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UNDERSTANDING THE NEUTRALS IN CANADIAN INSOLVENCY PROCEEDINGS

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INTRODUCTION

Canadian insolvency rates took an expected decline at the onset of COVID-19 due to government supports.[1] However, recent events indicate an upward trend for insolvencies starting in 2022. As of December 2020, government supports targeted at remedying financial distress as a result of the pandemic are no longer offered.[2] With businesses being weaned off governmental supports and Bank of Canada interest rates jumping fifty basis points, Canada is set to experience spikes in corporate and consumer bankruptcy filing rates.[3] The insolvency system must prepare for this rise in insolvency proceedings while being mindful of parties' increasingly restrained resources.

In this Article, mediation is highlighted as a tool to alleviate the overburdened judicial system and resolve disputes more quickly in insolvency law, while also offering critical analysis of the state of mediation in Canadian insolvency law. The overarching critique presented is that little regard is given generally to the identity of who is taking on the mediator mandate, and how decisions are made in these proceedings. These questions are meagerly answered in Canadian scholarship to this point.

Similar to other jurisdictions, mediation has played an increasing role in insolvency proceedings as of late in Canada. Increasingly, Canadian corporations are entering into insolvency proceedings when attempts to hold

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1. Off. Superintendent Bankr., *Insolvency Statistics in Canada – 2021*, Gov't Can., https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/statistics-and-research/insolvency-statistics/annual-reports/insolvency-statistics-canada-2021 [https://perma.cc/Y6DE-X9GC] (last modified July 7, 2022).

2. The Canadian Emergency Response Benefit closed on December 2, 2020. Emp. & Soc. Dev. Can., *After CERB: Transitioning to Recovery Benefits*, Gov't Can., https://www.canada.ca/en/services/benefits/ei/cerb-application/transition.html [https://perma.cc/J3GE-S63M] (last modified Aug. 8, 2022).

3. *Bank of Canada Increases Policy Interest Rate by 50 Basis Points, Continues Quantitative Tightening*, BANK CAN. (Dec. 7. 2022) https://www.bankofcanada.ca/2022/12/fad-press-release-2022-12-07/ [https://perma.cc/5GHX-7QZP].

companies accountable through mass litigation creates a threat to the company's viability.[4] In Canada, these corporate insolvencies often take place under the Companies Creditors' Arrangement Act (CCAA), similar to the American Chapter 11 proceedings.[5] Within these complex proceedings, there is a rise of mediation orders being made in an effort to further mediation's typical goals of fairness and efficiency in a CCAA context. Generally, mediation occurs when a presiding CCAA judge directs parties to participate in a mediation by either another judge or a private neutral person (Neutral). Mediations that take place in a CCAA proceeding provide insights into the way that Alternative Dispute Resolution (ADR) processes more generally can be beneficial when placed in the context of complicated insolvencies.

For example, recently mediation has encouraged successful settlements for the CCAA proceeding of CannTrust holdings, a cannabis company. Most of the defendants in class actions against CannTrust that were pending in the United States and Canada were able to reach a global resolution approved on July 16, 2021.[6] Not only can mediation bring about a settlement, but it can also play a fruitful role in cross-border issues that could further expedite insolvency proceedings that involve multi-national stakeholders. An important and often challenging element to insolvency proceedings are the plethora of stakeholders and claims that exist as corporations file for CCAA protection. The mediator plays a key role in managing these competing claims. Whereas we can cite successful outcomes of mediation, the mediator has been left outside of scholarly analysis. To continue implementing ADR in a meaningful and beneficial way, we require experienced counsel and mediators. But little is known about the experience and demographics of mediators in insolvency. This Article is an examination of who is mediating insolvency proceedings and subsequently, who *should* be mediating and who is able to mediate proceedings in the future.

4. See, for example, the recent decision in *In re* CannTrust Holdings Inc., 2021 ONSC 4408, ¶ 3 (Can. Ont.), https://www.canlii.org/en/on/onsc/doc/2021/2021onsc4408/2021onsc4408.html [https://perma.cc/CR9M-2D3F], where a class action was commenced in both the United States and Canada against the company upon CannTrust's announcement that it was growing cannabis in breach of federal law on July 8, 2019. The proposed Settlement of $83,000,000 in exchange for release of liability will be handled in the Plan of Arrangement through the CCAA proceeding. *Id.* ¶ 9.

5. The CCAA is a binding federal act that applies to insolvent debtor companies owing in excess of $5 million (CAD). R.S.C. 1985, c C-36 (Can.). The CCAA is comparable to its cross-border legislation, a Chapter 11 Filing under the United States Bankruptcy Code. 11 U.S.C. §§ 1101-1195.

6. The class action settlement was approved via Sanction Order (sourced from the Office of the Superintendent of Bankruptcy) on July 16, 2021. Sanction Order, *CannTrust*, 2021 ONSC 4408 (CV-20-00638930-00CL), https://documentcentre.ey.com/api/Document/download?docId=34006&language=EN [https://perma.cc/Y35Y-V9JL].

Melissa Jacoby's *Other Judges' Cases* inspires this attempted unveiling of the Canadian mediator in insolvency disputes.[7] The Ontario Bar Association's recent report on mediator demographics underscores the need to address mediator and arbitrator diversity. Statistics, case studies, and self-reports all confirm that the current norm in Canada is that a mediator will be white and male, but those who enter mediation come from different backgrounds. To this end, ADR remains out of touch with the reality of the diverse professionals and legal parties in Canada.

In Part I, this Article examines the nuances to mediation: What does it mean to be a mediator, and how can mediators be held to the same judicial ethics and accountability in a private, non-binding setting? In answering these questions, this paper reviews mediation's role in insolvency cases. Across these cases, mediation proves challenging in the attempts to balance parties' vulnerabilities with other stakeholder rights.

In Part II, this Article then takes the position that mediation agreements should be respected and encouraged in the context of insolvency proceedings, if there is recognition of issues with accountability and measuring success in the mediation context and requires improvements to transparency and diversity in CCAA procedure.

I. MEDIATION IN CANADA

A. Understanding Mediation

Mediation allows parties to mold the time, place and methods to resolve a situation. However, it can also be an area of judicial oversight, a way for judges to delegate their role to their colleagues.[8] While mediation is supposedly neutral, each party can provide input, which afflicts this neutrality. Impaired neutrality in mediation decisions can make mediation an ineffective tool for vulnerable parties. In an insolvency proceeding, one party has already exposed their financial insecurity; mediation should therefore be cautiously used in this context.

Mediation is one branch of ADR. While arbitration is an alternative route, judicial review of mediation can prove more modest, and courts provide more deference to mediation agreements.[9] Mediation is increasingly intertwined with the judicial system, with many court systems including

7. Melissa B. Jacoby, *Other Judges' Cases*, 78 N.Y.U. ANN. SURV. AM. L. 39, 42 (2022).

8. *Id.* at 43.

9. Jennifer W. Reynolds, *Judicial Reviews: What Judges Write When They Write About Mediation*, 5 PENN ST. Y.B. ON ARB. & MEDIATION 111, 112 (2013).

mediation as part of the pre-trial process.[10] Mediation is more accessible in Canadian jurisdictions than American states. In Canadian insolvencies, mediation is court-ordered and can be sanctioned at any point in the proceedings. Any party deemed fit can be a mediator.[11] For some Chapter 11 proceedings, mediation can only be used for certain matters. For example, fifty-one out of ninety-four American bankruptcy courts authorize mediation and of those, five courts authorize mediation solely for adversary proceedings (separate lawsuits to the bankruptcy, i.e., civil litigation). Fifteen courts authorize mediation solely for contested matters (issues to resolve so the bankruptcy can move forward) and adversary proceedings. The remaining permit mediation for any dispute that may arise.[12] States are adapting to allow their district court rules to include mediation as part of a bankruptcy court power,[13] but parties' access to mediation in a Chapter 11 proceeding is still determined on a district-by-district basis. For this paper, we examine and suggest improvements to Canadian mediation in the insolvency context in the hopes that the American system follows suit, as it already has with increasing allowance for mediation in Chapter 11 proceedings.

Mediation happens, this much is understood. But until recently, demographic information about mediators was sorely missing.[14] Who is a part of it, and are these mediating judges the optimal facilitator for out-of-court insolvency issues? American studies show that sitting judges have mediated in most municipal bankruptcies.[15] In Canada, there is also a pattern of judges as mediators.[16]

Mediation in bankruptcy has resulted in settlement for high-profile cases.[17] Though mediation in bankruptcy is increasingly used, few judicial opinions have discussed mediation's impact in bankruptcy.[18] Sometimes,

10. *Id.* at 112-13.

11. Bankruptcy and Insolvency General Rules, C.R.C., c 368, § 105(3)(b) (Can).

12. Ralph Peeples, The Uses of Mediation in Chapter 11 Cases, 17 AM. BANKR. INST. L. REV. 401, 410 (2009).

13. *See, e.g.*, D. Neb. Mediation Plan, https://www.ned.uscourts.gov/internetDocs/mediation/mediationplan.pdf [https://perma.cc/6D24-AMZL], *authorized by* D. Neb. Gen. R. 1.2(h); 11 U.S.C. § 105 (providing for the general powers of bankruptcy court to issue "any order . . . that is necessary").

14. ONT. BAR ASS'N, NEUTRAL DIVERSITY IN ONTARIO REPORT BY THE WORKING GROUP ON NEUTRAL DIVERSITY 2 (2022), https://www.oba.org/CMSPages/GetFile.aspx?guid=feddadcd-980f-4e83-86c9-ff8ecbfba32d [https://perma.cc/A8HT-5EGQ].

15. Jacoby, *supra* note 7, at 47-48.

16. As per hand-collected data on file with the authors.

17. Jacoby, *supra* note 7, at 46-47.

18. Nancy Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 428 (2009).

judges as mediators will make both procedural and substantive decisions, indicating that the role of mediator as divergent from the traditional neutral is not fully realized in bankruptcy proceedings.[19] Mediation is still useful in bankruptcy because these proceedings require experimentation with alternatives, and mediation can excel at facilitating these experimentations.

Bankruptcy courts can use ADR to negotiate the terms of the reorganization and resolve creditor disputes.[20] Mediation as a process can prove helpful in bankruptcy cases, but the parties subject to mediation can encounter barriers to access due to the lack of diversity amongst mediators in Canada, evidenced through recent revelations arising from mediator data.

There are incentives to having a judge as mediator. Parties involved in mediation may find it useful to be evaluated by someone who rules over legal disputes for a living.[21] Yet formal professional qualifications may not be the sole metric for competency. Culture can play a role in conflict such as bankruptcy proceedings. Culture is a broad term, describing the values, influences and attitudes that drive behaviours and decisions.[22] This concept also includes the groups we are part of, whether it be age, socioeconomic class, sexual orientation, religious affiliation, or gender.[23] Culture can influence the ways we frame and approach conflict, so it is therefore a crucial factor in the outcomes for dispute resolution.

Cultural fluency can be missing where a judiciary lacks diversity.[24] Without broader representation among those who facilitate mediation, there may be limited efficacy to mediation's accessibility and justice.[25] Despite approximately one in five Canadians identifying as a member of a visible minority group,[26] visible minorities are underrepresented in the Canadian judiciary. A diverse judiciary not only enhances representation but also

19. *Id.*

20. Ralph R. Mabey et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S.C. L. REV. 1259, 1267 (1995).

21. Jacoby, *supra* note 7, at 49.

22. Kendrick Lo, *Education Without Representation: Cultural Fluency, Diversity, and Dispute Resolution in the Canadian Context*, 7 J. ARB. & MEDIATION 65, 71 (2018).

23. *Id.*

24. Kirk Makin, *Of 100 New Federally Appointed Judges 98 Are White, Globe Finds*, Globe & Mail (Apr. 17, 2012), https://www.theglobeandmail.com/news/politics/of-100-new-federally-appointed-judges-98-are-white-globe-finds/article4101504/ [https://perma.cc/4BV8-T9PH].

25. Lo, *supra* note 22, at 70.

26. *Number and Proportion of Visible Minority Population in Canada, 1981 to 2036*, STATS. CAN., (Oct. 25, 2017), https://www.statcan.gc.ca/en/dai/btd/othervisuals/other010 [https://perma.cc/W5WG-W7YK] (demonstrating that 22.3% of Canadians identify as a visible minority).

judicial decision making.[27] Commentators believe the need for diversity in the judiciary is practical: the more diverse the bench, the better the quality of decisions. Diversity increases the range of perspectives and avoids unintentionally replicating perspectives and values of a limited subset of human experience.[28] Canada has taken significant steps in recent years to improve the diversity of the judiciary. However, this has not yet been evident in the Commercial List, for example, resulting in a smaller pool of diverse judges to look to serve as mediators. The Commercial List in Ontario is a subsection of the Superior Court of Justice handling complex commercial matters. Of the eight judges serving on the Commercial List, two are women-identifying, and all eight appear white and do not indicate diverse backgrounds in their profiles.[29] The Commercial List is a microcosm for the diversity issues at large in the Canadian courts.

Diversity provides parties with different insights than a homogenous bench or mediator. Parties enter a mediation to expand their choices beyond that offered in court procedure. Therefore, diversity is necessary in mediation to sustain the component of choice in ADR.

B. Case Studies in Insolvency

Judges in a CCAA proceeding in Canada have the authority to uphold the use of mandatory ADR procedures as part of a plan.[30] Although consent is key to allowing mandatory ADR procedures to practically move forward to a resolution, courts may still intervene to stop mandated ADR, such as arbitrations, in favor of a single proceeding bankruptcy model.[31] The Supreme Court of Canada notes that ADR can compromise the orderly and efficient resolution of a bankruptcy proceeding.[32] In certain insolvency matters, Canadian courts may rule that it is necessary to preclude ADR even if contractually agreed upon between parties in favor of a centralized judicial process.[33]

27. Samreen Beg & Lorne Sossin, *Diversity, Transparency & Inclusion in Canada's Judiciary*, *in* Debating Judicial Appointments in an Age of Diversity 117, 122 (Graham Gee & Erika Rackley eds., 2018).

28. *Id.* at 124.

29. *Commercial List*, LENCZNER SLAGHT (May 1, 2017), https://commerciallist.com/resources [https://perma.cc/T8ZJ-2BNC].

30. *In re* 1057863 B.C. Ltd., 2022 BCSC 759, ¶¶ 66, 123-124 (Can. B.C.) [hereinafter *Northern Pulp 2022*].

31. Factum of Respondents ¶ 130, Peace River Hydro Partners v. Petrowest Corp., [2022] S.C.R 41 (No. 39547) (Can.), https://www.scc-csc.ca/WebDocuments-DocumentsWeb/39547/FM090_Respondents_Petrowest-Corporation-et-al_Reply-to-Interveners.PDF [https://perma.cc/7FDP-AZWX].

32. *Peace River Hydro Partners*, [2022] S.C.R., ¶ 9 (Can.).

33. *Id.* ¶ 73.

Before examining the role of diversity in insolvency mediations, it is important to examine how mediation has been employed in this subset of Canadian law. This Section assesses recent examples of mediation in Canadian insolvency law to uncover when mediation is relied upon and what resistance or supports exists.

1. *Northern Pulp*

Mediation can offer a facilitative environment for dispute resolution, but it is not intended to bind parties. As a result, mandatory mediation can be ordered to force participation, but courts cannot force acceptance of any settlement or resolution in mediation without parties' consent, as explained in Northern Pulp 2022.[34]

On June 19, 2020, Northern Pulp, a producer of softwood pulp in Nova Scotia, voluntarily filed for protection under the CCAA.[35] The Petitioners had shut down the pulp mill on January 31, 2020, completely ceasing its business activities. Most employees were laid off, and due to the "devastating effect" of the shutdown, the Petitioners sought and were granted an initial order under the CCAA.[36]

Northern Pulp asserted compensation claims against the province of Nova Scotia due to the closure of the pulp mill.[37] The court concluded that the rights of the Petitioners under their claims against Nova Scotia were litigation assets that Northern Pulp was seeking to preserve to benefit its stakeholders.[38] In August 2021 Northern Pulp sent correspondence to Nova Scotia suggesting mediation. In September 2021 the province advised in response that it was opposed to any mediation and settlement discussions were premature since a claim was not filed.[39]

On December 16, 2021, the Petitioners filed a notice of action in the Nova Scotia Supreme Court against Nova Scotia, contending that the value of their claims could exceed $450 million.[40] The Petitioners also notified Nova Scotia of their intention to seek a mediation order. Mediation was ordered on April 1, 2022, as part of the Court's broad statutory jurisdiction under the CCAA.[41]

34. *Northern Pulp 2022*, *supra* note 30, ¶¶ 112-113.
35. *In re* 1057863 B.C. Ltd., 2020 BCSC 1359, ¶ 6 (Can. B.C.).
36. *Id.* ¶¶ 3-5.
37. *Northern Pulp 2022*, *supra* note 30, ¶ 18.
38. *Id.* ¶ 23.
39. *Id.* ¶¶ 31-32.
40. *Id.* ¶¶ 36-37.
41. *Id.* ¶ 49.

Nova Scotia adamantly objected to these mediations as a major secured and unsecured creditor.[42] Nova Scotia put forth that it was not liable, that it would not be in the public interest to settle the litigation, and that the province felt it was being "dragged" into the process.[43]

The insolvency legislation in Canada grants powers to order mandatory mediation.[44] Justice Fitzpatrick made reference to several CCAA cases as precedent for a mandatory mediation order. The referenced cases were distinguishable as the cases all involved a claim asserted by the creditor against the debtor, rather than the reverse in *Northern Pulp*. In addition, these cases involved urgent matters. Justice Fitzpatrick acknowledged these distinctions, but did not allow a lack of precedent to dictate the result. It is the legislation, the CCAA, that allows adaptation to meet the particular facts and issues before the court. Given the broad statutory jurisdiction and the fact that the proposed mediation is relevant to the success of the insolvency proceedings, Justice Fitzpatrick found it necessary to grant a mandatory mediation.

The recent case calls into question how mediation can be beneficial where there is an unwilling participant, such as the province of Nova Scotia. Mediation is meant to encourage discussions and settlement between parties. Justice Fitzpatrick noted that no matter the result, there would be benefits to a mandatory mediation. If settlement is achieved, then the result will enhance a successful restructuring. But, if settlement is not achieved, mediation may still act to narrow the issues between the parties.[45] Mediation success need not only be measured through settlement. As with many mediations in insolvency, the court selected a judge, the Honourable Justice Thomas Cromwell C.C., to act as a neutral third party mediator.[46] The costs of the mediator in *Northern Pulp* were set to approximately $385,000, whereas legal costs were $545,000 and counting.[47] Cost efficiency, narrowing of the issues, and possible settlement are therefore all benefits to a mediation despite the lack of agreement among both parties to enter these dispute resolution mechanisms.

42. *Id.* ¶¶ 4-5.

43. Taryn Grant, *Court Orders Nova Scotia to Enter Mediated Talks with Northern Pulp*, CBC (Apr. 1, 2022), https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-northern-pulp-mediation-1.6404496 [https://perma.cc/Z8V7-ZVT8].

44. *Northern Pulp 2022*, *supra* note 30, ¶¶ 54, 121.

45. *Id.* ¶¶ 96-97.

46. *Id.* ¶¶ 1, 6.

47. *Id.* ¶ 94.

2. *Laurentian*

Ontario's Laurentian University of Sudbury (Laurentian) became the first public university to commence a restructuring under the CCAA on February 1, 2021.[48] The primary factor related to Laurentian's deterioration was an increasing debt burden due to poor capital investments in expansion projects, aggravated by additional factors such as a domestic tuition reduction and freeze, and a large number of active programs relative to its number of students.[49] The restructuring led to significant changes to the university programs, resulting in significant cuts in faculty and staff.[50] In an effort to bring successful agreements between the stakeholders, Justice Sean Dunphy was appointed as mediator for negotiations between Laurentian and the affected unions.[51] The mediation focused on cost-savings and involved the Laurentian bargaining units, including a sub-committee of the university's Senate, LUFA (the bargaining unit representing faculty), and LUSU (the bargaining unit representing non-faculty staff).[52]

The mediation achieved certain milestones within two months of the year and a half ongoing CCAA proceeding, including amendments to the employee pension plans and discussions to improve the operating cost structure.[53] These milestones underscore the time-saving benefits to mediation in the insolvency proceedings. The mediation sessions were also attended by other interested parties, such as Laurentian's primary bank lenders.[54] Notably, the monitor repeatedly reported that the commitment and effort made by the parties in the mediation negotiations were "extensive,"[55] participating in sessions daily and engaging in further discussion without the mediator. Effort and ongoing participation may lead to an expedient mediation, further calling into question whether mandatory mediation, as in *Northern Pulp*, is the best strategy for an insolvency.

The mediation allowed for the representation of several stakeholders at Laurentian but also, demonstrated an acknowledgement of the diversity of stakeholders as the Senate Sub-Committee, including Anglophone,

48. *In re* Laurentian Univ. of Sudbury, 2021 ONSC 3272 (No. CV-21-656040-00CL) (Can. Ont.), https://documentcentre.ey.com/api/Document/download?docId=33498&language=EN [https://perma.cc/QG77-H3DV].

49. Virginia Torrie, *Laurentian University of Sudbury: A Consideration of Restructuring, Public Institutions and the Public Interest*, 66 Canadian Bus. L.J. 94 (2022) (manuscript at 3) (available at the Social Science Research Network), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3954208.

50. *Id.* at 1.

51. *Laurentian Univ. of Sudbury*, 2021ONSC 3272 ¶ 3.

52. *Id.* ¶ 59.

53. *Id.* ¶¶ 91, 118-120, 63.

54. *Id.* ¶ 61.

55. *Id.* ¶ 91.

Francophone, and Indigenous representation.[56] The mediation focused on reductions to LUSU positions and cost reductions through cuts to faculty and programming.[57] The Monitor acknowledged that Laurentian will face significant challenges to save money, and some of these challenges were overcome through the constructive mediation and sacrifices made.[58] Mediation will not solve all aspects of a restructuring. However, getting various stakeholders to discuss their interests and come to compromises are some of the foreseeable benefits of mediation in Canadian insolvency proceedings, especially in an unprecedented restructuring like a public university.

3. *Madison Square* (New York)

The aforementioned Canadian cases are large scale insolvencies, costing tens of millions of dollars. Mediation initiates discussions around settlement, but it is an out-of-court proceeding that requires participation from all parties involved. It is a dispute resolution mechanism that brings parties in constant contact, proximity with one another. This style may not prove useful in the context of vulnerable stakeholders.

This section concludes by examining the use of mediation in an insolvency involving mass tort litigation. On July 1, 2022, the Madison Square Boys & Girls Club notified its bankruptcy judge in New York City that it would use its Chapter 11 case to mediate over one hundred sexual abuse claims involving a doctor who volunteered at the club center.[59]

Madison Square informed the bankruptcy judge that mediation would be the only way to bring the sexual abuse claims to negotiations before the non-profit runs out of funds.[60] Madison Square filed a motion to appoint the Honorable Shelley C. Chapman as a mediator and to compel mediation with the sexual abuse claimants for a period of ninety days.[61]

Whereas *Northern Pulp* supported mandatory mediation between the province and a corporation, there are factors to consider where mandatory mediation involves vulnerable parties and a corporate petitioner. Madison

56. *Id.* ¶ 67.

57. *Id.* ¶ 99.

58. *Id.* ¶ 140.

59. Dietrich Knauth, *New York Youth Club Seeks to Mediate 140 Sex-Abuse Claims in Bankruptcy*, REUTERS (July 1, 2022), https://www.reuters.com/legal/litigation/new-york-youth-club-seeks-mediate-140-sex-abuse-claims-bankruptcy-2022-07-01/ [https://perma.cc/BG5H-E3PN].

60. *Id.*

61. Declaration of Jeffrey Dold ¶ 68, *In re* Madison Square Boys & Girls Club, Inc., 642 B.R. 487, (Bankr. S.D.N.Y. 2022) (No. 22-10910), https://fingfx.thomsonreuters.com/gfx/legaldocs/gdvzyggokpw/madison%20square%20first%20day%20declaration.pdf.

Square harnesses mediation to negotiate these claims before money runs out, however a compulsory process for vulnerable creditors may not be in the creditors' best interests.

4. Takeaways from North American Insolvency Caselaw

Mediation is praised as a vehicle for access to justice because it is meant to provide autonomy and empowerment for involved parties.[62] Critics have argued that where mediation is court-mandated, ignoring consent, there can be negative consequences for individuals with disadvantaged economic status.[63] These consequences include additional costs to litigation, facing coercive behaviors by mediators and the inability to receive legal advice from the mediator given the restrictive rules in a mediation.[64]

In cases involving vulnerable parties, mediation must be approached cautiously. These parties may face evaluative behaviours during mediation, such that the mediator becomes more coercive than facilitative.[65] Mediation may be a more expedient process, providing possible settlement rather than leaving victims unable to recover due to a lack of funds. However, it is essential that court orders consider parties' legal rights and entitlements, such as greater damages that may be awarded in courts as opposed to in the hands of a mediator.[66]

These cases emphasize the increasing role of mediation in high-cost and high-stake insolvency proceedings. The mediators assigned fit a consistent mold: a past judge, typically male, typically white. Considering the diverse stakeholders in an insolvency proceeding, it is worth questioning why mediators do not reflect the very parties they hope to understand and help in a mediation.

II. MEDIATION IN CANADIAN INSOLVENCY: THE WAY FORWARD

This Part of the Article examines Canada's efforts to account for mediator demographics and improve upon diversity and inclusion. For the first time, in March 2022, Ontario's Bar Association (OBA) released a report assessing Neutral Diversity in Ontario.[67] The Ontario Bar Association is the largest volunteer lawyer association in Ontario, with approximately 16,000

62. Jacqueline M. Nolan-Haley, *Mediation, Self-Represented Parties, and Access to Justice: Getting There from Here*, 87 FORDHAM L. REV. ONLINE 1, 1 (2018).

63. *Id.* at 2.

64. *Id.* at 5.

65. *Id.* at 5-7.

66. *Id.* at 7.

67. ONT. BAR ASS'N, *supra* note 14.

members. Its ADR section has over 250 members who are engaged in mediation daily.[68] This section created a working group to examine Neutral Diversity in ADR settings and suggest improvements in this area for Ontario.[69] Assessing this report, in conjunction with our review of CCAA mediations in the last ten years, it is clear the diversity must be enhanced and further studied in mediation and arbitration in Canada.

A. Expanding Canadian Mediation Accountability Measures

1. OBA Report: Neutral Diversity in Ontario

In Ontario, there is no central register for all the mediations that take place in a year, nor is there demographic information about the Neutrals who administer mediations.[70] Confidentiality rules can make it difficult to obtain demographic information while maintaining privacy.[71] This report contains results of an online survey administered in July 2021 to OBA members seeking information about the mediators and arbitrators in Ontario.[72]

The results, though not reflective of the diverse population in Ontario, are consistent with our review of CCAA mediations—mediators are predominantly white and male. The survey reports that mediators hired were men 70% of the time, and white 94% of the time.[73] While this demographic portrays the demographics of the legal profession in Canada,[74] what is more concerning is the resistance to changing and growing the diversity of Neutrals in Canada. Respondents note that there is a lack of familiarity with racially diverse, female mediators and when women mediators are proposed, they are always rejected.[75] A lack of diversity is attributable both to parties involved in a mediation and the dominant trends in lawyer demographics in Canada.

However, within the survey, some respondents took active steps to incorporate diverse Neutrals in their practice. One respondent reported hiring 173 Indigenous and 254 racially diverse mediators.[76] But there are still concerning behaviours amidst clients. There is a general preference for male

68. *Id.* at 2.
69. *Id.*
70. *Id.* at 8.
71. *Id.*
72. *Id.*
73. *Id.* at 9. It must be noted that the Working Group could not confirm if the race and gender of the Neutrals were assumed. *Id.* at 9 n.24.
74. Beg & Sossin, *supra* note 27, at 121-22.
75. ONT. BAR ASS'N, *supra* note 14, at 9.
76. *Id.* at 9 n.26.

mediators. While two respondents stated that a woman is preferred for sexual assault cases, these behaviors indicate that overall, a man is preferred over a woman when selecting mediators in most cases, unless it is a sexual assault case.[77]

The OBA emphasizes that change could not be achieved by those who are outside of the system. Without including marginalized groups through diverse Neutrals, the mediation system becomes inaccessible for a large portion of Canadians that identify as diverse or female.

2. Our Review

To further verify if the more generally observed Neutral demographics persist in CCAA proceedings, we reviewed this century's litigation-driven[78] CCAA filings and further investigated the proceedings that involved mediation (2000-2021).

Of forty-two CCAA filings we studied from 2000-2021, eighteen had mediation proceedings with a set mediator, three are yet to be determined, eighteen had no mediation proceedings, and three had missing information. All mediators were male and most likely white.[79] Mediation does not have precise effects on judicial outcome. Bankruptcy liquidation is a prevalent outcome for medium or small enterprise insolvencies in Canada.[80] Sometimes, liquidation is the most effective resolution but overall liquidation results in lost value and assets to creditors and debtors. The enterprise shuts down or is absorbed by larger entities.[81] We can confirm through our data that insolvencies with mediation experienced no different outcomes with regards to liquidations than insolvencies without mediation. Five of the eighteen CCAA proceedings with mediation resulted in liquidation, and of the eighteen CCAA proceedings without mediation, five also proceeded to liquidation.

In terms of the role in the judicial system, two mediators are still active judges, two mediators were not judges (both were lawyers focusing on ADR), and the remaining fourteen mediators were retired judges.[82] The profile reflects the OBA survey in terms of race and gender. While high-profile mediations in the United States have employed female-identifying

77. *Id.* at 10.

78. For the purposes of this study, *litigation-driven CCAA* is a filing that was driven by a mass litigation outcome.

79. Note: There is no source identifying the mediators' race. It is presumed from the name.

80. JANIS P. SARRA, MICRO, SMALL AND MEDIUM ENTERPRISE (MSME) INSOLVENCY IN CANADA 6 (2016).

81. *Id.*

82. Data hand collected by authors and on file with them.

mediators,[83] the same cannot be said for Canadian CCAA filings studied that have all been entrusted to males to date.

3. Challenges to Our Review

A challenge to this review was determining whether these statistics speak to the success or impediment of mandated mediation in CCAA proceedings. Mediation mandates did not always precisely define the purpose or desired outcome of the mediation process, so it could not be determined if mediation is useful for those cases without a prescribed mandate. The proceedings with mediation mandates typically include three elements as part of mediation: to delineate parties' respective issues,[84] facilitate a negotiation for a settlement,[85] and promote further discussions amongst parties even if no settlement is reached.[86]

We observed a trend that mediation was able to incite meaningful discussions, especially for the resolution of product liability claims.[87] Mediation provided a foundation for liability claims to settle, saving these petitioners millions and expediting the CCAA process for other stakeholders. For example, in *Re Muscletech*, mediation was stated to play a fundamental role in settling thirty out of thirty-three product liability actions.[88] *In re Muscletech* also saw mediation offer a highly successful mechanism for resolving product liability claims for many different tort claimants.[89] The role of mediation in CCAA proceedings can therefore be, at the very least, a guiding procedure for product liability claims.

83. *See, e.g.*, Dietrich Knauth & Jonathan Stempel, *Purdue Pharma Mediator Indicates Sackler Opioid Deal in Final Stage*, YAHOO!NEWS (Mar. 2, 2022), https://news.yahoo.com/purdue-pharma-mediator-extends-negotiations-140620564.html [https://perma.cc/3X9P-G8QF]. U.S. Bankruptcy Judge Shelley Chapman was appointed as mediator. She indicated that the Sackler opioid deal is in the final stages and was hopeful settlement could be reached.

84. *See, e.g.*, Litigation and Mediation Process Order of October 28, 2020, Zentner v. GFA World, 2022 ONSC 1683 (CV-20-00643091-00CL) (Can. Ont.), https://www.pwc.com/ca/en/car/gfaworld-/assets/gfaworld-048_110620.pdf [https://perma.cc/6BSB-6J32].

85. *See, e.g.*, *In re* Imperial Tobacco Canada, 2019 CarswellOnt 24185, ¶ 40 (Can. Ont.) (WL), http://cfcanada.fticonsulting.com/imperialtobacco/docs/Amended%20and%20Restated%20Initial%20Order%20as%20of%20April%205,%202019.pdf [https://perma.cc/Z8GR-Z6T4].

86. *See, e.g.*, *In re* Castor Holdings, 1993 CarswellQue 473 (Can. Que. QCSC) (WL). The mediation was not entirely successful but provided a basis for further discussions. The case eventually settled the litigation through CCAA, which likely saved years and many more millions of dollars to all parties. Letter from Philip Manel, Tr. of Castor Holdings, to Creditors (June 3, 2016), https://www.richter.ca/wp-content/uploads/Insolvency-Cases/en/C/Castor-Holdings-Ltd/Bankruptcy-Proceedings/Other/15-Report-creditors-20160603.pdf [https://perma.cc/G2HM-AHAR].

87. *In re* Muscletech Research & Development Inc., 2007 CarswellOnt 1029, ¶ 10 (Can. Ont.) (WL).

88. *In re* Muscletech Research & Development Inc., 2006 CarswellOnt 6230, ¶ 2 (Can. Ont.) (WL).

89. *Muscletech*, 2007 CarswellOnt 1029 ¶ 11.

We do note that one challenge to successful mediation in CCAA proceedings is having only judges as appointed mediators. Using judges as mediators can introduce judicial power, introducing coercive dynamics and undermining mediation's principles of transparency and facilitation.[90] Since this is the first Canadian study examining mediator profiles and demographics in insolvency, it is difficult to conclude whether these coercive dynamics truly take place in a court-mandated mediation for litigation-driven CCAAs.

Comparing CCAA mediation mandates to that of other Canadian mediation mandates, the judges are recognized and skilled in the mediation practice.[91] The possible issue with judges as mediators is not their merit, but whether the principles of mediation are upheld when a judge is appointed as mediator. The principles focused on in this paper are participation from involved parties, facilitation of discussion and parties' goals, and a democratic process.[92] The democratic process in this paper is understood as the parties' freedom to talk to each other directly and the ability to exercise a high degree of choice.[93]

Many critics caution that there ought to be a line between ADR and adjudication to prevent ADR from transforming into an adversarial adjudicative process.[94] If judges, in their role as mediator, act with too much gravitas, such that parties feel coerced to settlement, this works against parties' freedom and democracy in ADR.[95] Conversely, judges that are too passive can meet resistance from those parties mandated to enter mediation.[96] However, given that mediation can be practiced in different ways as mechanism for dispute resolution, these cautions should not negate a judge's ability to take on roles as a mediator. Rather, these difficulties could be resolved by ensuring a more diverse roster of mediators, from all positions, as opposed to only from the judiciary, for these instances where parties feel a judge is not upholding the principles of a mediation environment. The following section of this paper further addresses how diversity interacts with insolvency mediations, given that our review shows that diverse neutrals played little to no role in CCAA mediations to date.

90. Jacoby, *supra* note 7, at 40-41.

91. Hugh F. Landerkin & Andrew J. Pirie, *Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?* 82 Can. Bar Rev. 244, 266 (2003).

92. *Id.* at 259-60.

93. *Id.*

94. *Id.* at 277.

95. *Id.* at 294.

96. *Id.*

4. Diversity and Inclusion – Why Is It Necessary in Insolvency Mediations?

Besides ethical responsibility, there are also additional values to supporting the growth of Neutral diversity in mediation practices. This Section assesses two values derived from increased diversity in Neutrals: enhancing client outcomes and improving the legal system through inclusion.

i. Enhancing Client Outcomes

With more diverse mediators, there is greater cultural fluency and increased likelihood of a preferable resolution, such as a mutually beneficial settlement. It appears as though Canadians have little confidence in women, despite their proven success as mediators. For instance, in the United States, a woman-identifying mediator, the Honourable Shelley Chapman, was at the heart of one of the largest and most contested Chapter 11 proceedings to date—Purdue Pharma and the Sackler Family.[97]

Some clients may prefer a "hardball man" to a woman in a mediation, without any explanation as to how that could help their client achieve the best outcome.[98] For this Article, a successful outcome in mediation is defined as a mediation that includes participants to the maximum extent, which requires cultural fluency, based on the existing literature. In addition, successful outcomes can include reaching a resolution, such as a settlement, or deciding on the issues for litigation between parties.

Diversity-based processes incorporate participants that better understand underrepresented parties, such as elders in the community. Where participatory processes are used, there is greater racial, ethnic, and cultural diversity as a result and a better attention paid to diverse interests. One theory is that ADR can engage members of society in a mechanism for intergroup consensus as opposed to the competition that so often divides us.[99] Consensus is a key aspect to reaching a resolution, so there is some indication that understanding through inclusion and diversity can help us reach consensus.

Cultural fluency is a requisite to diversity-based processes such as mediation in a community.[100] In a diversity-based practice, those affected by

97. Knauth & Stempel, *supra* note 83.

98. ONT. BAR ASS'N, *supra* note 14, at 10.

99. Gemma E. Smyth, *Considering Democracy and ADR: Diversity Based Practice in Public Collaborative Processes*, 19 WINDSOR REV. LEGAL & SOC. ISSUES 13, 16 (2005).

100. *Id.* at 32.

a decision should be centrally involved in the decision's making. In CCAA mediations, the Neutrals remain traditionally appearing, such as a male experienced judge. Consequently, stakeholders may feel dominated by these traditionally accepted powerful parties, which should be avoided in a truly diversity-based practice.[101]

A key aspect to the facilitative aspect of mediation is narration and narratives. Diversity in mediation also allows mediation participants to be heard and appreciated. In guiding the discussion, mediators need to allow participants to share their story in their words. With a voice, participants are fully engaged in the mediation, with a sense of procedural justice and support for self-determination.[102] Appreciating the differences in participants who identify as diverse from the experiences of those who are white can allow mediators to construct a settlement that is mindful of parties' narratives. A mediator should shape discussions and indicate where the realm of agreement lies, once again requiring the mediator to be in touch with the participants' realities.[103]

Mediators that can connect to participant realities can generate discussions—and ultimately settlements—considerate of disadvantaged parties. In North America, these disadvantaged parties can be subject to court powers in the insolvency context that give them undesirable results. A more extreme version is found where American bankruptcy courts have increasingly imposed mandatory non-opt-out settlements for mass tort litigation claimants.[104] Scholars attribute these mandatory settlements to constitutional misunderstandings between federal and state power; resolving the issue through constitutional debate is unlikely.[105] Instead, mediators can step into a disruptive role to provide guidance and consideration of settlement options to the court and involved parties.

Bankruptcy proceedings see the collisions of multiple realities. It becomes important to balance different needs of both individuals, such as those in a mass tort claim, and large corporations as creditors. Diversity in mediators better reflects and comprehends parties' heterogeneity in a bankruptcy. Acknowledging and integrating the various parties involved in a proceeding gives way to different decision making. Studies have found that the presence of women in leadership positions can help curb tendencies for

101. *Id.* at 33.

102. Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 Cardozo J. Conflict Res. 453, 466-67 (2021).

103. *See id.* at 468-69.

104. Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 YALE L.J.F. 960, 961 (2022).

105. *Id.* at 978.

risky decision making that have caused financial crises.[106] Other studies found that women have higher levels of trustworthiness and collaborative styles. Women's experience with uncomfortable situations can help them take the lead with difficult issues.[107] These skills, collaboration, leadership, and avoiding risk are necessary when dealing with multi-stakeholder issues in a bankruptcy. Including diverse mediators therefore helps include these essential skills in the mediation process.

While the effects of diversity in a mediation are not well researched in the North American literature, many studies affirm that diversity in the context of a corporation can be beneficia. Research has shown that diversity through a heterogenous corporate board can expand access to information and networks, as women were twice as likely to request further information and take initiative where they made up the majority of the board.[108] A Canadian study found that boards with two or more women have greater accountability practices and performance reviews.[109] In a bankruptcy proceeding, trying to solve complex issues and satisfy multiple parties requires these accountability and network-building skills that could be delivered through more women-identifying mediators.

Selecting diverse mediators not only makes room for mediators with strong problem-solving skills, but perhaps make room for even more competent mediative skills. As demonstrated in both our statistics and the aforementioned OBA report, mediators remain dominantly white and man-identifying. Moreover, parties prefer this demographic, likely because of in-group favoritism. This concept influences perceptions of competence, where members of in-groups attribute fellow members' accomplishments to key attributes of intelligence and commitment.[110] However, this favoritism can dismiss the great competence demonstrated by out-group parties. Encouraging diversity in mediators thus makes room for more competent mediators that may have been set aside due to in-group mentalities. Promoting diversity provides more choice when it comes to selecting a competent, skilled Neutral which can lead to a better outcome for the clients.

106. Deborah Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 Del. J. Corp. L. 377, 394 (2014).

107. *Id.* at 395.

108. *Id.* at 396-97, 396 n.120 (citing VICKI W KRAMER ET AL., CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE 11 (2006), where a study of Israeli companies found that boards with at least three directors of each gender in attendance were twice as likely to both request information and take initiative).

109. *Id.* at 400–01, 401 n.147 (citing David A.H. Brown et al., Women on Boards: Not Just the Right Thing . . . But the "Bright" Thing (2002)).

110. *Id.* at 405.

ii. Improving the System Through Inclusion

Most Neutrals in North America have gone through the pipeline of lawyer, to judge, to mediator. The statistics that we observe in Neutrals is somewhat reflective of how the legal profession may still be lagging in diversity. A minority of lawyers in Canada are racialized and Indigenous, and while the gap is approaching parity, men are still the majority of admitted lawyers today.[111] Considering that CCAA mediators have been judges and therefore previous lawyers, it is not surprising that there are no women-identifying and/or racialized mediators in the Canadian insolvencies studied in this Article.

What we observe in the insolvency context is pointing at a bigger issue for the entire Ontario judiciary: commercial cases do not hold a place for diverse parties. As observed, diverse representatives are still the minority, diversity is currently only represented through women, and there is little to no representation for racialized people on the Commercial List. This only exacerbates the perception that Neutrals who are skilled in complex commercial matters are white.[112]

The OBA, upon releasing their report on the diversity of Neutrals concluding the report with resolutions expand the rosters of diverse Neutrals.[113] Even if hired, the issue remains as to whether stakeholders will accept a diverse Neutral over the face they are accustomed to seeing preside over a CCAA proceeding: a male, white judge. Despite evidence that diverse Neutrals like women have strong decision-making skills and similar competencies, they remain to be seen in a CCAA mediation. Underscoring the need for diversity and inclusion in mediation can have a ripple effect towards considering enhancing diversity in the legal profession.

111. CANADIAN BAR ASSOC., CBA LEGAL FUTURES INITIATIVE: DEMOGRAPHIC TRENDS 12-13 (2013), https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Demographic-trends-eng.pdf [https://perma.cc/Y6XU-T6BU]. Note that there is difficulty in securing recent demographics data for lawyers in Canada; many firms are taking action through surveys to get demographics on their members. The most recent survey for the Ontario Bar Association, which reflects Canada's most populated province, was last reported in 2013. The survey notes that the proportion of lawyers was increasing towards 37%, a modest increase compared to 33% in 2000. *Id.* at 12. Further, 17% of lawyers responded that they were for racialized communities compared to 23% of the general population in Ontario. *Id.* at 13. The increasing diversity in the legal profession was concluded as inconsistent with the make-up of the general population, more efforts to collect data on a national basis is needed. *Id.*

112. ONT. BAR ASS'N, *supra* note 14, at 11.

113. *Id.* at 22.

B. Further Findings on Mediation in Insolvency:

1. Inclusion Allows for Transparency in Insolvency Proceedings

A key function of mediation is the ability for parties to control the process. Inclusion of diverse mediators can help parties feel acknowledged and in control as opposed to at a distance. Parties themselves create the norms of the dispute as opposed to solving it through the general norms of a formal courtroom.[114] These pluralistic norms allow for creative responses to the parties' special needs. Studies demonstrate that parties experience fairness in mediation when they have a greater sense of control.[115] This sense of fairness follows through even where a party did not agree with the resolution of the dispute. For insolvency proceedings, there is an ongoing struggle between large corporate claims and tort claims that come from individuals in mass litigation. Therefore, there may never be agreement, but at least mediation can bring fairness, and as a result, it is a procedurally just way to handle the disagreements between multiple stakeholders in an insolvency.

2. Mediation in Insolvency: Limits and Strengths

ADR mechanisms, such as international arbitration, may facilitate resolution of cross-border insolvency disputes as long as there are safeguards. These mechanisms can ease cross-border insolvency proceedings and relieve courts.[116]

However, certain precautions must be taken, as not all insolvency-related issues may can take place in an ADR setting. "Pure" or "core" insolvency proceedings pertain to bankruptcy court's central function, such as the appointment of an estate administrator.[117] These "pure" proceedings are considering non-arbitrable. Non-pure insolvency-related issues are arbitrable in principle but may raise public policy concerns.[118] Major

114. Ronit Zamir, *The Disempowering Relationship Between Mediator Neutrality and Judicial Impartiality: Toward a New Mediation Ethic*, 11 PEPP. DISP. RESOL. L.J. 467, 470 (2011).

115. *Id.* at 471 (first quoting JOHN THIBAULT & LAURENS WALKER, PROCEDURAL JUSTICE (1975) [hereinafter PROCEDURAL JUSTICE]; and then quoting John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978) [hereinafter *Theory*]). In Thibault & Walker's studies on the subjective perceptions of litigants, the greater control a party felt, the greater that party's sense of fairness, even if the result of the dispute was not what they wanted. *See generally* PROCEDURAL JUSTICE, *supra*; *Theory*, *supra*.

116. Velislava Hristova, Alvarado Garzón & Andrés Eduardo, *International Arbitration and Cross-Border Insolvency—Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-border Insolvency-Related Disputes*, 12 J. INT'L DISP. SETTLEMENT 693 (2021).

117. *Id.* at 693.

118. *Id.* at 695.

insolvency cases still stand to save time and money during reorganization where the parties opt for arbitration to solve inter-company claims.[119]

This Article puts forward that a retired judge is a suitable mediator, but the future of insolvency law needs more. Retired judges have similar facilitative attitudes towards a mediation as a skilled mediator. What we emphasize is that diversity in mediation is an opportunity to offer diversity in the judiciary as a whole. Retired judges have the necessary expertise to participate in a mediation, but this expertise is translatable and teachable to other, more diverse parties for the future.

Even where ADR seems unsuitable for insolvency proceedings, there are still safeguards that can make ADR adaptable to meet the parties' needs in insolvency disputes. First, there should be consent amongst parties. Second, there should be involvement by the insolvency courts. This second safeguard would likely involve lifting confidentiality of arbitration proceedings in certain cases where required for the disputing party or if it is in the public interest.[120] Further transparency in ADR could help establish more data on mediators in CCAA and, across the border, Chapter 11 proceedings to further assess and conclude the impacts of diversity (or lack thereof) on mediation success. Currently, even demographic data of all lawyers in Canada is not clear, so the disparities that need to be remedied persist. The success of a diverse Neutral roster may not be accurately measured without transparency helping us understand the starting point of diversity in the profession.

Consequently, the success of arbitration in cross-border insolvency further affirms the potential success of mediation in parallel. ADR processes amidst large insolvency proceedings like a CCAA proceeding will likely persist in the near future and thus require inquiries as to how to optimize mediation to foster inclusion, consent, and autonomy, the fundamentals of any ADR procedure.

CONCLUSION

This Article brings to light that, so far, mediation holds the potential to produce excellent outcomes in the Canadian insolvency context but at this

119. *Id.* The authors put forth that cross-border trial might imply legal expenses, such as the USD 1.9 billion in Nortel Networks, and indicates that there is no guarantee that different courts will reach the same decision on the allocation of enterprise value. Should there be an ensuing dispute between different estates regarding the allocation of enterprise value, international arbitration is the best alternative to solve it.

120. *Id.* at 711. The authors argue that confidentiality may be lifted where parties agree. Consent is at the crux of lifting confidentiality.

stage, is under-inclusive of the principles that mediation should hold. It is now widely accepted that heterogeneity amongst decision-makers in the corporate setting has widespread benefits regarding accountability and good business practices. We make the case in this article that such findings translate to show that heterogeneity amongst mediators could have a similar success story. Further data analysis and empirical work is needed to track this progress.

Overall, we conclude that mediation is a useful tool for CCAA proceedings, but courts should consider who they are appointing as mediator, and whether the choice is reflective of the stakeholders involved. As evidenced by the successful Purdue Pharma mediation,[121] it is time to insist that women and racialized people are found on mediation rosters.

Though this Article advocates for mediation in CCAAs, the ongoing tension between ADR and insolvency law should be acknowledged. Party autonomy is key in ADR, whereas insolvency represents a collective process to preserve the debtor-company's value. There is thus an ongoing tension between the need to respect parties' autonomy with the need to expeditiously preserve assets of an insolvent company.[122] Creditors rely on the insolvency regime to maximize the creditor's recovery, whereas settlements drawn out in ADR can be undesirable in comparison to court orders. But given that many mediation settlements, for example *CannTrust* and Laurentian, can happen exponentially faster than a court proceeding,[123] agreeability may not be an alarming factor that would warrant dismissing mediation proposals.

For the future, different mediators should be considered and appointed to handle complex proceedings like a CCAA. Not only have diverse parties proven themselves competent in high pressure settings, but they may help mitigate the risks that come when judges handle other judges' cases. As Jacoby notes, when past and present judges preside over mediation, there is a risk of leakiness of information and the exercise of formal judicial powers

121. Dietrich Knauth et al., *Sacklers to Pay $6 Billion to Settle Purdue Opiod Lawsuits*, REUTERS (Mar. 4, 2022, 4:48 PM) https://www.reuters.com/business/healthcare-pharmaceuticals/sacklers-will-pay-up-6-bln-resolve-purdue-opioid-lawsuits-mediator-2022-03-03/ [https://perma.cc/49RF-F4ZN]. Reaching settlement is the indicator of the successful mediation.

122. *See* Darius Chan & Sidharrth Rajagobal, *To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes*, 38 J. INT'L ARB. 458, 465 (2021).

123. See, for example, *In re* CannTrust Holdings Inc., 2021 ONSC 4408 (Can. Ont.), where a settlement was reached within two years of filing what otherwise would have been a class action spanning several years. In *In re* Laurentian University of Sudbury, 2021 ONSC 3272 (No. CV-21-656040-00CL) (Can. Ont.), mediation accomplished important milestones within months of what was over a year and a half long CCAA court proceeding.

that may undermine the autonomy and control parties should possess in these processes.[124]

This Article draws out its very limitation: we do not always know who the mediator is in an insolvency, so we cannot say what they should be. But these data and the ongoing success in CCAA mediations are starting points towards a strong roster of CCAA mediators and thus a strong likelihood of successful, expedient ADR for insolvent companies to come.

124. Jacoby, *supra* note 7, at 71-72.