

## PERSONAL REFLECTIONS ON ADR REFORMS<sup>1</sup>

In our August 1996 *Task Force on Systems of Civil Justice* report to the Canadian Bar Association one of our primary recommendations was to encourage early and continuing non-binding dispute resolution to assist in achieving settlements as early as possible in the litigation process. The report stated at page 32, "The Task Force is persuaded that a focus on early consensual resolution of disputes holds the greatest promise for reducing costs and delays" and, as we made clear in our first recommendation, we wanted every jurisdiction to make available "opportunities for litigants to use non-binding dispute resolutions processes as early as possible in the litigation process." We envisaged that non-binding dispute resolution processes (or "ADR") would form an integral component of the civil justice system, that the courts would supervise the progress and pace of cases in a manner that would focus on early and ongoing settlement and that all participants in the civil justice system would have training, skills and obligations to help make ADR effective.

At the core of the Task Force's concern was the recognition that while the vast majority of civil cases settle before going to trial, "...a high percentage of settlements occur very late in the litigation process and therefore do not result in significant savings of time or money for the participants" (at page 32).

Ten years later how have these recommendations fared? My answer is a tentative one. From my perspective we have made some progress but the bold objective of a broad use of ADR processes to obtain early consensual resolution of disputes is still a distant target. Realists should not be surprised by this. Professor Frank E.A. Sander of Harvard, whose address at the Pound Conference in 1976 is regarded by many as the origin of the ADR movement, stated recently,<sup>2</sup> "On Mondays, Wednesdays and Fridays, I am amazed at how far ADR has come, but on Tuesdays, Thursdays and Saturdays, I am amazed at how far it still has to go." It is my hope that

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<sup>1</sup> Presented by E. David D. Tavender, Q.C. of Fraser Milner Casgrain LLP, Calgary, Alberta, for the Canadian Forum on Civil Justice Conference, "Into the Future, the Agenda for Civil Justice Reform", April 30 - May 2, 2006 at Montreal, Quebec. Mr. Tavender was the Vice-Chair of the *Task Force on Systems of Civil Justice*. Mr. Tavender would like to acknowledge the valuable contributions of Peter Cavanagh of Fraser Milner Casgrain's Toronto office and Noel Rea of Fraser Milner Casgrain's Calgary office.

<sup>2</sup> CPR Institute of Dispute Resolution, Annual Meeting, New York, January, 2006.

as a result of this conference we will make solid strides toward satisfying ourselves, at least on Mondays, Wednesdays and Fridays, that early, as well as on-going, ADR can become a successful reality in our civil justice system in Canada.

Mediations and judicial dispute resolution processes are taking place in most jurisdictions. Without attempting to be exhaustive, let me refer briefly to British Columbia, Alberta, Saskatchewan and Ontario. British Columbia has had an opt-in mediation program that began in 1998 for motor vehicle personal injury matters. It has since been expanded to general civil litigation. Remarkably high success rates (75%-90%) have been estimated for the B.C. program, together with a high participant satisfaction rate (82%), but the mediations are often occurring late in the litigation process.<sup>3</sup> The Alberta Court of Queen's Bench established a two year pilot mediation project for Edmonton and Lethbridge effective January 1, 2005. The Alberta pilot project is not a mandatory early mediation program, but is triggered, as in British Columbia, by either party filing a request to mediate. Saskatchewan has had over ten years' experience now in an early and on-going mandatory mediation system. It has been reported<sup>4</sup> that Saskatchewan's programme is receiving increasing support from lawyers, clients and mediators, but it has experienced a relatively low success rate, and the early mediation step, I am told, is often perfunctory or ignored. In 2001, Ontario established a pilot project for Toronto and the

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<sup>3</sup> See McHale, *The Role of Government Policy in Shaping DR Futures in B.C.*, April 25, 2002.

<sup>4</sup> See Macfarlane and Keet, *Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program*, (2005) 42 Alta. L Rev. 677. At p. 687 footnote 42 the authors report that mediators in Saskatchewan had recorded a 13 to 16 % settlement rate with another 13 to 19% rated as "agreement likely". This contrasts with data I have reviewed showing much higher mediation success rates elsewhere, ranging from as low as 40% to as high as 90%. I refer to a detailed compilation of statistics by Camilla Witt of Alberta Justice on November 10, 1997 showing success rates ranging from 40% to as high as 81%. Justice Chadwick issued a report dated May 11, 1998 on the Ottawa-Carleton ADR Pilot Project which reported a consistent 64% or better success rate. Dr. Julie Macfarlane reported a 54% success rate for the Toronto ADR Centre Pilot Project with an additional 15% of the cases settling before their scheduled mediation sessions commenced. A memorandum of June 29, 1998 reported a 67% success rate for the Mediation Pilot Project in the Provincial Court in Edmonton. Judicial dispute resolutions (J.D.R.s) in Calgary and Edmonton had a 75% success rate in 1998. In a January, 2004 update to Justice Agrios' *A Handbook on Judicial Dispute Resolution for Canadian Lawyers*, JDR success rates were placed in the 73% to 83% range. The Australian Law Reform Commission in its Issue Paper No. 25 (June 1998) reported 73% success rates. The Alberta Energy and Utilities Board in its article, "ADR Provides Solid Second Year Results", dated May 12, 2003, reported an 82% success record in its mediations in 2001 and 81% in 2002. In 2003, for a paper delivered at the ICC and CBA conference in Calgary on "International Commercial Arbitration & Energy Disputes - a Global Perspective", I conducted a survey of the recent experience of 16 energy companies involving 32 non-regulated mediated disputes of which 52% led directly to settlement and an additional 16% led indirectly to settlement for an overall 68% success rate.

Ottawa region<sup>5</sup> to require early<sup>6</sup> mandatory (with opt-out provisions) mediation in all but certain excepted civil cases. Consistent with the Civil Justice Task Force the purpose of this rule was "to reduce cost and delay in litigation and facilitate early and fair resolutions of disputes."

In November 2004 a practice direction was issued<sup>7</sup> which had the effect of removing early mandatory mediation requirements for Toronto actions commenced after February 1, 2005. The practice note stated that Rule 24.1 "will cease to apply automatically to civil actions in Toronto" but added that "mediation will continue to be mandatory. Parties are expected to conduct mediation at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after the action is set down for trial by any party." The explanation provided for abolishing early mandatory mediations in Toronto provided by the practice note is as follows:

"The bench and bar are concerned about serious delays in the civil justice system in Toronto. Waiting times to obtain dates for both interlocutory motions and trials are unacceptably long and growing. Concern has also been expressed about rising costs occasioned by the increasing number of formal steps and appearances which must be undertaken (particularly at the early stages) and the decreasing ability of counsel and parties to determine on a case-by-case basis how and when to move their cases along."

If early mandatory mediations in Saskatchewan and Toronto were not functioning as effectively as intended, the important question raised is whether or not the Task Force in 1996 was naïve in focusing on early consensual resolution of disputes. If early mandatory mediations in Saskatchewan and Toronto had produced the success rates referred to in footnote 4, it would be hard for me to understand why early mandatory mediations would not, overall, produce savings in time and money rather than rising costs, increased waiting times and added formal steps or, worse, be perfunctory or ignored.

The thesis of this paper is that there are a number of reasons why early mandatory mediation may not have worked as well as it might, and that there are practical lessons that we

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<sup>5</sup> Rule 24.1.01 of the Ontario Rules of Civil Procedure was extended to the County of Essex for cases filed on or after December 31, 2002.

<sup>6</sup> Within 90 days after the first defence is filed unless the court otherwise orders.

<sup>7</sup> (2004) 71 O.R. (3d) 97 (which reserves early mandatory mediation for wrongful dismissal and simplified procedures cases).

can learn from these reasons. My main point will be that our civil justice systems ought to institutionalize early mediation with incentives and sanctions, but without necessarily taking the next step of making early mediation mandatory.

Let me start by exploring some reasons why early mandatory mediation may not always work. The discussion that follows is influenced by my own experience, but has also benefited from articles by Dr. Julie Macfarlane, including her report on civil mediation in Saskatchewan referred to in footnote 4 above and also her article on Toronto and Ottawa entitled *Cultural Change? A Tale of Two Cities and Mandatory Court - Connected Mediation*, 2002 J. Disp. Resol. 241. Reasons why early mandatory mediation may not work include the following:

1. Mediation premature: Mediations in my experience do not work well when the parties are not ready for mediation. Parties need to be consensually committed to the process and fully prepared. It is important for sufficient relevant information to have been exchanged. Parties ought to have carried out a reasonable front-end analysis and risk benefit evaluation so that they can then negotiate effectively and the mediator can make meaningful contributions. If a dispute is not ready for mediation, a mandatory early mediation can indeed represent a costly and unnecessary step that has little chance of success.
2. Lack of skill and expertise: Mediations, particularly complex ones, benefit enormously from skilled, experienced, proactive mediators. In my experience, purely facilitative mediators, who do not nudge, intervene and occasionally, carefully, evaluate, have difficulty in producing settlements in complex cases. Equally, lawyers who are not effective negotiators or are not fully committed to the mediation process create roadblocks to successful mediations.
3. Tactics and possible prejudice: Some mediations are demanded for tactical or leverage reasons only. Sometimes a party's motivation will be limited to obtaining early disclosure of the other side's case. Not infrequently a party with a very weak case will use mediation in an attempt to extract a relatively substantial "nuisance" settlement. There are also cases where a party may legitimately fear disclosing prematurely key elements of strategy, evidence or arguments. Cross-examinations are sometimes

necessary to tie witnesses down on credibility issues. On occasion, the other side may not have woken up to an essential element of the case. In such cases trial counsel are often reluctant to tip their hands prematurely.

4. Resistance from lawyers: Some of this resistance may be for quite legitimate reasons, which I shall discuss further below. Some resistance however may come from those who are unprepared or unwilling to participate in an early mediation process, particularly one that is imposed on them. There may still be lawyers who view mediation as a fundamental challenge to their views of the adversarial system, particularly when mediation is imposed on them. There may still also be lawyers who feel uncomfortable or unskilled in mediation and resist it for that reason.

My response to these concerns is that they can be managed in a properly functioning early and ongoing mediation system. A properly functioning early mediation system, in my view, would reflect the following:

1. Lawyer resistance to early ADR can, in my view, be moderated by ensuring that the court system is built on the solid foundation that lawyers retain the freedom to assess reasonably whether and when mediation should take place and under what conditions. Mediations work best when the proper conditions for mediation exist. The obligation to ensure that such proper conditions exist rests properly and primarily on the lawyers involved. If the lawyers accept their professional obligation to consider, and where appropriate pursue, early and ongoing ADR, and if each jurisdiction provides, as the Task Force in its report recommended, *opportunities* for litigants to use non-binding dispute resolution processes as early as possible, then early *mandatory* mediation, which imposes a burden of proof on a party to opt-out of that step, may go farther than is necessary. Seen in this light the retreat in Toronto from Rule 24.1.01 may be a positive rather than a negative step. The British Columbia mediation programme and the Alberta Court of Queen's Bench pilot project, which both employ an opt-in model where either party may trigger a mediation by filing a request to mediate, give more control back to the parties and their lawyers, and may be viewed as a more favourable model than Saskatchewan's and Ontario's Rule 24.1.01's opt-out approaches.

2. Creating institutionalized opportunities for early mediation, if the mediation is not mandatory, will in my view require incentives and sanctions to reinforce the underlying importance of considering, and where appropriate using, early mediation. The English Court of Appeal<sup>8</sup> recently addressed the issue of whether a successful litigant who refused to participate in ADR should be deprived of costs. The court held that it was not the court's role to compel parties to participate in ADR but that the courts could encourage such a state and warned that "the form of encouragement may be robust". In that case the court encouraged the use of case management orders which required the parties to consider whether a given case is suitable for ADR with a direction that cost orders may be made after trial if the trial judge concludes that ADR would have been appropriate.
  
3. If more control over early and ongoing mediation is to be returned to the lawyers, it is essential for the lawyers to embrace fully their professional obligation to "consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options".<sup>9</sup> The *Halsey* case, in addressing whether a successful litigant who had refused to participate in ADR should be deprived of its costs, stated:<sup>10</sup>

"The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."

Lawyers in my view cannot now resist ADR because they do not like it or feel unskilled or uncomfortable in ADR processes. It would, in my view, be unprofessional conduct for a lawyer to turn a blind eye to this important and developing aspect of the litigation practice.

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<sup>8</sup> *Halsey v. Milton Keynes General NHS Trust* [2004] 4 All E.R. 920 (C.A.).

<sup>9</sup> Rule 2.02(3) of the *Rules of Professional Conduct of the Law Society of Upper Canada*; see also Chapter IX, Commentary 8, *Canadian Bar Association Code of Conduct*.

<sup>10</sup> *Ibid* at 924.

4. Whether in a given case to commit to early mediation will often involve a careful analysis of a number of relevant factors. There are some cases, as the *Halsey* case noted, that may not be suitable for ADR. These include precedent setting cases, those involving important issues of law and the construction of agreements that would affect future relationships, cases involving allegations of fraud and disreputable conduct, and cases seeking injunctive or other relief essential to the protection of a party's position. The court in *Halsey* also recognized the dangers of claimants using "the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit" and where "large organizations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy". The court also stated, "the fact that a party *reasonably* believes that he has a watertight case may well be sufficient justification for a refusal to mediate". The court recognized such factors as the cost of mediation outweighing the cost of a simple day in court or a late request for mediation that might jeopardize a trial date.
5. Adequate disclosure of important documents, information, arguments and settlement positions are critical to the success of mediations, and in particular early mediations. Extensive discovery is not, in my experience, necessary in most cases to permit a sufficient level of relevant disclosure to take place in order to give mediation a good chance to succeed. Experienced mediators will typically convene a pre-mediation meeting where adequate disclosure, scheduling, concerns about fairness, confidentiality and potential prejudice can be discussed. If there are legitimate concerns about premature disclosure, tactical maneuvering or potential prejudice, processes can be set up with the mediator to address those issues, and perhaps permit confidential disclosure of critical information to the mediator alone or, alternatively, to defer critical disclosures until the parties are close enough to settlement to justify disclosure.
6. Preparation is fundamental to the success of virtually all mediations. Preparation requires an adequate level of disclosure. It requires a careful risk/benefit/cost analysis. It requires an exchange of reasonable settlement offers. It requires an examination of underlying interests. It requires proficiency in the art of negotiation and mediation. Preparation is not limited to lawyers. It must include the mediator and equally importantly the parties

themselves. Based on my experience, the role of the parties should never be underestimated. Most mediators in my experience will not be satisfied with a process in which the lawyers dominate and the clients are all but invisible. Parties should not fear this. If they are well prepared, and if they use effectively their own opportunities to meet with their lawyers in confidence during the course of the mediation, breakdowns in communication can be minimized and the clients can be brought more directly into the ultimate decision-making process where their participation and ultimate consent are essential.

7. Finally, mediations, particularly early ones, benefit enormously from skilled mediators. The more complex, the more difficult the given case is, the more important it is to have a creative mediator who can draw on the wide range of options and solutions that mediation can offer. While many mediators are trained to be purely facilitative chairpersons whose primary duty is to assist the parties in conducting their own negotiations, I favour, particularly in more complex cases, a proactive mediator. A skilled proactive mediator will not impose solutions on the parties, but will use a wide range of techniques to help the parties evaluate their risks, benefits and costs, identify and focus on their important and underlying interests, will look for creative options, and will work in confidential caucuses to get parties to look more realistically at their case and to make suitable compromises. I can think of no single step that would do more to advance the cause of institutionalized early mediation than the significant expansion of skilled, available, proactive mediators.

Let me conclude by returning to the fundamental proposition that early mediations can and do work and that the 1996 *Task Force on Systems of Civil Justice* got it right when it said that "early consensual resolution of disputes holds the greatest promise for reducing costs and delays". In addition to the mediation success rates that I refer to above in footnote 4 (p. 2), I examined for this paper 25 fairly recent complicated, but concluded disputes, in which I personally acted as counsel, mediator or arbitrator. Ten of those cases involved mediation. Seven of those ten were successfully resolved at or shortly after the mediation, reflecting a 70% success rate. Eight of the mediations were early mediations and five of those settled at or shortly after the mediation session, reflecting an early success rate of 62%. These success rates,

including early mediation success rates, fall squarely within the data reported in footnote 4. This leads me to say, echoing my earlier quote from Professor Sander, that mediations in Canada are in fact working on Mondays, Wednesdays and Fridays. On the negative side of the ledger, seven arbitrations and three lawsuits did not settle but went to binding dispute resolution. That represents a non-settlement rate of 40%, which is high on almost any standard. A total of fifteen cases settled, seven which as stated above were resolved at or shortly after mediation. That leaves eight cases that were settled without any direct benefit from mediation. Of these, four (that is 50%) were settled very late in the litigation process after significant costs and time had been expended. This part of my statistical story causes me to agree with Professor Sander that on Tuesdays, Thursdays and Saturdays it is amazing how far mediation still has to go! For all of the laudable progress in ADR, our civil justice system still has challenges to surmount before it can claim to have achieved the goal of early consensual resolutions of disputes occurring as early as possible in the litigation process.