Executive Summary
Since the 1950's, planning theory and practice have been substantially influenced by a communicative normative ethical framework (Susskind, van der Wansem, & Ciccareli, 2003; Winkler & Duminy, 2016). The communicative planning approach has continued to be developed in relation to its theoretical and practical scope by scholars such as John Forester and Judith Innes. In relation to land use planning, both Forester and Innes advocate that planning should empower disadvantaged communities and resolve power imbalances through well designed processes (Westin, 2022). To achieve these ideal processes, one technique put forth by Forester and Innes is the application of Alternative Dispute Resolution (ADR) to land use planning conflicts (Forester, 2006; Westin, 2022). As one modality of ADR, mediation is described as the use of a third party to assist disputing stakeholders to discuss issues and underlying interests and use these insights to design mutually beneficial solutions (FEARO, 1992). Due to its emphasis on dialogue, fairness, and consensus, mediation has received particular focus in planning literature for its theoretical correspondence to the aims of communicative planning. These theoretical and practical justifications of mediation have often resonated with environmental planning due to the prevalence of complex conflicts that are characterized by competing stakeholders, scales, issues, interests, and values (Richardson, 2005). Despite the broad application of environmental mediation in planning, there has been a lack of similar theoretical exploration or practical examples in environmental impact assessments (EIA). However, similar calls as those seen in the planning literature have been made for the application of consensus-based processes and mediation in EIA to address issues of procedural justice and substantive outcomes (Lawrence, 2000; O'Faircheallaigh, 2010; Moore, von der Porten & Castleden, 2017; Eckert et al., 2020; Mainville & Pelletier, 2021). Despite the prevalence of mediation provisions in Canadian EIA legislation and scholars advocating for its use, there has been limited research to address the underlying causes of mediation's lack of uptake in EIA (Doelle & Sinclair, 2010). Combined with a lack of critical evaluation to underlying theoretical assumptions or practical implications, the literature is currently unable to answer three important questions regarding the use of mediation in Canadian EIA:

1. How does mediation and its theoretical assumptions affect the efficiency – in terms of time and costs savings – and the effectiveness – in terms of procedural justice, fairness, and substantive outcomes – of EIA?
2. How do EIA stakeholders perceive the uptake, challenges, and potential of mediation?
3. How have federal, territorial, and provincial EIA policies, as well as professional practice, facilitated the use of mediation in EIA?

To address these questions, this paper employed a qualitative approach. To collect and analyze the perspectives of EIA stakeholders, 10 semi-structured interviews were employed. Interviews were used in a semi-structured approach using a pre-defined interviewing script supplemented by the author's questions to capture emergent information form participant responses. Document analysis of interview transcripts as well as EIA legislation and guidance was conducted. Emergent codes were developed to support initial theory development with the purpose of answering the research questions. A latent approach to document analysis was taken which emphasized the interpretive reading of documents to identify underlying themes (Williams & Moser, 2019; Silverman & Patterson, 2022). In line with the constant-comparative method,

emergent open codes were first applied to each data source followed by focused coding to compare open codes and develop broader underlying themes across data sources. NVivo was used to catalogue and organize codes in the data for its demonstrated use and recommendation in the literature and for its wide application in similar research contexts (Molina-Azorín & López-Gamero, 2016; Young et al., 2017; Elliot, 2018; Silverman & Patterson, 2022).

A jurisdictional scan was completed to identify ADR and mediation provisions in EIA legislation in Canada. At the federal level, opportunities for using mediation in EIA are limited. While the Canadian Environmental Assessment Act (CEAA) 1992 included explicit provisions for the use of mediation in the federal EIA process, these provisions were removed with the introduction of CEAA 2012 (Doelle, 2012; Gibson, 2012). At the provincial and territorial level, opportunities to use mediation exist in 7 jurisdictions with varying approaches and levels of sophistication. Due to the varying provisions for ADR and mediation at the federal, provincial, and territorial levels, and the range in the scope of these provisions, a consistent approach to mediation within Canadian EIA processes is lacking, contributing to a complex regulatory landscape.

From coding interview transcripts and guidance material, the following themes were derived related to the use of mediation in EIA: Types of mediation, role of mediation in EIA, role of the mediator in EIA, application of mediation in EIA, practical considerations, confidentiality considerations, public interest considerations, and factors affecting uptake.

Interviewees identified two major types of mediation: Western mediation and Indigenous mediation. Western-based mediation approaches were seen by interviewees as the conventional approach to mediation which has been based in legal practice and developments in conflict resolution literature over the last 3-4 decades. Within Western mediation, interviewees noted 2 additional subcategories which include participant-led mediation and mandated mediation. In comparison to Western mediation, Indigenous mediation approaches were noted to be characterized by Indigenous approaches to planning, Indigenous ways of knowing, and Indigenous legal traditions and protocols.

Interviewees mentioned 3 primary roles for mediation as either: an alternative to the EIA process, a supplement to discrete components within an overarching EIA process, or an alternative form or supplement to engagement and consultation. In general, interviewees and documents identified the use of mediation as either a supplement to the existing EIA process and/or as a consultation tool. In addition to these general roles of mediation, interviewees also noted specific roles related to normative assumptions of what mediation should or could accomplish. These roles included providing solutions to conflict through consensus, improving communication and structure of negotiations, building trust and relationships among parties, advance reconciliation, and increase participant control over the EIA process and its outcomes.

Interviewees identified several criteria to determine whether to proceed with or avoid the use of mediation in EIAs. These considerations are particularly important to guide the application of mediation with respect to contextual factors and include having a clear issue or objective, having a voluntary process, ensuring parties engage in good faith, the impacts related to the issues can be mitigated, there is a limited number of parties and issues, and there is a lack of fundamental conflicts and power imbalances.

As mediation is traditionally confidential, this created concern from the interviewees and literature around introducing confidentiality in EIAs. Arguments for limiting confidentiality in mediation included concerns over reducing transparency and reducing procedural fairness. Conversely, arguments presented for allowing confidentiality included that components of EIA are already confidential, the results of mediation are eventually public, and confidentiality may be necessary to ensure meaningful discussion and protect sensitive information. Similarly concerns over mediation affecting public interest revolved around the presence of competing conceptions of the public interest and the lack of representativeness of mediation participants. However, the application of mediation in a supporting role rather than a decision-making role was seen as limiting the potential for the use of mediation to impinge on the public interest.

Interviewees and documents identified 4 main factors affecting the uptake of mediation in EIAs, including a nominal distinction between mediation and other dispute resolution processes, perceptions of time and cost associated with mediation, low levels of willingness to use mediation due to uncertainty, and a lack of qualified mediators.

Interviewees and the literature identified potential benefits for incorporating mediation into EIA processes based on the practical and normative roles of mediation such as developing solutions through consensus processes with greater participant control in order to increase buy-in and aid implementation of agreements, improving communication and relationships between parties, and advancing reconciliation objectives. While consensus based processes were seen by some interviewees and authors as creating potential for coercion and compromise on substantive issues, the role of the mediator to assist parties in identifying and maintaining their “best alternative to a negotiated agreement” was seen as an effective feature to mitigate these issues. Incorporating insights from other planning theories was also seen as an opportunity to raise the awareness of ethical implications and value judgements within mediation processes and engage in reflexive practices.

In seeking to work toward reconciliation objectives, a concern was raised by some interviewees and documents that Western mediation processes could be limited in recognizing Indigenous rights and values and be used to avoid other consultation mandates like the Duty to Consult. In addressing these concerns, practitioners will need to pay heed to developments in Indigenous-led mediation, conflict resolution, and consultation.

Interviewees and the literature identified factors which can influence the magnitude of time and money costs or savings associated with a mediation process. In the context of EIA, mediation is likely to save time and money where it is used as an alternative to litigation and quasi-judicial processes and aids in supporting consultation. Where parties are too numerous and mediation is used as a delay tactic, this can increase the cost and time of the EIA process. Consequently, the screening to determine the appropriateness of mediation based on the requirements of a limited number of parties engaging in good faith is likely important to the success of mediation as a viable alternative process or tool within the EIA process.

While confidentiality poses a potential risk to transparency, designing mediation to include external consultation or using a tiered engagement approach are strategies to maintain a level of transparency while providing a confidential environment to facilitate meaningful discussion.

Additionally, mediator's reports detailing the mediation process also allows public scrutiny. Conversely, the benefits of confidentiality for ensuring an effective environment for negotiation and the protection of sensitive information and Indigenous Knowledge provides a greater rationale for preserving these provisions. While a need to limit the number of parties to a mediation for efficiency's sake was identified, many sources expressed concern over the implications this would have on procedural justice and the public interest. However, this concern may be less warranted where mediation takes a supporting rather than a decision-making role.

The conflation of mediation with a number of other dispute resolution and consultation processes (e.g., negotiation, facilitation, focus groups) is subtle but likely produces pronounced effects on mediation uptake. Both intentional and unintentional conflation has contributed to a lack of awareness and understanding of mediation over time. Consequently, developing more sophisticated understandings of mediation which help frame the potential opportunities and benefits of mediation may be required. The lack of understanding of mediation likely interacts with a lack of application in EIA and contributes to an atmosphere of uncertainty surrounding mediation and its outcomes. These barriers may also be addressed by other strategies to improve understandings of mediation to highlight the lack of precedent setting value and the incentives of using mediation compared to other conflict resolution processes. While there is a lack of qualified professionals to take on the role of a mediator in the context of EIAs, the creation of mediator rosters and increased skills development opportunities in professional bodies are strategies to address these deficits.

Given EIA's role as a legislated process in Canada, EIA legislation, regulation, and policy plays an important role in incentivizing or disincentivizing the use of mediation in EIA. One of the largest challenges for mediation is the lack of provisions at the federal level as this would make mediation challenging in joint assessment between multiple jurisdictions where no unifying provision is present. The divergence of most provisions at the provincial level will also make cross-jurisdictional comparisons on the use of mediation more challenging, limiting the ability for learning and uptake. There is also notable absence of Indigenous mediation mentioned in legislation. The role of the regulator and/or minister as the final decision-maker may cause some disappointment with the ability of mediation to approximate higher levels of citizen control. By incorporating strategies such as inclusion of regulators as a party to mediation, this can provide a strategy to ensure more consistency between the creation and implementation of agreements and the regulator's/minister's mandate. Additional specificity around potential areas to apply mediation in the EIA process helps provide some guidance to the use of mediation. Additionally, the general alignment of most mediation provisions with the normative assumptions of mediation may make the implementation of mediation smoother given the alignment with stakeholder expectations. Finally, the requirements for mediator's reporting on the mediation process may also assist in developing a data source for monitoring mediation efforts. Due to the divergence of jurisdictions, considerations for reforming existing provisions require a case-by-case approach.

However, a number of broad policy and practice trends should be considered. Alignment of mediation provisions, in addition to other parts of EIA legislation, with United Nations Declaration on the Rights of Indigenous Peoples, and the potential to use mediation in higher level assessment streams, such as strategic and regional assessments, may be two particularly relevant areas in coming years.