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

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

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

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

Even in matters that might, on the surface, appear as "cut and dry" with little gray outside of a guilty or not guilty outcome, there exists much *below* the surface for parties to explore in order to reach a greater common understanding between them, which expands the pool of meaning to support creative brainstorming of options for resolution beyond the simple verdict of right or wrong. For example, a mandatory penalty could intertwine a suspension with an agreement to participate in education. This outcome moves the parties beyond retribution to achieve the mutual interests of the individual's rehabilitation and prevention of a repeat

offence. Applying a nimble framework that supports the possibility of non-binary outcomes disrupts the limitation of conventional outcomes and underscores the reality of the multilayered essence of disputes.

### The Role of Mediation and Resolution Facilitation

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

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

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

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

Interest-based negotiation, grounded in the works of Roger Fisher and William Ury, suggests that disputants are often driven by underlying interests rather than strict positions. Mediators guide parties toward a more holistic understanding of the interplay between their own needs and interests and the concerns of others. Integrating these interests into the resolution process can yield solutions that resonate more profoundly and are more sustainable than a conclusion reached following the debate on whose position is "correct".

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

At the heart of both these theoretical models is the belief that all human action is the pursuit of satisfying basic human needs. Supporting conversations that recognize the importance of status/identity, certainty, autonomy, and fairness leads to possible outcomes that honour individual

closely held values while working together to accomplish the priorities and goals of the parties.

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

Mediators are crucial in guiding parties towards resolution. Mediators are also able to impact and support the follow through of the resolution. An interest-based agreement can outline the rationale behind the decisions made, emphasizing how the resolution aligns with the parties' core interests. The use of non-violent language (in both style and

approach) can infuse the agreement with a tone of empathy, acknowledging the emotional dimensions of the dispute while underscoring the shared pursuit of sports' integrity.

### **Conclusion**

The ability to empower parties to transcend binary outcomes is perhaps more akin to an art form than that of a technical skillset. For arbitrators and mediators, striking the right balance between addressing underlying issues

and staying focused on the main appeal is crucial. Overindulgence in the sub-issues can lead to a loss of direction, prolonging the process unnecessarily. Conversely, disregarding them entirely can result in a resolution that lacks depth or may be a contributing factor for the continuation of the conflict, possibly into an adversarial process. Skillfully navigating this balance requires a deep understanding of the parties' dynamics, the nature of the conflict, and the nuances of the sporting world itself.

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

*"Integrating these interests into the resolution process can yield solutions that resonate more profoundly and are more sustainable [...]"*



## SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and beyond, and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 54 mediators and arbitrators and we will slowly be introducing you to some of them through our regular installments of “SDRCC Roster Member Profiles”. In this edition we would like to present **Aaron Ogletree, Med/Arb Neutral**.



### What led you to a career in ADR?

Before my third year of law school, I hired a moving company to move my property from Minneapolis, Minnesota to Miami, Florida. The company did a poor job, resulting in many of my items being lost, stolen or damaged. I filed a lawsuit against the company and during that litigation, I was introduced to ADR through court-ordered mediation. The mediator helped us reach an efficient, effective and fair judgment. I wanted to have the skill set that the mediator had and to assist people in reaching resolutions similar to mine beyond what I can provide as a lawyer. Over time, I acquired that skill set which has continued to grow.

### As an SDRCC arbitrator and mediator, I...

... have managed several issues that are brought by both athletes and federations. I ensure that the parties understand the issues and the process. I also ensure that all the parties have an opportunity to be adequately heard.

### Field of specialization/Area of expertise:

I provide arbitration, mediation and med-arb services in civil, commercial and sport disputes. My work also involves training arbitrators and soon mediators in African countries, such as Zimbabwe.

### Favourite sport(s):

I enjoy fencing and playing rugby.

### Dispute prevention tips for athletes:

First, clearly articulate your issues and concerns. Second, listen actively to the other party’s concerns. Third, brainstorm about creative solutions to the issues at hand. Fourth, listen to the legal advice of your lawyer. Fifth, seriously consider which ADR process is best tailored to reach a fair resolution of your dispute. ■

**In our next edition, look for the profile of an SDRCC Mediator.**

## 2024 Mediator and Arbitrator Conference planning is underway!

In partnership with the Court of Arbitration for Sport (CAS), the Public Seminar will be held on Thursday February 1, 2024 at the Westin Calgary Downtown. Registration information will be available soon.

Contact [conference@crdsc-sdrcc.ca](mailto:conference@crdsc-sdrcc.ca) for more information.

**Follow Us on Social Media!** Stay current on the Sport Dispute Resolution Centre of Canada’s new decisions, activities and educational publications. Keep up with initiatives and updates from Abuse-Free Sport and the Office of the Sport Integrity Commissioner.



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Sport Dispute Resolution Centre of Canada  
Abuse-Free Sport Sans Abus



We are pleased to announce an exciting and important milestone for the Helpline. Following four years of successful operation, providing an invaluable resource to the Canadian sport community, the Canadian Sport Helpline will now be known as the **Abuse-Free Sport Helpline**, to align with the Abuse-Free Sport program and services offered. The Helpline acts as the first point of contact for all Canadians with inquiries about maltreatment and discrimination in a sport environment, serving the community by listening and offering support, and when possible, referring the client to the appropriate reporting mechanism.



## New SDRCC Staff Members



**Benjamin Bernier** joins the Office of the Sport Integrity Commissioner (“OSIC”) as Program Coordinator. He holds a degree in Radio Television Arts - Sport Media from Toronto Metropolitan University and pursued a legal education, obtaining a degree in Common Law from the University of Ottawa. Having completed his studies and licensing requirements, Benjamin sought to combine his two passions: sport and dispute resolution. He is excited to join the OSIC team and fulfill his role supporting and promoting the development of Abuse-Free Sport initiatives.



**Lise-Emma Aurélien** joins the SDRCC as Assistant Case Manager in the Dispute Resolution Secretariat. She obtained her college diploma in paralegal studies in 2019, then worked as a court clerk at the *Palais de justice de Montréal* for three years. Having always had a great appreciation for the legal sector (especially criminal law), she then started a law certificate at University of Montreal with the aim of becoming a lawyer. Lise-Emma is delighted to be able to broaden her horizons and fields of knowledge while supporting the sport community.



**Cindy Samu** joins the OSIC as Program Coordinator. The protection of values such as integrity, equity and justice are, in her opinion, fundamental and important. These values are defended by the Universal Code to Prevent and Address Maltreatment in Sport, so it is with enthusiasm that she joins the team. Regarding her professional education, she studied law in Belgium, obtaining her lawyer title from the Brussels Bar. She then acquired an equivalent law diploma in Canada at the University of Montreal. In Quebec, her professional experience has led her to work in a variety of fields. ■

## Notable Dates:

- **October 11, 2023:** Presentation to law students at Queen’s University, Kingston, ON;
- **October 17, 2023:** Virtual workshop on the Med-Arb Process for SDRCC roster members;
- **October 25, 2023:** Kiosk and workshop at the Safe Sport: It’s Everyone’s Business event, Ottawa, ON;
- **November 1, 2023:** SDRCC Webinar – Causes of Disputes and Prevention Strategies (open to public);
- **November 2-3, 2023:** Kiosk and presentation at the 2023 Petro-Canada Sport Leadership Conference, Calgary, AB;
- **November 20, 2023:** Virtual presentation to kinesiology students at the University of Calgary;
- **December 6, 2023:** SDRCC Webinar – Building Sound Team Selection Policies (open to public);
- **February 1, 2024:** Public portion of the SDRCC Mediator and Arbitrator Conference, Calgary, AB (open to public). ■

**WE’RE MOVING!**  
As of **December 1, 2023**,  
our address will change.

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