

# "Mediation and Other Stuff"



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Welcome to the first issue of Mediation and Other Stuff for 2012. I hope the coming year brings continued personal and professional success for us all.

My mediation practice grew significantly last year. I would like to take the opportunity to thank those of you who have retained me in the past year and I look forward to future dealings with you.

In this issue I look at the topic of picking the right mediator for your case which is an important consideration that does not get the attention it deserves.

In the Case of the Month I return to a topic covered in last January's Newsletter which is recovering the costs of a non-mandatory mediation after trial.

As usual, if you have any questions about mediation or arbitration

please feel free to contact me. I am always happy to discuss these topics whether or not you retain me, although of course I would prefer if you did!

If you have a topic that you would like covered in my newsletter, please let me know.

Colm

## PICKING YOUR MEDIATOR

Mediation offers an efficient and cost-effective way to try and resolve disputes that may arise on any major project. Although choosing the right mediator can be absolutely crucial to getting the most out of your mediation, it seems to me that many lawyers and clients do not pay enough attention to this step in the process.

Many mediators are capable of mediating almost any type of dispute but others are not. You need to think about the style of mediator which best fits your dispute. Do you want an evaluative mediator, a facilitative mediator or maybe a transformative mediator? Many mediators say they subscribe to one or other models of mediation. But today, especially in legal based disputes, it is more common for mediators to use a mix of techniques from the different models to craft the process for the particular dispute at hand.

Here are a few points not necessarily in order of priority, to be considered when picking a mediator:

- Is the mediator a Chartered Mediator (ADR Institute of Canada) or certified through the International Mediation Institute in the Netherlands? Mediation may be a mix of "art" and "science" and there are many excellent mediators who do not have formal qualification etc but they are in the minority.
- Does the mediator bring a pro-active style to mediation? If the

mediator just accepts what you say, he or she is unlikely to challenge the other side either. This will not bring the parties any nearer to settlement.

- How will the mediator prepare for the mediation? Does he or she require briefs or other information from the each party? The parties will have invested a large amount of time and emotional energy in preparing for the mediation. They will feel that much of this has been wasted if the mediator turns up unprepared.
- Do not pick a mediator without seeing their CV. If possible ask for recommendations and opinions from colleagues. Will the other party agree to this mediator? Be prepared to explain why you consider the mediator to be appropriate for the dispute. If you just suggest a name without explaining this, they may reject your choice and suggest someone else. Try your best to agree to a mediator with the other side. Do not be afraid to agree to their suggestion as a reputable mediator will not be "on their side". But only agree if you are comfortable that the mediator is able to meet your objectives.
- Does the mediator carry liability insurance? Mediators are rarely sued, in fact there are no reported cases in Ontario to date, but carrying insurance shows that the mediator is concerned about protecting his or her clients in the unlikely event of a loss for which the mediator is responsible.
- Check that mediator has no conflict of interest. If the mediator only works in a couple of subject or geographic areas he or she may have had dealings with the other lawyer if there is one. While the mediator should disclose this, you should not disqualify him or her over it as the mediator has no decision making power unless you are concerned that the relationship would likely give rise to a bias in favour of the lawyer or his/her client.
- Make sure you understand the mediator's style. Most mediators in Ontario are trained in a 'facilitative' model of mediation, but some use evaluative or transformative styles as well. I tend to use a blend of these and other techniques depending on the case at hand.

- What are the mediator's fees? Are there additional fees if there are more than two parties? Is the fee for a half day or a full day? Does it include preparation and travel? What is the mediator's hourly rate if the mediation goes beyond the time allotted?
- Does the mediator or one of the parties have a suitable venue available, or will the parties have to pay for space?
- How experienced is the mediator in the type of dispute in question?
- Have they done any writing, training or speaking in the field?
- Do you like their "style" and feel comfortable when you speak to them?

When I first wrote about this topic my newsletter in early 2010, I was not as clear on the issues of process or substantive expertise. Although there is some controversy about this, as in most writing about mediation, I strongly suggest that where possible you pick a mediator who is also knowledgeable about the subject matter of the dispute. While mediation skills are the most important criteria, if the mediator also has knowledge and experience in the subject matter it will likely help with the mediation process.

## CASE OF THE MONTH

In my January 2011 Newsletter, I looked at a topic which lawyers and mediators rarely think about which is, are the costs of an unsuccessful mediation recoverable under legal costs if successful at trial? This is not a problem in mandatory mediations conducted under Rule 24.1 or 75.1 as they clearly are. But what about the costs of mediation that are not part of the mandatory regime?

The costs endorsement in the Divisional Court case of [Saltsov v. Rolnick](#) 2010 ONSC 6645 (CanLII) in December 2010 dealt with the question head on and came to the conclusion that unless the parties have dealt

with this point in their mediation agreement, they are not. The court commented

In this case, while there is no formal agreement on costs of the mediation, it appears that the claim by the successful appellants to partial indemnity costs and disbursements related to mediation is not disputed in principle by the respondent Saltsov. However, as noted above, an agreement in principle does not fetter the jurisdiction of this Court to deny a claim for mediation-related costs and disbursements.

Referring to earlier case law from 1993, when mediation was not quite so mainstream, the court adopts Mr. Justice Blair's concerns that "parties may be discouraged from engaging in constructive dispute resolution processes for fear that at the end of the day, if such proceedings do not lead to settlement, costs will be increased". With great respect, that decision seems contrary to a policy of encouraging settlement and does reflect the fact that mediation is now embedded in the litigation culture of Ontario.

We now have a Superior Court of Justice costs endorsement released on January 16, 2012 from Mr. Justice David M. Brown. In [3574423 Canada Inc. v. Baton Rouge Restaurants Inc.](#), 2012 ONSC 296 (CanLII) dealing with a party's position that mediation costs were not recoverable, he stated:

[24] Finally, I do not accept the plaintiff's submission that counsel's fees for the mediations are not recoverable. Judges of this court strongly encourage parties to mediate their disputes. Fees paid for mandatory mediations are recoverable under Tariff Item 23.1, and in my view fees paid to mediators for mediations which were not mandatory would be recoverable under Tariff Item 35. I regard the counsel fees incurred by a party for a mediation as reasonably related to the conduct of the proceeding and therefore also recoverable.

This makes good sense and I hope Mr. Justice's Brown's position is adopted by other judges in Ontario.



If you have any questions or comments, please contact me.

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