputants who are unable to understand why, if they are telling the truth, they would not be believed in a dispute where credibility is the central issue. The assumption that “telling the truth” will guarantee a successful outcome for them is usually an erroneous expectation that in itself presents a serious obstacle to settlement.

A third variable that seems to be critical in the development of expectations is the relationship between the expectations of the individual or representative disputant and those of a wider reference group with whom the disputant identifies. A reference group may be as intimate as family, as broad as membership in a particular ethnic or religious group, or as impersonal as a particular corporate structure. Whatever form it takes, where a significant reference group exists, its approval is always critical to settlement. In mediation, disputants often recount what they have heard from others they listen to or who listen to them. On other occasions, the reference group may be invisible, but its influence just as strong. Two men with whom I once worked to resolve their respective responsibility for the damage and medical costs of a night of heavy drinking came to an agreement following many hours of negotiations. However, neither was willing to sign a settlement agreement until their wives and families could attend to witness the signing and see their menfolk take responsibility for their actions. This was arranged and the agreement signed amid much smiling, handshaking, and general celebration. Our sense of self-esteem is highly dependent on how our significant others perceive us, and so we strive to meet what we understand to be their expectations of us.<sup>70</sup> In this way, reference groups exert a powerful influence in the creation and reinforcement of expectations at all stages of disputing, whether naming, blaming, or claiming.

The influence or even physical presence of close reference group members may also obstruct efforts to resolve conflict. Disputants may validate or reinforce their own views by reference to a wider group that they imagine “must”, though may in fact not, share their perspective. Psychologists describe this phenomenon as false consensus,

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<sup>70</sup> See G.H. Mead, *Mind, Self and Society: From the Standpoint of a Social Behaviorist* (Chicago: University of Chicago Press, 1934).

the tendency for an individual to overestimate the extent to which his or her views are shared and supported by a wider group.<sup>71</sup> On other occasions, a disputant may feel that he or she must resist any effort at compromise or accommodation because significant others will regard this as a sign of weakness. Frank, confidential disclosure in settlement negotiations may be forestalled by the presence of a significant other. For example, when one side challenges a particular assertion (“I am sure that I said nothing about delivery by Tuesday during that conversation”; “I am certain that I paid the rent for that month”), retreat is especially difficult in front of a support person to whom the same assertion has been reiterated, and whose expectation is that the assertion was truthful and accurate. Other kinds of disclosure—possibly harmless in themselves and even irrelevant to the substantive issue—will be resisted because they undermine or challenge the expectations of a significant other. In a landlord-tenant dispute, the tenant was accused by her landlord (with whom she shared space) of staying out late at night and sleeping off evenings of heavy drinking on the couch in the communal living room. The tenant had brought her mother with her to the mediation. It was not possible for this young woman—living away from her parents’ home for the first time—to concede these allegations in front of her mother, whose expectations of her daughter’s lifestyle did not include this type of behaviour. This angered the landlord and further escalated the dispute. In the commercial context, it is common to require a corporate representative to report back to a wider board for ratification or even authorization. The extent to which he or she has met the expectations of this wider group will be critical to whether a settlement results. Not infrequently, the expectations of the representative who participates directly in settlement discussions have evolved as a consequence of this involvement, and communicating changes in expectations to the absent decision maker can present another potential obstacle to settlement. The individualistic model of rights dominant in Western legal culture may blind us to the importance of reference groups—both intimate and commercial—in the dynamics of disputing. Kidder describes this as “conventional Western legal myopia ... focusing on the perceptions, attributions, attitude changes and actions of individuals.” He goes on to argue that in fact individual decisions regarding disputing “may be shaped primarily by the internal dynamics of groups to which they belong.”<sup>72</sup> A balancing of individual redress with advocacy on behalf of a broader group is most evident in the context of test-case litigation.<sup>73</sup> Responsibility to a wider group and car-

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<sup>71</sup> See e.g. M. Biernat, M. Manis & D. Kobrynowicz, “Simultaneous Assimilation and Contrast Effects in Judgments of Self and Others” (1997) 73 *J. Pers. & Soc. Psych.* 254 at 254-55.

<sup>72</sup> *Supra* note 67 at 725.

<sup>73</sup> An interesting example is *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577, where the plaintiffs had reached a settlement of their dispute but continued with the action before the Supreme Court of Canada to extend the principle to a wider reference group of gays and lesbians.

riage of its expectations is often an important legitimization for both complaining action and unwillingness to settle.<sup>74</sup>

In these ways, the analysis of expectations provides an important cognitive framework within which each party may appraise—and possibly re-evaluate—settlement options. It is critical that disputants analyze and understand the basis of their own expectations, and as far as possible, those of the other party. Failure to clarify and explain expectations in settlement discussions often impedes settlement.

### III. What's at Stake: Values and Resources

*My client isn't interested in settlement because this is a matter of principle for her.*

It is often noted that when an ethical and value-related issue is deeply embedded in the substance of a dispute, it is extremely difficult for the parties to settle.<sup>75</sup> Whether or not a dispute is “about” values is not a simple either/or proposition—moral or ethical issues may be central to the conflict or they may be peripheral, and to many different degrees. What is apparent is that the extent to which a disputant perceives the conflict to be over values is critical to his or her cognitive framing of the dispute. Generally speaking, the more value-related the disputant perceives the issues to be, the more adverse he or she will be to settlement, since this appears to be moral surrender. What often complicates settlement appraisal is the tendency for conflicts to mutate into ethical and value conflicts, even if they did not begin this way. This tendency is further aggravated in a litigation model. If the potential result is either winning or losing (as in a trial or in traditional negotiation strategies played out in the shadow of a trial), there is only one acceptable outcome: winning. What is more, the winner will be the party whose arguments are judged the most compelling using criteria (legal norms) that assume the essential moral basis of any conflict. An adjudicative model that provides

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<sup>74</sup> A dispute over a neighbour's fence in which I was involved as a mediator turned on a claim that the fence had been constructed to a height above the permitted maximum but leaving a gap at the bottom. Several hours into extremely acrimonious negotiations over the aesthetics of the fence, the grievors asserted for the first time that the reason they were making their complaint was that the gap between the bottom of the fence and the ground made the fence a danger for small children who might get their heads stuck. Ironically, the only people with small children in the neighbourhood were, in fact, the owners of the fence. There is a widespread conception that protecting the collective rather than the personal legitimates complaining action, like calling the police. See Ewick & Silbey, *supra* note 25 at 85.

<sup>75</sup> See e.g. C.W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2d ed. (San Francisco: Jossey-Bass, 1996); E.A. Waldman, “Identifying the Role of Social Norms in Mediation: A Multiple Model Approach” (1997) 48 *Hastings L.J.* 703.

moral victors—and holds out such a promise to each and every disputant—strongly reinforces our natural tendency to assume the moral basis of claims and assertions.

Even outside the context of litigation, there is an almost irresistible temptation to rationalize the basis of a grievance as moral or normative. Conflict is described by Rubin, Pruitt, and Kim as any situation in which the aspirations of the parties are incompatible. This incompatibility may be actual or perceived—the result is the same.<sup>76</sup> Once an aspiration is thwarted, or perceived to be thwarted, the aggrieved party quickly develops a response that provides him or her with a rationalization for what is happening. Unless the aspiration is dropped, reduced, or acceded to, there is a dispute. Each disputant's rationalization for the continuation of the claim or defence is critical to how he or she will consider the possibility of settlement. As a rule, those involved in conflict will quickly rationalize their claim or defence as having a moral or ethical basis.<sup>77</sup> Once an individual feels aggrieved or injured by another, he or she is immediately susceptible to the assumption that his or her own position—including feelings, needs, and objectives—is morally justifiable, and that accepting any outcome other than the one he or she feels entitled to would amount to a moral backing down. Once the conflict becomes "objectified" in this way (sustained by an appeal to allegedly objective moral standards, and beyond merely partisan preferences), it becomes inevitable that the aggrieved party will press a moral claim.<sup>78</sup>

If conflict is understood as synonymous with ethical disagreement, it is easy to understand why Owen Fiss describes settlement as morally objectionable, and why for many parties the idea of settlement involving any kind of compromise or accommodation appears totally unacceptable. If positions are stated in moral terms, it becomes the obligation or duty of the party adopting a contrary position to resist.<sup>79</sup> This equation of disputing with fighting "injustice" further hardens attitudes towards settlement.<sup>80</sup> The rights-based model of Western justice systems emphasizes an individualist approach in which one recognizes and upholds individual rights or protects against the oppressive assertion of another's rights. An emphasis on an individualistic model of disputing and dispute processing means that those involved are often motivated by a strong sense of personal moral entitlement, whether on their own behalf or on behalf of the notional "others" for whom they will create precedent.<sup>81</sup> This further reinforces the assumption that settlement means unacceptable moral capitulation.

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<sup>76</sup> *Supra* note 45 at 11-15.

<sup>77</sup> See e.g. V. Aubert, "Competition and Dissensus: Two Types of Conflict and of Conflict Resolution" (1963) 7 J. Con. Res. 26 at 31-32; D. Druckman, B. Broome & S.H. Korper, "Value Differences and Conflict Resolution" (1988) 32 J. Con. Res. 489.

<sup>78</sup> See G. Simmel, *Conflict*, trans. K.H. Wolff (Glencoe, Ill.: Free Press, 1955).

<sup>79</sup> See Barnett Pearce & Littlejohn, *supra* note 27 at 14-15.

<sup>80</sup> Kidder, *supra* note 67 at 723.

<sup>81</sup> See also the discussion at the beginning of Part III, above.

In reality, many conflicts are precipitated by incompatible aspirations involving access to finite resources, principally money. For example, how much are these goods or services worth? What will I pay? What value can be placed on my losses that were caused by your acts? Other types of resource-based conflict, common in commercial, workplace, and even family contexts, include disputes over non-monetary resources such as relative status or spheres of influence. These include access to and competition within markets, status and reputation, and issues of personal control.<sup>82</sup> Bargaining over resource allocation and distribution is generally easier than negotiating over values and principles, and settlement is more straightforward. Resource-based disputes characteristically enable outcomes in which the resource “pie”—money, influence, status, market control, etc.—can be divided between the parties, or even integrative (“win-win”) outcomes, in which “expanding the pie”<sup>83</sup> and/or prioritizing different aspects of settlement enables both sides to achieve some of their objectives. Integrative solutions or trade-offs are usually possible; for example, repayment of monies owed in instalments, division of markets, renegotiation of relative status and areas of control, or an undertaking to compensate based on externally derived criteria. While any particular outcome may be plausibly advocated as the most expedient, the most logical, or even the most fair, it is difficult to assert the moral superiority of any one resolution. As one scholar notes, “When I.B.M. and Xerox square off against each other in court over the issue of controlling shares of some market in computer hardware, the issue of justice may be very remote. The battle is a cold-blooded struggle over a limited resource.”<sup>84</sup>

In practice, however, resource-based disputes quickly and easily become transformed into disputes over values and principles, in which one side “deserves” to get all the benefits and the other “deserves” to be punished by walking away with nothing. The focus of the conflict moves from the original point of disagreement and on to other, deeper, and more intractable issues, such as the motivation of the other parties, the intentionality of their acts, or how they have responded to the matter now in dispute. What is noteworthy is how instinctive this tendency is and how difficult it is for us to separate the ethical from the purely pragmatic in conflict. Disputants almost always describe their conflict as “a matter of principle”; legal counsel frequently describe their client’s position in the same terms. The claim of “principle” is attached to

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<sup>82</sup> See Moore, *supra* note 75 at 60-61.

<sup>83</sup> *E.g.* by generating solutions that have value to one or both sides but which fall outside the claim/defence paradigm. Typical examples include future business arrangements, apology and acknowledgements, or the bestowal of other some other valued outcome by one party on the other. See *e.g.* D. Lax & J. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York: Free Press, 1986); C. Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem Solving” (1984) 31 U.C.L.A. L. Rev. 754 at 813-17 [hereinafter “The Structure of Problem Solving”].

<sup>84</sup> Kidder, *supra* note 67 at 723.

many disputes that, in their origins at least, appear to be wholly or primarily resource-based. Whereas many lawsuits adopt the language of justice and moral outrage, at their core the primary concern is not convincing the other party of their ethical position, but rather maximizing their economic self-interest. A good test is to ask whether, if there were limitless resources, their problem would be solved, or does resolution require that one of the parties accept the moral perspective of the other side?

The language of principle often signals that the issues over which the parties are now most aggrieved are not the same as those that were the subject of the initial "blaming".<sup>85</sup> In an important sense, the dispute has been transformed into something related to, but different from, the original dispute as the parties react to one another's claims and allegations. For example, a straightforward claim on an unpaid account develops into an argument over treatment of this particular client or customer, or assertions of discourtesy or rudeness, perhaps escalating to allegations of improper business practices, though the real issue may be a lack of organizational competence or efficiency or a lack of adequate resources assigned to deal with the matter by either side. An initial dispute over vacation entitlement may become a dispute over alleged victimization or discrimination, where the original issue was staggering the scheduling of staff vacations, aggravated perhaps by a new supervisor who was ineffectual in communicating the reasons for this organizational requirement. As in this example, during the process of reaction and counter-reaction, the substantive focus of the dispute may also change. For example, an original dispute over a landlord's failure to carry out repairs becomes a lawsuit over tenant arrears when the tenants withhold rent in protest, or a contested insurance claim becomes a dispute over what the insured understands as a deliberate strategy to delay payment on the policy. The development of the conflict over an extended period may also mean that resolving the original resource-based issue is no longer what is most important to the parties. A dispute over the distribution of assets following the dissolution of a partnership may become a struggle over which partner "deserves" the greater share in the success of the business. In cases where this displacement is complete, where the parties appear no longer interested in resolving the resource-based dimensions of the original claim, it is characteristic that the normative issue coming to dominate the dispute is one that attracts general societal approbation (for example, alleged dishonesty, harassment, sexism, or racism), thus maximizing the anger and hurt on each side. For example, in a protracted dispute between an employer and an employee regarding the denial of promotion, the actual allocation of desired resources such as alternate job placement, salary raise, and other similar issues become immaterial alongside the employee's claim of racial harassment and discrimination and the employer's indignant rebuttal.

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<sup>85</sup> Felstiner, Abel & Sarat, *supra* note 48.

Disputes that have shifted to a values focus are characterized by attributions that are highly personalized. Each party attributes the causes of the conflict to the initiating behaviour of the other, either by behaving in a particular way or refusing to behave in a particular way. Disputants who now understand their conflict as “a matter of principle” tend to emphasize dispositional factors (relating to the personality traits of the others involved) over situational factors (relating to external pressures or needs beyond their control; for example, letdown by a supplier, a sudden and unexpected downturn in trading, freak weather).<sup>65</sup> As the focus shifts from resources to values, a conflict that may have begun as a specific complaint regarding a particular action or event becomes a generalized grievance questioning the fundamental integrity and moral motivation of the actor.<sup>67</sup> Anticipated outcomes move rapidly to zero-sum as the parties inevitably conclude that they can no longer discuss settlement with a person who is not, in their view, negotiating in good faith. Furthermore, where dispositional factors—rather than action and reaction to a particular event—are understood to be the causes of the conflict, disputants consider efforts at settlement to be “hopeless”, assuming that they are powerless to change or control the situation.<sup>68</sup>

This resignation to an outcome that is outside the control of the parties is often expressed as a willingness to let a judge decide the matter. One comment I frequently hear expressed is “if the judge tells me to do it, then I’ll do it” (from a party who otherwise adamantly refuses to carry out this particular action). In such cases no amount of reality checking (“but the judge may agree with you, or she may not, in which case ...”) seems to make any difference. This attitude could be understood as purely instrumental and fixed on a particular outcome—that is, that person’s assumption that his or her position would be accepted by a judge at trial. Certainly some disputants who lose at trial perform their subsequent obligations with less than good grace or fail to perform them at all. Nonetheless, there is a prevailing superordinate belief in the absolute objectivity and impartiality of the adjudicative process as an entity. This means that whatever the substantive judgment, the outcome will be acceptable—unlike a consensual or negotiated outcome. Patricia Ewick and Susan Silbey refer to this phenomenon as the deification and the “reification” of the legal system.<sup>69</sup> Judges are understood to exercise discretion under certain practical constraints that are accepted without question (for example, what evidence is available, what written record or textualization exists of the conflict). An adjudicated outcome, whatever the actual result, vindicates the notion that a normative battle was fought here. The process of judge-made determination imbues the conflict with the procedure (presentation of ar-

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<sup>65</sup> See A.L. Sillars, “Attributions and Communication in Roommate Conflicts” (1980) 47 *Com. Mon.* 180.

<sup>67</sup> See J.Z. Rubin, “Conflict from a Psychological Perspective” in Hall, *supra* note 16, 123.

<sup>68</sup> See e.g. Sillars, *supra* note 86 at 182-85.

<sup>69</sup> See Ewick & Silbey, *supra* note 25 at 77-82.

guments, cross-examination) and the language of moral rights and duties. A loss at trial does not challenge the assumption that this was a conflict over rights and principles. It simply means that the judge did not understand (or was constrained from understanding) your point of view. Where at least one disputant is resigned or resolved to proceed to trial, the dialogue between the parties becomes dominated by talk of values and principles, frequently those relating to the process of dispute resolution itself and its legitimacy. It may be important to distinguish between disputes transformed into value conflicts in this way—where the values of the process take over—from those that become fights over values or principles attributed to the disputants' behaviour. The significance of this transformation for settlement discussions is, however, the same. This normative understanding of the conflict now represents the disputants' reality, however far removed it might be from the original substance of the conflict.

Once resource-based conflicts are transformed into conflicts over values, settlement becomes much more difficult. Obviously the same is true of conflicts that actually originate in incommensurate moral positions.<sup>90</sup> Sometimes these are described as a "pure" values dispute.<sup>91</sup> A classic example is a conflict between two parents over appropriate religious schooling for their child. Another is a conflict between "pro-choice" and "pro-life" activists in the abortion debate. There are often elements of resource issues embedded in value disputes. Where an elderly man shouted racial slurs at his neighbour, the problem might be superficially understood as access to the resource of shared neighbourhood space and degrees of privacy, but the root was the man's deeply bigoted attitudes towards Eastern European Jews.<sup>92</sup> Other disputes are more difficult to categorize since the values and resource elements seem intertwined and their relative weight may differ from one individual to another; for example, the conflict over native fishing rights that erupted in eastern Canada following the *Marshall* decision.<sup>93</sup>

A dispute that either originates in moral differences or becomes overtaken by the same requires a model of settlement appraisal that addresses issues of values as well as resources. "Splitting the difference" cannot work in pure value-based conflicts since the nature of moral conflict is that it is indivisible. A child in the above example can attend only one of two schools. The deliberate termination of pregnancy either is

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<sup>90</sup> Barnett Pearce & Littlejohn, *supra* note 27 at 48-80.

<sup>91</sup> Aubert, *supra* note 77 at 28-33.

<sup>92</sup> Another instantly recognizable values-based conflict—this time transformed into the language of interests as the parties fight over budgetary resources—is that between the "hawks" and the "doves" in the U.S. Congress, who have different ideologies regarding foreign policy and international relations. See A. Rapoport, *Strategy and Conscience* (New York: Harper and Row, 1964).

<sup>93</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513; *R. v. Marshall*, [1999] 3 S.C.R. 533, 179 D.L.R. (4th) 193.

or is not a morally tolerable act. “Expanding the pie”<sup>54</sup> will also fail to result in useful outcomes if both parties identify the same priority—which may be to convince the other of the moral superiority of his or her argument.<sup>55</sup> Neither the “pure” values dispute nor one that has become irreversibly transformed into a values dispute can be solved by the limitless resources test (would limitless resources eliminate the source of the problem?). Instead, “an altered understanding of the situation by one or both parties is necessary.”<sup>56</sup> At minimum, resolution requires that all disputants recognize and accept their ideological differences. Even taking this step demands a commitment to exploring another’s moral position and accepting an alternate possible construction of social reality.<sup>57</sup> Where each regards the other’s moral position as repugnant, and his or her own position to be the sole “truth”, this may simply not be possible. Another approach is to consciously and radically restrict the scope of the dispute and the negotiations—where the parties “agree to disagree” on the normative issue and negotiate only over the resource issues. In this case, both or all sides give up their desire to convince the other(s) of the moral rightness of their case.<sup>58</sup> Another settlement strategy is a search for consensus on an overarching moral principle or set of principles.<sup>59</sup> This approach is usually only possible where all parties are in need of a minimal level of security, stability, or peaceful coexistence, which pursuit of the conflict would imperil.

In disputes that do not originate in issues of moral difference, or that have not been irreversibly transformed into moral conflicts, other settlement strategies are possible. An intervenor can work with the parties to unpack the escalation of their dispute and to roll back the transformed scope and shape of the dispute to its resource-based origins. These resource-based issues may then be reasserted as the focus of bargaining. Sometimes the sense of moral indignation or outrage over a transformed dispute is such that a formal apology or acknowledgement is required to unblock access to resource-based solutions. However, acknowledgement of miscommunication, unintentional incompetence, or even bad behaviour falls well short of moral capitulation or the acceptance of an opposing moral or ideological perspective and may mean that

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<sup>54</sup> See “The Structure of Problem Solving”, *supra* note 83; Lax & Sebenius, *supra* note 83.

<sup>55</sup> In the example given earlier of a dispute involving allegations of racial discrimination in a workplace, “expanding the pie” with proposals for promotion, relocation, and staff development was ultimately of no assistance in resolving the conflict because the only thing that either side really wanted was vindication of his or her own perspective—either an acknowledgement that there was discrimination, or an acceptance that there had been no discrimination and that the allegations were unfounded.

<sup>56</sup> D. Druckman & K. Zechmeister, “Conflict of Interest and Value Dissensus: Propositions in the Sociology of Conflict” (1973) 26 *Hum. Rel.* 449 at 450.

<sup>57</sup> Barnett Pearce & Littlejohn, *supra* note 27 at 116-17.

<sup>58</sup> *E.g.* using some of the “risk appraisal” factors described in Part V, below.

<sup>59</sup> See Moore, *supra* note 75 at 60-66; R. Fisher, W. Ury & B. Patton, *Getting to Yes: Negotiating Agreement without Giving In*, 2d ed. (New York: Penguin Books, 1991) at 40-55.

settlement is now attainable. While reconceptualizing the conflict as a resource-based issue does not necessarily mean that a creative solution to address resource needs will be forthcoming—as there may still be anger and resentment over the behaviour and events that transformed the conflict into “a matter of principle”—it can help to refocus bargaining on this objective, as well as provide some critical perspective on what the parties are “really” fighting over. When parties are encouraged to engage in a thorough analysis of the sources and origins of their conflict, disputes that are principally or wholly over values are far less common than we might imagine. Even the identification and subsequent resolution of one resource-based element of the dispute can go some way towards de-escalating the level and urgency of the conflict.

The willingness of the parties to negotiate constructively and creatively to satisfy their interests is directly related to their willingness to consider alternatives to a dominant normative rationalization for their conflict, including looking beyond conventional individualistic values in disputing. Where the parties can be encouraged to rethink their dispute in these terms, many settlement possibilities open up. However, strategies that are effective for resolving resource-based issues are quite different from those that are appropriate to efforts to resolve ethical or moral conflict, and confusing the two can result in settlement negotiations that are both inefficient and ineffectual.

#### IV. The Need to Feel Fairly Treated

*My client feels offended by the way she has been treated by the other side throughout this process, and as a result, she has hardened her original position.*

Wayne Brazil has recently proposed that an evaluation of the range of options for structuring court-connected processes should be tied to the key values of public trust and confidence in the process, respect for the parties, and fairness.<sup>100</sup> This approach seems promising in light of the importance consistently placed on these values by individuals engaged in dispute resolution processes.<sup>101</sup> This next section examines one further factor that has a significant influence on disputing behaviours and orientation towards settlement. This is the need to feel fairly treated in whatever dispute resolution process is adopted. This material is concerned principally with how the disputants feel, *i.e.* how they respond on an emotional level, about the dispute. Unlike the two preceding analytical frameworks, the focus of this discussion is not so much the substance of the conflict as it is understood by the parties as it is the manner in which the

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<sup>100</sup> See W.D. Brazil, “Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns” (1999) 14 Ohio St. J. Disp. Res. 715.

<sup>101</sup> See *e.g.* T. Tyler, “The Psychology of Disputant Concerns in Mediation” (1987) 3 Neg. J. 367. See also the further discussion, below.

dispute is responded to, managed, and processed. For a disputant to feel fairly treated within a process—on both a formal and an informal level—he or she must believe that his or her issues are given serious consideration. He or she must experience at least a minimal level of comfort with his or her role in the process that unfolds. The significance of a disputant's feeling fairly treated within a process is such that even where all other conditions for settlement appear to be met, voluntary resolution will not occur if a disputant experiences the process as unfair.

There are at least two related ways in which fair process concerns arise in settlement processes. The first relates to the inclusion of appropriate symbols and criteria for the identification of key concerns brought by one party or the other; in other words, the recognition of one's social construction of the conflict. For example, in the case involving the playhouse,<sup>102</sup> the female vendor initially looked for but could not find any recognition of her issue within the process (the playhouse was not mentioned in the statement of claim). In a dispute over the consequences of an admittedly disastrous hair styling in which the plaintiff's long blond hair was turned pink, she was not satisfied that the criteria being proposed by the defendant to assess the value of her hair met her expectations and feelings about the true "worth" to her of her hair. These types of fair process concerns are generally instrumental because they tend to relate directly to the achievement of "fair" outcomes. Second, the perception of unfairness can arise in relation to the micromanagement of the process itself; for example, how much speaking time is allowed, whether those involved in settlement discussions are really listening, and in particular whether the other party has an unfair advantage (for example, in access to legal representation, additional resources, experts, and so on). Such concerns may, or may not, be wholly instrumental. A feeling of not being taken seriously, of being treated without respect, or of having one's view overlooked or ignored, is sometimes articulated as part of a general dissatisfaction with outcome, or in anticipation of a poor outcome. Such complaints are also expressed even where the actual result is a good one for the complainant. For example, a significant number of litigants in the Ontario General Division interviewed for a 1995 study expressed dissatisfaction with the process, notwithstanding a positive outcome to their cases. More than one-third (36 percent) were dissatisfied with the "fairness", described as opportunity to provide input to the counsel, time to speak and be heard, of the process.<sup>103</sup> Both concerns about the use of appropriate symbols and criteria in developing outcomes and those that relate to the micromanagement of the process itself are often de-

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<sup>102</sup> See text accompanying note 48.

<sup>103</sup> Furthermore, only 8.5 percent described themselves as completely satisfied with the outcome, perhaps reflecting that further enforcement steps were often necessary after securing a favourable judgment. In some cases, this seemed to overshadow the final result. *E.g.* one successful litigant told the interviewer: "It[']s taken so long and we're still waiting. It's taken its toll on myself and my family. Nothing could have prepared us for this." See *Mediation in Civil Cases*, *supra* note 2 at 689.

scribed as "procedural justice" issues. Fairness here is procedural in the sense that it concerns the norms and standards that govern the process.

The work of Thibaut and Walker has established (and later studies have confirmed) that perceptions of fair treatment are as important as the actual outcome when disputants come to appraise dispute resolution processes.<sup>104</sup> While there is an obvious relationship between a sense of fair process and a favourable outcome, this research suggests that these judgments are substantially independent.<sup>105</sup> One study by Tyler has suggested that procedural fairness is in fact *more* significant than distributive fairness (*i.e.* outcomes) in determining the attitudes of litigants towards the courts.<sup>106</sup> This finding is further reinforced by studies that have found higher levels of compliance with court orders where, in the view of the disputants, the process was a fair one.<sup>107</sup> A feeling of procedural fairness may enhance perceptions of apparently negative outcomes, described as the cushion effect.<sup>108</sup> This is for the same reason, perhaps, that for some a negative experience of process persists notwithstanding a positive outcome.<sup>109</sup> It has been further suggested that preference for procedural fairness, as well as the identification of the factors that make up procedural fairness, is fairly consistent across a range of cultural contexts.<sup>110</sup> While preferences for particular dispute resolution procedures may vary across cultures, these preferences appear to reflect respondents' impressions of how far any particular process is associated with widely generalizable characteristics of procedural fairness.

The conclusions drawn by this research are highly significant for intervenors and systems designers because they suggest that disputant attitudes towards the perceived

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<sup>104</sup> J. Thibaut *et al.*, "Procedural Justice as Fairness" (1974) 26 *Stan. L. Rev.* 1271; J. Thibaut & L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, N.J.: Lawrence Erlbaum Associates, 1975).

<sup>105</sup> Similar results were reported in a study asking citizens to appraise both their personal benefits (specifically regarding taxation and benefits) and the fairness of government policy. See T.R. Tyler, K.A. Rasinski & K.M. McGraw, "The Influence of Perceived Injustice on the Endorsement of Political Leaders" (1985) 15 *J. App. Soc. Psych.* 700.

<sup>106</sup> T. Tyler, "The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience" (1984) 18 *L. & Soc. Rev.* 51.

<sup>107</sup> See "Compliance through Consent", *supra* note 10.

<sup>108</sup> T.R. Tyler & E.A. Lind, "A Relational Model of Authority in Groups" in M.P. Zanna, ed., *Advances in Experimental Social Psychology*, vol. 25 (San Diego, Cal.: Academic Press, 1992) 115; Thibaut *et al.*, *supra* note 104.

<sup>109</sup> See the discussion accompanying note 104.

<sup>110</sup> See *e.g.* K. Leung & E.A. Lind, "Procedural Justice and Culture: Effects of Culture, Gender and Investigator Status on Procedural Preferences" (1986) 50 *J. Pers. & Soc. Psych.* 1134; E.A. Lind, Y.J. Huo & T. Tyler, "... And Justice for All: Ethnicity, Gender and Preferences for Dispute Resolution Procedures" (1994) 18 *L. & Hum. B.* 269; E.A. Lind & T.R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988) at 107-11.

fairness of settlement processes will be critical in promoting settlement. But what does “fairness” mean in the context of settlement negotiations? One interpretation of procedural fairness is control over the process. This generally means some level of active involvement in the dispute resolution process, whether or not actual participation is desired or sought. For some disputants, control over process is exemplified by being able to tell their own story in their own words. For others, process control may mean having someone else actually speak for them, while retaining a clear sense of how the process unfolds and a secure role as decision maker. While individual aspirations and preferences over process control vary between disputants, the informality and comparative flexibility of settlement negotiations allow for a number of possibilities. Control over process may extend to the development of suitable process norms; for example, disputants can be invited to propose their own basic rules of courtesy and civility for settlement discussions. Whereas disputants who understand themselves to be the subject of such rules imposed by a third party often continue to “breach”, extending control over agreed norms to the parties themselves often produces more constructive dialogue. For example, business parties will readily propose and agree to “no bad-mouthing” of one another, either in mediation or outside. This approach may be extended to include party participation in process design, for example, agreeing how long each side will have to present their arguments, what types of expert evidence will be included, and so on. Devolving a measure of process control to individual disputants, according to their needs and preferences, has important practical implications for the dynamics of settlement discussions. It is noteworthy that when disputants in mediation are asked how they would like to move forward towards the end of a first meeting in which settlement is not reached, proposals are almost always forthcoming, and reaching agreement on “next steps” is remarkably straightforward, in contrast to securing agreement on any substantive issues. Tyler comments that “a willingness on the part of the parties to focus not on their ultimate influence over outcomes but on the quality of the decision making process ... adds an additional positive element to the dispute resolution process which can enhance the likelihood of its success.”<sup>111</sup> Enabling the parties to make relatively uncontentious decisions regarding future process design, such as holding another meeting in one week’s time following the gathering of further information, or a “cooling off” period during which each party will review a draft agreement, can develop some momentum towards joint decision making. It can also encourage some give and take between the parties, seen perhaps as fair exchange for a degree of process control that benefits all sides.

In Thibaut and Walker’s original work, the desire for control over process was assumed to be instrumental on the part of disputants or parties; control over process was understood as a means of maximizing the possibility of positive outcomes. This is one possible interpretation of the above example. Another is that parties value the oppor-

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<sup>111</sup> “The Psychology of Disputant Concerns in Mediation”, *supra* note 101 at 370.

tunity to fashion a process that meets their needs quite independently of any anticipated outcome. More recent work has suggested that for some disputants a degree of process control, and in particular the expression of their particular "voice", has value in itself, sometimes described as the "value-expressive" view.<sup>112</sup> Bush and Folger<sup>113</sup> go further and argue that self-expression that empowers the speaker by giving voice to his or her concerns and goals is itself a legitimate objective for the mediation process, regardless of whether or not settlement results. Each of these perspectives may underestimate what is, in practice, a highly integrated and complex relationship between process and outcome where a consensual outcome is sought. In contrast to the traditional adjudicative structures that Thibaut and Walker examined, in settlement processes the parties themselves are the decision makers.<sup>114</sup> Enhancing an overall sense of fair process may be one of the necessary conditions for a satisfactory outcome. Agreement on one party's preferred terms would seem to be more likely if the other side feels satisfied with the fairness of the process.

The development of trust between the parties in settlement processes is critical to the framing of possible outcomes. Establishing a protected process for dialogue—where each party feels confident in the expression of opinions and the floating of ideas, safe from criticism or the spotlight of unfavourable publicity—can generate sufficient comfort to enable new solutions; for example, co-operation in future commercial ventures.<sup>115</sup> The development of trust and goodwill in the negotiation process can also provide the parties with new confidence in solutions offered previously but rejected. Disputants need to feel, as Morton Deutsch puts it, that the other side can be relied upon to do as they say they will do.<sup>116</sup> Collaboration over process offers a testing ground for the exploration of trusting relationships. As each disputant gains new information through dialogue, he or she can use it to develop greater predictive certainty about the behaviours of the other. This predictive information is crucial to the establishment of knowledge and trust about the other person. Michael Roloff notes: "As people share more information about each other, the nature of their predictions changes ... they move from making stereotypic or

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<sup>112</sup> T. Tyler, K. Rasinski & N. Spodick, "The Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control" (1985) 48 *J. Pers. & Soc. Psych.* 72.

<sup>113</sup> R. Bush & J. Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) at 84-89.

<sup>114</sup> J.M. Brett, "Commentary on Procedural Justice Papers" in R. Lewicki, B. Sheppard & M. Bazerman, eds., *Research on Negotiation in Organizations*, vol. 1 (Greenwich, Conn.: JAI Press, 1986) 81.

<sup>115</sup> Bush & Folger describe "spillover effects" from empowerment that include the enhancement of future conflict resolution skills; see *supra* note 113 at 88.

<sup>116</sup> *Supra* note 39 at 143-76.

generalizing predictions to making discriminating predictions about each other.”<sup>117</sup> Giving and keeping process undertakings, such as sharing particular information or material within the security of a “without prejudice” environment, or agreeing to place an issue important to only one party on a shared agenda for discussion, is often the first step in the development of trust. Another use of process to develop trust is the development of interim agreements between disputing parties. For example, in a complex partnership dispute, the parties decided that the production and sharing of certain key invoices between mediation sessions was critical to forward movement towards settlement of the numerous outstanding issues between them. The invoices themselves were relatively insignificant as a proportion of the disputed amounts, but they represented critical assertions of truth telling by one party. An interim agreement was drafted in which the defendants agreed to provide this documentation to the other by a specified date, in which event a part of the statement of claim would be withdrawn. In other cases, undertakings not to discuss settlement negotiations with any other person are symbolic trust builders and any breach—however inconsequential to the settlement being sought—becomes a settlement breaker. The successful passage of tests of trust can develop a momentum towards settlement, especially where each party is becoming increasingly invested in the process they have chosen (they do not want to feel, in retrospect, that they have wasted their time).

Empowering each party by devolving to each a measure of process control may be especially significant for a disputant whose mistrust of the other is founded on a profound sense of inequality (of resources, of access to representation, and so on). One landlord-tenant dispute initially presented apparently striking inequalities between the parties. The tenant was a teenage mother with a hearing disability and was additionally handicapped by what her social worker described as an “anger management” problem. The landlord was a relatively experienced and articulate older person, with obvious resource superiority.<sup>118</sup> Upon agreeing to participate in mediation, each was asked to give an undertaking regarding equality of speaking time and respectful listening to the other. Providing the tenant with the space to speak without interruption by the landlord, and asking the landlord to curtail disparaging non-verbals, enabled this young woman to find her voice in a dramatic way. Though the mediation began with several angry outbursts by the tenant, her gradual realization that this was her opportunity to put her perspective across had a profound impact on her ability to express herself. As a result, she appeared to be able to negotiate effectively with her landlord, and together they reached an acceptable solution to their problem.

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<sup>117</sup> M.E. Roloff, “Communication Strategies, Relationships and Relational Change” in G.R. Miller, ed., *Explorations in Interpersonal Communication* (Beverly Hills: Sage Publications, 1976) 173 at 173.

<sup>118</sup> This concern was partially ameliorated in the mediation “set-up” by the attendance of counsel with the tenant while the landlord came with only his girlfriend.

Another fair process issue articulated in research on procedural justice is the importance of the parties' feeling that they have been listened to, and for listeners, even if they ultimately reject the other's arguments, to explain how they took account of these in any final judgment.<sup>119</sup> This research is based on experiences with formal adjudicative processes, and points to the importance of a decision maker's providing the parties with articulated reasons for a decision. In settlement processes in which no ultimate decision will be rendered, this finding appears to highlight the significance of the acknowledgement and validation (but short of acquiescence or agreement) of what each party has to say about the dispute. It points to the importance of continuously demonstrating, by respectful listening, that the perspective of each party has been heard and understood. This extends beyond the intervenor and includes all those involved in settlement discussions, whether central or peripheral to decision making: the other party or parties, counsel, any friends or supporters present, and any expert advisors. I have seen several settlement negotiations break down because counsel for one party, despite my admonitions, constantly whispered to his client while the other side was speaking. On one occasion, negotiations ended because one party took offence to the manner in which counsel for the other side took extremely lengthy and detailed notes while he was speaking, interpreting this as extreme formalism rather than open-minded listening.

The value of acknowledgement and validation is strongly advocated by a growing number of mediation practitioners and scholars, who propose what is sometimes described as a "communication" frame for negotiation and dialogue, as contrasted with the "settlement" frame that focusses on the delineation of the technical and factual issues in order to resolve the presenting dispute.<sup>120</sup> Mediators who view mediation as primarily an opportunity to enhance communication focus their efforts on paraphrasing and reframing each party's expression of needs to provide explicit acknowledgement and validation. They will also explicitly encourage complementary acknowledgement and validation by the other party, if possible. The best-known advocates of the communication frame are Bush and Folger, who in *The Promise of Mediation*<sup>121</sup> set out a thesis of acknowledgement that they describe as "recognition". Recognition by

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<sup>119</sup> Testing four possible limitations on the satisfaction associated with a high degree of process control, Tyler found that the only factor that significantly reduced or eliminated this satisfaction was where the final decision maker did not appear to give due consideration to the disputants' view. See T. Tyler, "Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models" (1987) 52 *J. Pers. & Soc. Psych.* 333. See generally Lind & Tyler, *supra* note 110 at 104-106.

<sup>120</sup> D.M. Kolb *et al.*, eds., *When Talk Works: Profiles of Mediators* (San Francisco: Jossey-Bass, 1994) at 17-58. This is also sometimes described as a "therapeutic" style of mediation. See S.S. Silbey & S. Merry, "Mediator Settlement Strategies" (1986) 8 *L. & Pol'y* 7; L.L. Riskin, "Mediator Orientations, Strategies and Techniques" (1994) 12 *Alt. High Cost Litig.* 111.

<sup>121</sup> *Supra* note 113 at 28-40.

one party of the needs and goals of others is the quid pro quo of personal empowerment. While recognition may be tacit, open recognition of another disputant's needs and interests generally reflects a changed understanding, however subtle, on the part of the speaker, and as a consequence a reassessment of, or a reorientation to, the problem that has caused the dispute between the parties.<sup>122</sup> Bush and Folger argue that this type of reorientation gives rise to the "transformative" effects of the mediation process. While empirical research on procedural justice sets the threshold somewhat lower, suggesting that it may be sufficient that each party feel that his or her perspective was listened to and given full and proper consideration, this dimension of a sense of fair process deserves more attention than it is presently afforded in the adjudicative-rational model. Respectful listening, acknowledgement, and recognition can easily be expanded into a broader principle of civility and courtesy between all participants in settlement negotiations.<sup>123</sup> Well-advanced settlements can and do break down at a late stage when, despite lip service being paid to the elements of procedural fairness, one party experiences the attitude of another person participating in the negotiation as condescending, contemptuous, or dismissive.

A final, important complexity to a sense of fair treatment in settlement processes is that it is not limited to a final meeting or interaction. Instead, procedural justice issues will take shape throughout what may be a lengthy and drawn-out process of negotiation. Disputants seem to have long and detailed memories for feelings of unfairness; where there has been an earlier affront, it is frequently referred to even as an agreement begins to take shape. Past events and interactions are often reviewed just prior to final resolution: "You yelled at me that first day I contacted you and then refused to take my calls—why did you do that?" or "We could have made this deal months ago but you wouldn't even consider our offer then." The reviewer generally will not make any allowance for the climate of mistrust that probably existed at that earlier time between the disputants. Sometimes the final settlement needs to take account of, or at least act to neutralize, previous actions. For example, in several disputes with which I have been involved, copies of heated correspondence between the direct protagonists were sent to a wider group. Final settlement required both an apology and a strategy for informing these parties that the conflict had now been settled, without loss of face to either disputant.

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<sup>122</sup> *Ibid.* at 89-92. It is clear that "lip service" or feigned recognition is inadequate and even dangerous; I have on occasion observed feigned acknowledgement of the other side's concerns being unmasked and resulting in the undermining or even the elimination of any developing sense of trust.

<sup>123</sup> See Lind & Tyler, *supra* note 110 at 109. For an unusually explicit professional standard on civility, see the *Florida Rules for Court-Appointed and Certified Mediators*, Fla. R. Civ. P. 10.100 (2000).

## V. Rational Risk Appraisal

*I have advised my client that, in my professional opinion, we have a very good chance of winning this case.*

A discussion of risk appraisal has intentionally been left until this point. The assessment of likely outcomes—how likely are we to win at trial?—is the place where most lawyers and their clients begin in thinking about whether to negotiate for a settlement with the other side or to prepare an offer to settle. It is the conventional touchstone for the analysis of settlement possibilities.<sup>124</sup> In contrast, this article has tried to demonstrate the significance of a range of other factors, both cognitive and affective, to an ultimate decision over whether to settle. While rational risk appraisal may be a useful tool in this process, it is rarely the sole or even the most significant factor. Moreover, the traditional approach to risk appraisal requires significant expansion if it is to be helpful in assisting disputants to make a comprehensive appraisal of the risks and rewards of settlement.

Any form of risk assessment—whether legal, financial, political, or other—is an inherently “rational” exercise in which a measurement of likely risks and rewards produces a judgment about action. Although the results of this accounting and balancing may point to a logical “best course”, this is only marginally useful in predicting settlement outcomes where the client is motivated by expectations and aspirations that are apparently irrational, reflecting conscious or unconscious cultural choices.<sup>125</sup> Risk assessment tends to be more meaningful for those involved in litigation if undertaken after some reflection on the other factors in settlement appraisal that have been discussed above. Disputants who have spent time considering how the conflict arose, and why they feel the way they do about it, have generally reached a level of self-awareness and reflectiveness. To some degree the conflict is objectified by their analysis of it. This enables disputants to approach risk appraisal more calmly and with a sense of personal comfort, rather than feeling threatened by an assessment that may suggest that they should change course. Where the conflict is emotionally intense, parties who have been able to talk about their feelings about and reactions to the conflict release a significant amount of emotional tension in the process. Only once this tension—which can absorb significant thinking energy—is reduced are they ready and able to think concretely about any risks of continuing the conflict. In addition, disputants who have thoughtfully examined the origins of their conflict often acquire important new information to bring to the process of risk appraisal.

Conventional risk assessment by lawyers—based on a measurement, claimed to be “objective”, of the likely outcome of litigation—makes a number of implicit as-

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<sup>124</sup> See the discussion in Part II, above.

<sup>125</sup> See Engle Merry & Silbey, *supra* note 1.

sumptions about the way choices are made about disputing behaviour. First, it assumes an equation of risk management in which weight is pre-ordinately given to factors that are known and/or assumed as matters of fact, rather than what is felt or intuited. Second, it assumes that the results of such an accounting (whether to continue with the action or to settle) represent the best interests of the client. Within the framework of these assumptions, rational risk assessment is a straightforward cost-benefit analysis. Simply put, is the chance of reward worth the degree of risk in continuing to refuse any offers to settle? More specifically, what are the chances that the judge will side with this client? How much damages might be awarded? How easy will collection be? How long will it take to get to trial? What will the costs be? For example, costs expended on the dispute to date can be compared with costs calculated to achieve a desired “best case” result. An appraisal of costs should also include an assessment of any accumulating damages or consequences that can be readily measured; for example, business losses such as lost productivity, lost market opportunities, negative public relations, and so on. It may also be necessary to factor in any costs that would apply in relation to the enforcement of a judgment. It is important to note that, in contrast with the other factors influencing orientation towards settlement described above, rational risk appraisal is for the most part derived from the judgment and experiences of those who are not direct participants in the conflict, such as lawyers and also other experts such as accountants, actuaries, and risk adjusters. Where all professional advice, whatever its source, is directed primarily to the development of a strong legal case and subsequently an assessment of the likely legal outcome (including its costs), there is generally no place for the expertise or opinion of the disputants themselves.

This tendency to exclude the experience of the disputants themselves is exacerbated by the narrow definition of “risk” used by lawyers in conventional risk appraisal. Other factors besides likely legal outcome are important for many litigants, and deserve fuller consideration than they sometimes receive. The concept of the “best alternative to a negotiated agreement” (“BATNA”) has been popularized by Fisher and Ury as a tool to assess the risk of continuing with a dispute. It suggests the identification of a hypothetical best-case scenario if negotiation does not result in settlement before adjudication.<sup>126</sup> Examining a hypothetical “best alternative” to a negotiated solution—which usually implies, at minimum, increased costs, mounting levels of stress, and continuing personal and/or commercial uncertainty—provides disputants with a benchmark, often a “reality check”, against which to judge the relative benefits and downsides of settlement. The concept of BATNA is incomplete if it is

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<sup>126</sup> See Fisher, Ury & Patton, *supra* note 99 at 97-106. Others have argued that the more realistic measure would be “worst case scenario” (“WATNA”). Yet others propose “most likely” outcome as the pragmatic choice (“MLATNA”). Each assessment requires the same basic data elements set out above.

understood only as an assessment of likely legal outcome. The most complete and useful sense of “best alternative” is one that integrates anticipated legal outcomes with other consequences of not settling the dispute at this time. Tangible, directly related commercial consequences include the loss of future contracts, workplace morale problems, and uncertainty that discourages investment. Less directly, but more fully inclusive of the disputant’s experience of the conflict, is whether the continued conflict will damage a personal or business relationship or relationships in a way that would be difficult to reverse. What are the emotional costs of the conflict? What level of stress is likely if the conflict continues? Looking forward, will failure to settle now result in further negative consequences? Are the parties approaching a point of crisis when matters will quickly worsen if they do not get better?<sup>127</sup> Are the continuing conditions of the conflict likely to produce a “hurting stalemate”, where either one, or possibly both, parties to the conflict find themselves in a no win situation in which any possible gains are being cancelled out by ongoing losses?<sup>128</sup> Not all these considerations are equal, of course, and it is important to determine their relative weight for an individual disputant in any particular case. For example, for some parties, any amount of consequent stress or anxiety is less important than pressing their claim. For others, the most important factor in seeking closure is their need to bring the dispute to an end and begin to recover emotionally.

Also important—and often missing—in a complete appraisal of risk are considerations of timing in the dynamics of bargaining. There are no “neutral” moves in negotiation, including silence; every move and countermove changes the bargaining climate. Will an opportunity offered now continue to be available if no agreement is reached at this time? Failure to agree at this time may raise the psychological stakes and make it unlikely that a similar set of proposals will be put on the table another time around. It is an essential part of risk appraisal that parties consider how the other side will react to turning down settlement terms, both substantively and emotionally. Litigants, both corporate and personal, often refer to proposals they have made earlier to the other side and state that they are no longer willing to match that offer, having been affronted by the fact that the other party turned it down and prolonged the dispute. This dynamic is even more complicated—and probably likely—where a representative or agent for a corporate party is present at negotiations or mediation. Having perhaps encouraged a principal to make an offer once, only to see it turned down, that

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<sup>127</sup> This is described by William Zartman as a “precipice”. See I.W. Zartman, *Ripe for Resolution: Conflict and Intervention in Africa* (New York: Oxford University Press, 1989) at 268-69.

<sup>128</sup> This is described by Zartman as a “plateau” in the development of the conflict: “a flat, unpleasant terrain stretching into the future, providing no later possibilities for decisive escalation or for graceful escape” (*ibid.* at 268). See also D. Pruitt & P. Olczak, “Beyond Hope: Approaches to Resolving Seemingly Intractable Conflict” in Bunker, Rubin & Associates, *supra* note 23, 59. See also the discussion at *infra* note 134 and accompanying text.

agent is unlikely to be willing to ask his or her principal to make the same offer, maybe six months later. The rejection of an offer deemed by the offeror to be eminently reasonable often leads to a spiralling of conflict. Changes in actual business conditions may also affect timing. Circumstances that allow for the possibility of a particular, immediate solution may be subject to change in the near future. This means that a particular offer may be time-limited, with or without the goodwill to extend or repeat it.

Each of the elements of risk assessment described here is important in enabling disputants to decide whether to settle or continue their conflict. For a minority of disputants, predictive data regarding legal and other consequences will be sufficient by itself for them to decide whether or not to continue with a dispute. Characteristically, these are decision makers who are distanced from the conflict—both its origins and its ramifications—and feel no personal investment in the outcome. While such disputants do exist, they are a very limited group, even in the corporate context. Where conflict occurs between corporate litigants, it is unusual to find a decision maker who regards the dispute as both someone else's fight and of no personal consequence.<sup>129</sup> Competitive corporate culture easily embraces the normative structure of litigation. Rational decision making based solely on objective risk appraisal is rare. It is more likely that risk assessment will be just one factor in deciding whether to continue to dispute or agree to settle.

Where the results of rational risk assessment conflict with other instincts—both conscious and unconscious—they will probably be overridden. In particular, undertaking risk appraisal prematurely—especially conventional legal risk appraisal, which often feels remote from the disputant's construction of the conflict<sup>130</sup>—undermines the potential for settlement and is more likely to lead to entrenchment. Disputants may override expert advice, because the assessment of experts feels irrelevant to the disputant's actual experience of the conflict. Alternatively, expert advice may be accepted because of its authoritative source, but the disputant's continuing ambiguity will resurface in other ways, commonly in last-minute roadblocks to settlement, or in non-compliance with the terms of settlement. Despite the heavy reliance placed on it by legal and other professionals, risk assessment is not by itself a reliable predictor of settlement outcomes, because it assumes rational choices in disputing behaviour.

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<sup>129</sup> See the discussion in Part III, above.

<sup>130</sup> The prevalence of "stock stories" combined with what William Simon calls "ritualist advocacy" often produces a feeling of detachment for clients. See W.H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 29 Wis. L. Rev. 29 at 92. Furthermore, "the burning issue which originally belonged to the disputants, both intellectually and emotionally, becomes detached from them on both levels once it is placed in the hands of the legal system." See J. Macfarlane, "The Mediation Alternative" in J. Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications, 1997) 1 at 5.

Sometimes disputants appear thoroughly irrational in their resistance to confronting the practical risks involved in their strategy. Where a disputant rejects the results of rational risk appraisal, it is futile to keep pressing the point; instead, it is necessary to return to an examination of the other factors that influence attitudes towards settlement.

### **Conclusion: Some Implications for Systems Design**

At the beginning of this article, I suggested that the way we approach settlement processes should be informed by what we are learning about why people do—and do not—settle. Understanding more about disputing behaviour, and some important patterns of response to conflict, can enable us better to assess when, and how, intervention will be effective. It also takes us beyond structural issues such as the format and timing of settlement processes and into questions of implementation and action. Each of the factors discussed above suggests techniques and tools for negotiation aimed at resolving disputes consensually. For example, one side may need to set out how and why they have developed a particular expectation of outcome, or what circumstances led them to bring their complaint forward in the first place. Once each side in a dispute understands more about the expectations of the other, renewed possibilities of both reorientation and bargaining open up.<sup>131</sup> It will be important to explore what values and resources the disputants understand to be at stake, and how these have evolved and possibly transformed over the period of the conflict. A sense of fair treatment within a fair process needs to be a central concern for both systems designers and intervenors. Disputants can be encouraged to develop agreed steps in their own process and shared expectations for courteous relations during settlement negotiations. Risk appraisal can be expanded beyond its conventional interpretation to comprehend a broader understanding of risk that is more inclusive of what is important to the individual disputant. As a rational basis for providing advice, risk appraisal should not be overestimated or overemphasized in preparing parties for settlement discussions. It may be complementary to the other analytical frames described here, but is only rarely a substitute for them. Each of these frames for appraising settlement can be discussed with the parties in order to gauge the usefulness of entering settlement discussions. Taken together, they provide a sort of barometer of the disputants' willingness and readiness to discuss settlement as opposed to continuing the conflict, measured on both cognitive and affective levels.

The more difficult question is whether what we are learning about why people settle can be used to generate broadly applicable recommendations for the design of systems that support constructive negotiations. The approaches described here for ori-

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<sup>131</sup> *E.g.* what Pruitt & Olczak describes as the reciprocal reduction of expectations, akin to the trade-off among interests described in Fisher, Ury & Patton, *supra* note 99 at 40-55. See Pruitt & Olczak, *supra* note 128 at 59-87.

enting disputants towards an informed consideration of settlement centre on the unique needs and circumstances of each case, and the most important design implication may be that any process or system should be sufficiently flexible to take account of these. What works for one dispute will not necessarily work for another, however superficially “similar” they might appear. Individual expectations, motivations, and values—how disputants have constructed their “reality” of the conflict—are different in every dispute.

Nonetheless, some obvious lessons emerge. The first is that preparation for settlement discussions should go beyond the conventional development of a legal case to include consideration of the influences on settlement discussed here. For example, where client and counsel work together on unravelling value issues from resource issues, the client may be able to give instructions for settlement that deal with the issue of resources and either set aside or separate what was understood initially as “a matter of principle”. Discussing the level of involvement the client wishes to have in any settlement negotiations enables clarification of the client’s expectations for fair process and the degree to which process control is important to him or her. Appraisal of the likely risks of continuing with litigation is likely to be more effective if it is tied to a deeper analysis of the disputants’ interests, needs, and motivations. Such an approach to preparation for settlement negotiations has many implications for the type of advice and service that clients receive from their legal representatives, and how lawyers are trained to undertake such a role.<sup>132</sup>

Second, the observations drawn about why people settle point to the need for a meeting format that enables a face-to-face exchange of information and perspectives between the parties. This meeting must be managed carefully if it is to achieve its potential and not further escalate the dispute. Least useful is a rehearsal for trial in which positions already set out at length in pleadings are repeated. Most useful is an exchange of perceptions and understandings between the disputants over how the conflict arose and what is now at stake. Among other things, this discussion can challenge assumptions about the other side’s motivations and rationale, fill in gaps or explode “theories” about the meaning of one another’s acts, reduce data discrepancies between the parties, and challenge stereotyping of motives and behaviours. This focus for the substance of settlement discussions does not exclude discussion of legal arguments, a component of rational risk appraisal, but places the articulation of these positions firmly within the context of an analysis of the dispute itself. This means that the disputants themselves need to do at least some, if not the greater part, of the talking. The type of information exchanged between the parties requires at least some personal de-

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<sup>132</sup> See e.g. the recommendations of the CBA Joint Committee on Comprehensive Legal Education, *Attitudes—Skills—Knowledge: Recommendations for Changes to Legal Education to Assist in Implementing Multi-Option Civil Justice Systems in the 21st Century* (Ottawa: Canadian Bar Association, 2000).

livery, whether by personal litigants or the representatives of corporations or institutions providing information on their behalf. Where an organization or corporate body is involved, this needs to be the individual closest to the conflict, and if this is a different person, the decision maker. This is a shift in traditional expectations over participation in settlement negotiations, and brings challenges for both parties and their representatives alike.<sup>133</sup>

Third, settlement discussions should be timed to take place when the conflict is “ripe” for settlement. This means using our knowledge about why people settle to better recognize when a litigation matter is “ripe” for settlement and—more importantly for system designers—to nurture the conditions that give rise to “ripeness”. “Ripeness” describes the conditions under which efforts to resolve conflict appear to be timely, and recognizes the cyclical character of conflict with its ebbs and flows and peaks and troughs.<sup>134</sup> Much of the scholarly writing on ripeness suggests that the most likely circumstances for effective intervention towards settlement is when there is a “hurting stalemate” between the parties, where each party is trapped without obvious options for escaping or avoiding the conflict. Hurting stalemate provides an incentive for the parties to ask themselves what they want and need out of this conflict and how they can take the necessary steps to reduce the negative impact of the dispute on their lives, their businesses, their reputations, and their long-term plans. Parties who find themselves in a hurting stalemate are motivated to settle, but they are also resentful and bitter, and negotiations are often very acrimonious. This appears to describe accurately the circumstances under which many lawsuits reach settlement. It would also explain why settlement often comes so late, the inexorable progress of arm’s-length procedures meaning that it may be months or even years before the parties understand themselves to be in a hurting stalemate, and this is most likely to occur as a trial date approaches. This may mean simply playing a waiting game: waiting for the virtual in-

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<sup>133</sup> Lawyers need to rethink their role in this type of meeting. They can encourage their clients to be both emotionally and substantively well prepared to participate in the discussion, and can also prepare them effectively in advance. Lawyers continue to play an important role as client advocate. The notion of “mediation advocacy” is just beginning to be written about. See e.g. J.L. Greenstone, S.C. Leviton & C.M. Fowler, “Mediation Advocacy: A New Concept in the Dispute Mediation Arena” (1994) 11 *Med. Q.* 293; C.A. McEwen, N.H. Rogers & R.J. Maiman, “Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation” (1995) 79 *Minn. L. Rev.* 1317; C. Noble, L.L. Dizgun & D.P. Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998).

<sup>134</sup> Kriesberg describes this as “circumstances when the conflict is ready for an effort to bring about ... change.” See *supra* note 46 at 4. See also Zartman, *supra* note 127; S. Touval & I.W. Zartman, “Mediation in International Conflicts” in K. Kressel *et al.*, eds., *Mediation Research: The Process and Effectiveness of Third-Party Intervention* (San Francisco: Jossey-Bass, 1989) 115 at 125-126; J.Z. Rubin, “The Timing of Ripeness and the Ripeness of Timing” in Kriesberg & Thorson, *supra* note 11, 237 at 242 [hereinafter “The Timing of Ripeness”].

evitability of settlement, negotiated by legal counsel at the eleventh hour between embittered opponents.

The analysis presented here suggests a number of alternate, more subtle signals of ripeness for dispute settlement. These include the ability to make discriminating predictions not based on assumptions or generalizations; the ability to “roll back” the conflict to its conceptual and pragmatic roots to understand better what is at stake; a heightened awareness of one’s own expectations and a readiness to understand the expectations of the other party; a decrease in emotional investment and a subsequent increase in pragmatic detachment and willingness to assess the risks of continuing the conflict; a readiness to collaborate with the other side over a process format and some basic ground rules of civility; and generally, a willingness to acknowledge the social reality of the other party as a starting point for negotiations. As well as recognizing new criteria for ripeness, understanding more about why people settle enables us to plan ways intentionally to create and nurture those conditions in the design of processes and systems.<sup>135</sup> The approaches I have described offer disputants a reflexive framework for an informed appraisal of settlement possibilities, helping to promote ripeness as early as possible in the life of a dispute. Further and deeper knowledge about why people settle needs to be viewed as a critical component of this and other future research and policy-making in dispute resolution.

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<sup>135</sup> See “The Timing of Ripeness”, *ibid.* at 239-40.