

Ontario Mandatory Mediation Expands: Four Years Experience

Com-Munn Sense: Get the Most from Your Mediation

1. Make sure that your lawyer has up-to-date information about any changes in your situation.
2. With your lawyer, review the mediation agreement and any advance information from the Mediator about the guidelines for the mediation.
3. With your lawyer, review the factual and legal issues in dispute for both parties.
4. Consider options for resolution which might be offered or accepted by you and by the other party.
5. Assess your alternatives. Ask your lawyer to explain the range of possible outcomes and costs if you do not settle at mediation.
6. Participate. Often the discussion between the parties, assisted by the Mediator is a significant part of the mediation. For this reason, your lawyer may leave much of the talking to you.
7. Listen carefully to the other party.
8. Explain your perspective and your concerns. Try to avoid threats, sarcasm, and "bottom lining". Make it easy for them to listen to you.
9. Recognize your lawyer's role. In mediation your lawyer will be working on keeping the lines of communication open so that the other party will be willing to accept a settlement that you can accept. The mediation table is not the place for courtroom techniques such as attacking the other party's motives or credibility because that will tend to make the other party less open to listening to you.

At the beginning of 2003 the Ontario Mandatory Mediation Program* expands to Windsor and Essex County. Since it is working well in the pilot cities of Toronto and Ottawa finally the decision has been made to expand it. Both Toronto and Ottawa had earlier mediation pilot programs when the Rule came into effect on January 1, 1999. Court-connected mediation was not new in either community. This is the first opportunity for those of us in other parts of the province to get access to mandatory mediation on our home territory.

The Ontario Mandatory Mediation Program requires a mediation* session within 90 days of filing the first statement of defence. If the parties agree they can postpone the mediation for up to 60 days. If requested by a party, the court may make an order exempting the action from mandatory mediation or an order abridging or extending the time for mediation. In each city there is a roster of mediators chosen and supervised by a local mediation committee. Parties may select a roster or non-roster Mediator. If the parties do not choose a Mediator within 30 days, then the local mediation coordinator appoints a Mediator from the roster. At least seven days before the mediation session every party is required to prepare a statement of issues and provide a copy of it to every other party and the Mediator. The statement of issues identifies the factual and legal issues in dispute and briefly sets out the position and interests* of the party making the statement. The parties and their lawyers, if the parties are represented, are required to attend the mediation session unless the court orders otherwise. The mediators are paid by the parties according to a fee schedule established by Regulation.

As a Roster Mediator since the program started, I have had four years experience with that program. I am a Roster Mediator in both Toronto and Ottawa. Going into the program my expectation was that I would be frequently meeting a group of lawyers and parties who did not wish to settle or who felt that the mediation was too early to be able to settle. I expected that for cases where I was assigned under the Rules, it would be very unlikely that the parties would choose to settle.

I soon saw that my expectations were wrong. What I found was that lawyers and parties were generally prepared and willing to spend the scheduled minimum three-hour mediation

working hard at reaching a settlement. To my surprise, my settlement rate for the mandatory cases was about the same as for voluntary mediation - about 80 to 85 % of the cases settled; most fully settled, some settled in part.

How does that compare with the official evaluation? The Ministry of the Attorney General retained an independent evaluator to study the 2- year pilot project in both Ottawa and Toronto and to determine whether the mandatory mediation made a positive or negative contribution to the administration of justice in Ontario. The evaluator examined four different areas (1) the effect on the pace of litigation, (2) the effect on the cost of litigation, (3) the effect on the quality of disposition outcomes, that is, whether the mediation session yielded complete or partial settlements, and (4) the effect on the mediation itself and on the litigation process.

Answering in the positive for all four criteria, the evaluator's main recommendation was to make the pilot program permanent in Ottawa and Toronto. That was done in 2001.

The evaluator's report showed that mandatory mediation yielded a complete settlement in about 4 out of 10 cases and a partial settlement in about 2 out of 10 cases. For the 4 out of 10 cases which did not settle after mandatory mediation, the evaluator suggested that changing the timing of the mediation may achieve better results. For example in cases of medical malpractice the mediation session could be more effective if held after discoveries. Even in these cases which had a low rate of complete settlements at mediation, the cases still settled earlier than the control group of medical malpractice cases that did not experience mandatory mediation.

The parties' selection of the mediator occurred much more frequently in Ottawa than in Toronto (82% of the time in Ottawa compared with 53% in Toronto). This was considered to be significant because Mediator selection by the parties, rather than Mediator appointment by the local mediation coordinator, increased the likelihood of a successful mediation session. Another significant factor was the extent of the mediator's prior experience with Rule 24.1. Based on that, my advice is to select a mediator within the 30-day window and choose one with mandatory mediation experience.

Where is Ontario in the Line Up?

A Quick Tour of Civil, Non- Family Mediation Across Canada

Canada:

The Department of Justice created the Dispute Resolution Services (DRS) in 1992 and gave it the mandate to serve as the "leading center of dispute resolution in Canada". The DRS created the dispute resolution fund which has invested \$6.9 million in 52 Government of Canada projects. According to a Spring, 2002 report from the Canadian Forum on Civil Justice, future funding is very uncertain.

British Columbia:

The Ministry of the Attorney General opened the Dispute Resolution Office (DRO) in December 1996. The primary focus of the DRO is to "support the use of alternative dispute resolution processes in the civil justice system and in government". One of the main programs by the DRO is the Notice to Mediate process. This allows any party involved in a Supreme Court action to compel all other parties to participate in a mediation session. It has been expanded to cover most civil, non- family cases in the B.C. Supreme Court.

The B.C. Mediator Roster Society administers a roster of trained and experienced mediators. The Roster is accessible to the public by telephone and Internet

Alberta:

Mediation is available in the Provincial Court (Civil Division) in Edmonton and Calgary. Parties may request mediation or cases may be selected for mediation. A roster of trained mediators provides the mediation services required. Alberta Justice is in the process of conducting a consultation about civil mediation in the courts which may result in one or more pilot programs.

Saskatchewan:

In 1994, amendments to *The Saskatchewan Queen's Bench Act* introduced an initial mediation session at the close of pleadings in every non-family, civil litigation action. This is being evaluated during 2002.

Manitoba:

The Court of Queen's Bench program for civil cases is Judicially Assisted Dispute Resolution. In addition the Manitoba Farm Mediation Board mediates agreements between farmers and creditors where financial pressures are leading towards legal action.

Quebec:

There is no mandatory system for civil and commercial mediation, although the Rules of Civil Procedure now refer to a dispute resolution conference which has the purpose of helping the parties settle out of court. The Ministry of Justice encourages the use of mediation on a voluntary basis.

Nova Scotia:

Guidelines for a Mediation Roster have been established for civil cases by the Nova Scotia Barristers Society and the Department of Justice, with the support of the Supreme Court of Nova Scotia.

Northwest Territories:

A pilot project provides alternative dispute resolution for former students of Grollier Hall, (a former student residence operated by the Catholic Church in Inuvik), the federal government and the Roman Catholic Diocese of the MacKenzie.

From Canadian Forum on Civil Justice, Spring 2002

*What do you mean when you say...?

Interests: The "why" of your position. Your position is what you want, your interests are what you need. Interests are the concerns, hopes, expectations, desires and fears that drive us. For more about interests see Common Ground #10 Sept/Oct 2000 at www.munnrcs.com.

Mediation: In mediation an impartial person, the Mediator, helps the disputing the parties to find a solution that works for them. Mediators do not decide cases or impose settlements. The Mediator helps the parties to communicate and negotiate with each other in order to achieve a resolution that is based on common understanding and mutual agreement.

Ontario Mandatory Mediation Program: Rule 24.1 of the Ontario Rules of Civil Procedure establishes mandatory mediation for civil, non-family, case managed actions. Rule 75.1 establishes mandatory mediation for contested estates, trusts and substitute decisions matters. For more information about the Ontario Mandatory Mediation Program see Common Ground, April 1999 and #14 Fall 2001 at www.munnrcs.com. More information is also available on The Ontario Ministry of the Attorney General web site www.attorneygeneral.jus.on.ca/sermed.htm

Mark Your Calendar

Upcoming Training Events
Presented by Kathryn Munn

Mediation Training

Full 40 hour program

Fanshawe College

Part 1 - January 30 & 31, 2003

Part 2 - February 27 & 28, 2003

Part 3 - March 27 & 28, 2003

Call 519-245-3900 Ext. 120 for more information and registration.



Munn-thly Memo will return in the next issue of Common Ground.

I am pleased to fill requests for presentations about mediation and negotiation at meetings of professional and business groups. Call or e-mail to make the arrangements.

Electronic Common Ground

If you prefer to be on our e-mailing list please send us an e-mail.

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