

## Hijacked by Ulterior Motives:

### The Manipulation of the Mandatory Mediation Process in Ontario

By:

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The use of mediation as a method of conflict resolution has gained strength in recent years, thus facilitating conflicts to be approached in a rehabilitative manner, which focuses on relationship rebuilding. One of the many reasons for the increase in support for conflict resolution through mediation is that the process offers an economical method to solve disputes. Instead of the common adjudicative approach, which is adversarial, mediation can be used successfully for a variety of legal conflicts ranging from family mediation (which entails divorce settlements) to other areas such as personal injury and contract disputes. Based on the potential offered by the use of this option, mediation is gaining recognition, legitimacy, and support as a viable approach to resolve conflict. It has been introduced into the court system in some provinces in Canada, through initiatives such as the Mandatory Mediation Program in Ontario. The purpose of this article is a cursory examination of the

Mandatory Mediation program in Ontario with regards to its use, its benefits, as well as to examine ultimately and specifically whose agenda is paramount throughout the mediation session: counsel or client?

The Mandatory Mediation program in Ontario began in Toronto and Ottawa in January 1999. This began by the establishment of “Rule 24.1 of the Rules of Civil Procedure [which] establishes mandatory mediation for case managed civil, non-family actions. Rules 24.1 and 75.1 apply in Toronto, Ottawa and Windsor. [Since then] Rule 75.1 brings contested estates, trusts and substitute decisions



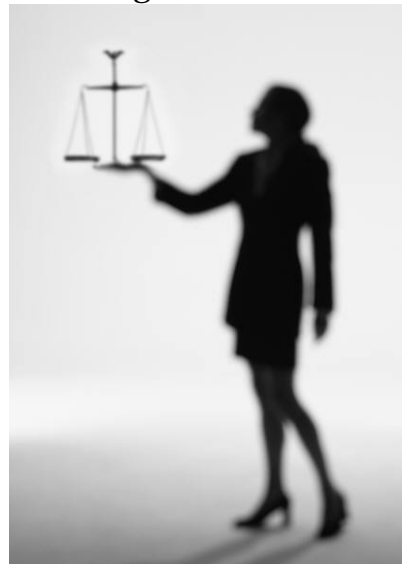
matters within mandatory mediation.”<sup>1</sup> The Program was established by the government to assist in the ever-increasing backlog of court matters in an overburdened court system which is fraught with delays. It was initially intended for settlements to be reached without parties having to go through litigation, in addition to this, it allows parties to play a crucial role participating in and developing their uniquely crafted solution which may lead to the settling of the matter. The Program ensures that the parties

in civil cases brought before the Superior Court of Justice attend mediation in the hopes of resolving the conflict thus freeing up the courtroom for much more pressing matters while also providing benefits such as conserving time, money, and an overall satisfaction with the settlement process.

Rule 24.1 mandates that parties must attend mediation before the matter proceeds to trial to reduce the burden on the court; reduce the enmeshment of the parties, while facilitating amicable resolutions. The Attorney General's office of Ontario has studied the effects of employing mediation to aid in conflict settlement and has found that forty percent of cases fully settle during mediation sessions, while another twenty percent partially settle the matter during the session.<sup>2</sup> Even those that preceded mediation settle at a ninety percent rate prior to going to court, and therefore only ten percent go to litigation.<sup>3</sup> Ultimately, this begs the question: why are more matters not being settled at mediation? Despite the fact the Mandatory Mediation Program offers a viable opportunity to settle matters outside of court, in some cases the agenda of the lawyers' conflicts with the opportunity to resolve disputes in the best interests of their clients.

Although all the underpinning motivations for this attitude in counsel is beyond the

scope of this paper, nevertheless, it is fair to say mediation is not always used by parties and/or lawyers for the intended purpose, which is settlement. There are instances where the hope of settlement, although available, is not utilized, as resolution has been decided against, by one or both parties before the mediation has begun because they are enmeshed in the position that their matter should go to court. In areas where it does not make practical sense to go to court, one must question the ethics of lawyers in the mediation process. Proof of this comes from a recent publication on the Ministry of the Attorney General website where it is stated that the cost of a three day trial for civil litigation is on average in excess of \$38,000.00 per side.<sup>4</sup> Bearing this in mind, one must ask: is it ethical to proceed to litigation without considering these costs?



Let us consider this point in a simulated situation. A plaintiff is suing for breach of contract for \$25,000.00. Let us assume this dispute is not settled at mediation, and the case proceeds to litigation. Even if the party is granted a judgment for the full claim, although no legal costs are awarded, the winning party would end up paying \$13,000.00 in the end due to the legal costs of a civil trial.<sup>5</sup> These facts can be inferred in the article as stated by Justice Winkler. Based on this we must ask: Is it ethical for the lawyer to allow this case to proceed to litigation, if in the end, the party awarded the judgement in their favour must incur high costs of going to trial? Is it not more beneficial to settle during the mandatory mediation session so that the party is awarded funds for the breach of contract and thus, they have saved time and money? Despite the fact that the parties may believe that they have a great case against the other side, going to court cannot guarantee any lucrative or positive outcome. In addition, an understated loss especially with respect to future relations between the parties is that the adversarial approach does not allow the parties in the conflict to be actively involved in the settlement process, thus further minimizing the possibility of a

future relationship between the conflicted parties. After these considerations, why is it that the process of mediation is overlooked and under utilized in many cases, thereby allowing the matter to proceed to trial? In a significant number of cases, it appears that attending a mandatory mediation session is viewed as merely a profunctionary step which must be completed in order to get to court to litigate the matter. The completion of a mandatory mediation session must be fulfilled prior to attaining a court date for the trial. Thus, in some cases the viable and potentially better remedy is ignored and mediation only then becomes a step in the process which has been completed to allow the case to proceed to litigation.

One issue of concern that arises from the Mandatory Mediation Program in Ontario is the lack of supervision of the attorneys participating in the matter. It has been noted in a recent meeting held through ADR Ontario by Justice Winkler, that some lawyers who participated in the mandatory mediation used this process as a discounted way of 'discovery' in a given case, rather than with the intentions to settle.<sup>6</sup> In 'discovery' each side in a civil matter may be presented with the evidence or proof of the matter in which many lawyers

assess the legitimacy and overall legality of pursuing a given case. If the goal of the lawyers is discovery through the mediation process, rather than to encourage settlement, they are failing to uphold their duty to participate in good faith in the mediation session. The use of the Mandatory Mediation session for discovery undermines both the confidentiality and integrity of the process, for mediating the conflict must be the prevailing ideal when participating in the session as opposed to the purpose of discovery. It is a shame that such a valuable and encouraging process is perverted and thus an opportunity to settle conflicts is lost.

Mediation offers the opportunity to hear both sides of an issue and to facilitate communication amongst the parties, hence potentially leading to settlement. In another tactic employed in some instances of mandatory mediation, the lawyers view the process not as an opportunity to settle, but to threaten opposing parties with their particular assessment of the merits of their case or lack thereof. This tactic is viewed as either intimidating the other side into submission or creating another obstacle in order to get them to litigation. An example of one of these cases, in which the mediation was not entered into with the hopes of settlement or the good faith of the parties, is a personal injury mediation session, in which I

actively participated. Briefly, the dynamics of the case involved a cyclist who was hit by the defendant's car, thus leading to a personal injury claim. The defendant's lawyer attempted to begin mediation with a pre-mediation brief affirming that the matter would not settle. The effect of the pre-mediation began the session on a negative tone. The plaintiff's lawyer did not agree to the process and wanted the mediation terminated; therefore, they could proceed with the matter in court. There were offers that were made that should be examined. The claim for this case for the personal injury was for \$120,000.00 in damages. An offer of \$60,000.00, as their bottom line, was put on the table by the plaintiff at the mediation. If this was rejected by the defence, the plaintiff's counsel expressed their willingness to proceed to litigation. The deductible in the Statute of Accident Benefits at the time of the accident was \$30,000.00. Considering the percentage of contributory negligence (where the plaintiff contributes to the damage caused by the defendant through their own negligence, and thus lessens the extent/percentage of responsibility of damages caused only by the defendant), it is clear that this matter should have settled during the mediation session. This amount of contributory negligence subtracted from the \$60,000.00 offer would

leave \$30,000.00 remaining to be negotiated. One additional factor in the defendants favour would be the percentage of Contributory Negligence caused by the plaintiff. This would have lowered the \$30,000.00 by even more. Given that this matter in trial would cost more than \$38,000.00, as was stated by Justice Winkler, it is clear that it should have resolved at this mediation, to all parties' advantage. Unfortunately it did not because of posturing and negative communication between the counsel of the conflicting parties. Ultimately this created a greater desire to go to court on the matter and prevented any negotiation or agreement. To say the least, the process of mediation was put in jeopardy immediately by the pre-mediation meeting between counsel thus hindering the possibility of resolving this dispute.



Overall, the use of the Mandatory Mediation Program in Ontario has been well received due to the renewed use within the Ontario Courts of Justice; it is a functioning and enriching the process to the justice system to the enlightened practitioner who appears to be in the majority. This process has many benefits such as an economical way to resolve disputes, an opportunity to rebuild a rift in a relationship, the ability to actively participate in the process and communicate between the parties, as well as a timely manner to resolve disputes. With all of these benefits it is astounding that cases proceed to court, and that some parties want to hold off on settlement to go to litigation, which is uncertain in nature. Perhaps society and some legal counsel are not ready to accept and work within the legal framework of mediation. Perhaps many are stuck in the litigation frame of mind in which there is a desire for someone to be wrong and lose on a given matter. Whatever the reasons for the desire to take the matter before a judge and proceed via litigation, many cases do not need to proceed to litigation and can be settled at a mediation session. If ninety percent of cases settle before the trial, one must wonder why the process of mediation not encouraged by legal counsel to be an equitable and effective manner to resolve disputes, and is in the best interest of

their client, their primary concern, and motivation. Whatever the reason is for misusing the Mandatory Mediation Program in Ontario this process should be encouraged and utilized by the parties in a good faith manner. Though not all cases will settle at mediation, there are a vast majority of cases that should be settled mediation and not proceed to court resulting in lessened costs to the parties, better ongoing relationships, more space available in the court docket and more time available for lawyers to spend practicing their craft that they spent so many years learning on complex matters that involve meaningful understanding of the law.

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<sup>1</sup> “General Information – Ontario Mandatory Mediation Program.” Ministry of the Attorney General Website. Accessed on Wednesday January 23, 2008 from: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.asp>

<sup>2</sup> “Report of the Evaluation Committee for the Mandatory Mediation Rule Pilot Project.” March 2001. Ministry of the Attorney General of Ontario website. Accessed on February 4, 2008 from [http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval\\_committee.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_committee.pdf).

<sup>3</sup> Supra, Note 1.

<sup>4</sup> “The Cost of the Civil Justice System, Chapter 11.” Ministry of the Attorney General Website. Accessed on February 4, 2008, from <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/cost.asp>

<sup>5</sup> Ibid.

<sup>6</sup> Alton, Roger. “Mandatory Mediation Update.” December 2006. Access on