

THE WISDOM OF THE QUEBEC LAWMAKER AND MEDIATION: HOW GAME THEORY PROVIDES A NUDGE IN THE RIGHT DIRECTION

INTRODUCTION

In the new *Code of Civil Procedure*, Quebec's lawmakers have shown a strong resolve in favour of private processes for preventing and resolving disputes.¹ This resolve is manifested not only in the preliminary provision², but also by the fact that considering private means is now a mandatory step prior to litigation.³ As it is so recent, early assessments of the new Code are based on anecdotal evidence rather than a systematic analysis of private processes. Taking an approach rooted in mathematical economics⁴ demonstrates the lawmakers' (somewhat unintentional⁵) wisdom in advocating for these private processes—particularly in the case of mediation—as they favour more optimal dispute resolution for the parties involved than litigation. In this context, optimality refers to a strategy that maximizes utility for the parties. This approach reveals the mechanisms that make mediation optimal in many cases where parties are involved in a dispute.

AN APPROACH BASED ON MATHEMATICAL ECONOMICS

According to parliamentary proceedings, lawmakers primarily sought to recognize these private processes in order to reduce the burden⁶ on the court system and to foster a spirit of consensus in dispute resolution.⁷ However, the obligation to systematically consider these private processes⁸ has raised debate with respect to the priority granted to such processes versus public ones.⁹ In particular, Sylvette Guillemard, a professor at Laval University, is concerned that mediation may produce dissatisfaction in the long term as agreement is achieved through concession.¹⁰ On the other hand, Jean-François Roberge, director of Sherbrooke University's dispute prevention and resolution program, believes that the new code makes justice more accessible and efficient.¹¹

Despite these commentators' expertise, science has the advantage of being able to confirm or refute personal experience in a more objective way. This theory is in line with the law and economics movement (or economic analysis of law), a multidisciplinary intellectual ap-

proach that uses economic tools to study legal phenomena.¹² An important branch of this movement is normative law and economics, which analyzes legal phenomena from an economic standpoint in terms of their efficiency or optimality. In a conflict situation, a result is considered optimal when there is no other alternative in which all parties would be in a better position.¹³ While some criticize this approach as being somewhat simplistic,¹⁴ it does allow us to deepen our understanding of the mechanisms involved in legal phenomena.

Applying this reasoning, game theory confirms that mediation is more efficient than litigation and favours more optimal results for the parties involved in the conflict. Game theory uses mathematical economics to analyze the strategic behaviours of rational actors. According to the theory, a game is a context within which humans are in conflict or must cooperate in order to produce a result that is in their interests.¹⁵ The definition of a game is broader than a board game or a sport; it includes any



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human interaction governed by rules where those involved must adopt strategic behaviours. As seen through the prism of game theory, mediation is a game of both conflict and cooperation insofar as there are two parties seeking to come to an agreement that maximizes their individual interests.¹⁶

THE RULES OF THE GAME OF MEDIATION

Given the various models of mediation and various approaches taken by mediators, it can be difficult to isolate the unique characteristics of mediation.¹⁷ Each model of mediation requires different actions by the mediator and alters the optimal behaviours that each party should adopt. There are three main models of mediation: evaluative, facilitative and transformative.¹⁸ Evaluative mediation is an interventionist model in which the mediator advises the parties while aiming for a resolution he

or she considers fair. It is important to present the mediator with good arguments, as cooperation between the parties plays less of a role and the outcome depends on the mediator's neutral assessment.¹⁹ In facilitative mediation, the mediator is involved on a procedural level so as to ensure that the environment is favourable to negotiation. This model allows the parties leeway to negotiate between themselves. Meanwhile, the transformative mediation model is centred on a process seeking to rectify the breakdown of communication between the parties and favour more lasting interaction. The parties involved in transformative mediation must consequently adopt more cooperative behaviours, even outside the context of conflict.²⁰ Although somewhat succinct, these descriptions testify to the complexity of defining parameters that apply to all mediation models.

Mediation consists, first of all, of a confidential process that is without prejudice to the parties and takes place in the presence of a mediator. This process encourages the parties to express themselves freely. The mediator's role is to facilitate discussion between the parties so they can agree on a mutually satisfactory solution.²¹ According to Jean-Yves Brière, one of the mediator's principal tasks is to "make the parties understand that their position may not be as solid and perfect as they thought and that it would be in their interest to look at the opposing point of view."²² With this objective in mind, the mediator must begin by listening to the parties, sometimes proceeding in an interrogative manner so as to clarify their positions and differences. Aside from the mediator's presence and general attitude, mediation is relatively flexible in terms of form and encourages the parties' free expression.²³

THE THREE MECHANISMS OF MEDIATION

Game theory reveals several mechanisms that allow mediation to produce results that are more optimal than litigation, including: i) the ease of exchanging information, ii) the lower cost of mediation, and iii) the long-term transformation of the lawyer's profession.

I) THE EASE OF EXCHANGING INFORMATION

Like other means of dispute resolution, mediation is characterized by an absence of information and intentions. In contrast to games with complete information (such as chess or tic-tac-toe), mediation is a "game" with incomplete information.²⁴ In this sense, it is similar to poker, as the parties start off with little information, but more is revealed as the game goes on. In other words, the "players" know their own cards or relevant facts, but not those of the opposition. From a game theory standpoint, this information limits the players' range of strategic behaviours. The range of possible strategic behaviours becomes more restricted as more information is shared by the parties—just as the options in a game of chess are limited by the position of the pieces on the board. When a player does not have all the information, the most strategic behaviour is to prepare for all eventualities, which multiplies the possible strategic behaviours while attenuating the conflict.

Throughout mediation, the mediator plays a crucial role in the exchange of information. According to the economic model proposed by Goltsman et al, the exchange of information is a decisive factor in the success of mediation.²⁵ When a mediator is present, the parties feel more comfortable talking, allowing them to learn information from one another that was previously private.²⁶ In mediation, the relevant information includes not only the facts directly related to the dispute, but also the parties' preferences and positions with respect to the issues at hand. For example, in the case of mediation dealing with the splitting of an estate, relevant information may take the form of a preference to receive long-term liabilities rather than short-term. The other party may then orient their strategic behaviours taking this expressed preference into account. According to another model, when the information gap is reduced, the offer gap is also reduced, which speeds up the conflict resolution process.²⁷

The mediator controls the exchange of information so it is available to all par-

ties,²⁸ using means such as summaries and verification questions.²⁹ These behaviours make it possible to filter and verify information during mediation, ensuring a certain level of information sharing between the parties.³⁰ According to game theory, such filtering by the mediator is optimal conflict resolution behaviour, as it reduces the parties' range of possible strategic behaviours in this game of incomplete information.³¹ This has the effect of funnelling the information, thus reducing the number of contested issues and clarifying the real issues at stake in the conflict.

II) THE LOWER COST OF MEDIATION

From an economic standpoint, an amicable agreement is efficient when the explicit and implicit transaction costs are minimal. In a legal context, the explicit costs mainly include legal fees for lawyers and witnesses, as well as the costs or benefits associated with the settlement. The implicit costs primarily consist of missed opportunities for more favourable resolutions. In an ideal world, an optimal result would not entail any transaction costs for the parties.³² In reality, any transaction comes with costs—it is therefore a matter of determining how to minimize them.

The costs associated with mediation is a factor that motivates the parties to resolve their conflicts. According to a model designed by Cooter, Marks and Mnookin, increasing the cost of resolution speeds up the mediation and negotiation process.³³ Private processes

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have a marked psychological impact on the parties' expectations for the final outcome as well as the strategic behaviours they accordingly adopt.³⁴ Placed in a mediation context, the parties feel psychological pressure to make offers in order to get the process started and to come out with the best result. At the beginning, the parties are less flexible and less keen to compromise. As the mediation process goes on, the psychological barriers to reaching a resolution become less important in determining the parties' behaviours. These barriers often arise due to lack of information, meaning the parties are unable to understand the other side's rationale.

Consequently, the more information is exchanged, the more barriers to agreement are likely to fall. This psychological pressure explains, in part, the reduced explicit costs of mediation in comparison to other means of resolution.³⁵ According to this same model, the parties should do everything they can to avoid trial by favouring mediation.³⁶ If an agreement on the subject of the dispute is possible, it is preferable to resolve the conflict through mediation as the transaction costs are lower.

III) THE LONG-TERM TRANSFORMATION OF THE LAWYER'S PROFESSION

Professional ethics dictate that lawyers act in their client's interests.³⁷ However, the way in which a lawyer defends the client's interests can vary depending on the context. In other words, the lawyer's strategy is altered by the structure of the game. During a trial, the parties are aiming for a specific goal: to win. In contrast, private processes (mediation in particular) are often seen as a way of avoiding the "total war" of litigation and finding more creative solutions to legal problems.³⁸ This war imagery is fitting insofar as litigation is a zero-sum game between parties seeking the same objective: a winning verdict.³⁹ The lawyers' strategies will be focused more on achieving victory at the other party's expense than on reaching a mutually satisfactory agreement through cooperation.

By practising mediation, lawyers de-

velop skills and attitudes that are better adapted to mediation, such as empathy, understanding and good judgement.⁴⁰ Placed in a mediation context, lawyers—like mediators—are in a position to facilitate communication between the party they represent and the other.⁴¹

Furthermore, lawyers are able to develop conflict resolution techniques in a context that is less constrained by legal considerations.⁴² The law as such is the product of numerous considerations distilled into the form of rules. These considerations include public order interests, the various interests of the stakeholders in society and government interests.⁴³ During a trial, conflict is a zero-sum game between parties hoping to achieve the same goal: a winning verdict by virtue of the law. Mediation is less constrained by legal considerations and allows for resolutions based on the parties' interests.⁴⁴ Given this latitude, lawyers are able to suggest more creative, non-judicial solutions to their clients. Clients are therefore well advised to retain the services of a lawyer with more mediation experience. In other words, experience in mediation transforms a lawyer's job from "fighter" to "cooperator," which is an approach better suited to mediation.⁴⁵

CONCLUSION: THE WISDOM OF THE LIBERTARIAN PATERNALISM OF THE QUEBEC LAWMAKER

Quebec's lawmakers show a certain libertarian paternalism in the fact that private means of dispute resolution are

favoured rather than imposed. In *Nudge*, Richard Thaler and Cass Sunstein defend libertarian paternalism—a theory based on the idea that, most of the time, we are not completely rational agents capable of maximizing our own interests.⁴⁶ They argue for active techniques to build choice architectures that demonstrate a benevolent intention to favour the interests of the stakeholders while preserving their freedom of choice.

Through economic analysis based on global optimality, the wisdom of this libertarian paternalism can be confirmed. Thanks to the three mechanisms describe above, mediation can be used to achieve results that are more optimal for the parties involved. While the concept of optimality makes it possible to identify the best result for *all* parties, it does not allow the best result for *one* party to be achieved.⁴⁷ In this sense, the methodology applied is itself tinged with this paternalistic spirit, as it aims to protect society's well-being rather than to maximize individual interests. Nevertheless, this does not mean that those seeking to maximize their personal interests should not favour mediation over other means of dispute resolution. To the contrary, many economic models demonstrate that a rational actor will often prefer mediation instead of risking litigation, unless the conflict is a truly legal matter.⁴⁸ In short, from an economic standpoint, the new *Code of Civil Procedure* is a nudge in the right direction. 🏠

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