

Dispute Resolution in the Courts and Beyond : What are We Learning about Mediation?

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Canadian jurisdictions with established (civil non-family) court-connected mediation

- **Saskatchewan** Queen's Bench Mediation Program (mandatory opt-out)
- **Ontario** Superior Court Mediation Program (mandatory opt-out)
- **Alberta** Provincial Court Civil Mediation Program (upon request of both parties)
- **British Columbia** Notice to Mediate process in Supreme Court (triggered by one party)

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The impetus for court-connected mediation

- Timing of settlement
- Costs of trial
- System costs
- Delays in justice
- Access to justice
- Leadership in the Bench and the Bar

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The push-back....

- "Look, we're big people and we can settle the darn thing, what do we need a third party and why do our clients have to be there?"
- Early settlement kicks me squarely in the pocket book...if you're being entirely selfish, just looking at the lawyer's interest, then why do I want this?"
- Mediation is "...a watered down legal system."

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...The irresistible logic

- "I personally am concerned that if only 3% of the cases actually go to trial, that means 97% of the time all the pre-trial stuff is wasted to a large extent, so 97% of money I make is from wasted time"
- "When I started practicing back in the mid 60's there was a terrible arrogance in our profession. We thought all clients were not necessarily idiots but didn't know what was best for them, and had no idea what was going on in the legal system. People are 100% more sophisticated now, know what goes on in the system generally and are much more conscious of where their buck is going than they used to be."

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Accommodation over time

- "I was certainly skeptical of mediation but that skepticism has now been removed and I have developed the skill to go into mediation. I always go to it with the view that I can learn something anyway whether or not it settles."
- "I am no longer offended by the earlier process." It is an antidote to "the almost fetishistic obsession with knowing everything about a file before you can say anything about it."

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What do we know so far from evaluation of court-connected programs?

- Mediation shortens time to case disposition
- Voluntary programming has low take-up
- Client satisfaction is generally high, and not affected by whether the referral is voluntary or mandatory

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Impact on counsel

- Counsel attitudes towards mediation improve with experience
- Experience with mediation leads to greater awareness of the need for new skills
- Experience with mediation increases the time and attention counsel gives to settlement strategizing

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Continued concerns and critiques

- Timing and voluntariness
- Expertise and qualifications of mediators
- Lack of preparation/ appropriate skills among counsel
- Dominance of counsel, lack of client participation
- Going through the motions : the 20 minute mediation
- Settlement which is "less than" justice

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How "Local Legal Culture" affects Mediation Practices

- Culture of local Bar in exchanging information, co-operating in negotiations (often urban/ rural distinction)
- Local leadership on the Bench and Bar
- Access to local mediators (also familiarity, comfort)
- Local norms of "good lawyering" in both negotiation and adversarial processes

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Conditions for effective mediation (1)

- "Ripeness" and/or "hurting stalemate"
- Each side *approximately* equally committed to making a mediation process constructive
- All the "parties" at the table/ input accounted for

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Conditions for effective mediation (2)

- Counsel has prepared her client to participate and consider options (including reality checking)
- Proactive, capable mediator
- Parties can interact face-to-face

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Conditions for effective mediation (3)

- Need for pragmatic, effective and realistic solution overrides desire for vindication or victory
- Relative certainty of the law
- Counsel willing to offer her client a realistic appraisal of possible outcomes (including costs)

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Conditions widely associated with effective mediation (but far less important in practice)

- Continuing relationships between the parties
- One or other side has a “hopeless” case
- Evaluative mediator (hasher, basher or trasher)
- Post-discoveries

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What Do People Need in Order to Settle?

- To feel that they can either let go of their conflict as a values-issue –or reframe it as a resources issue
- To feel that their expectations have been met to an acceptable degree
- To feel fairly treated – given voice, had their concerns taken seriously, understood the place of their concerns in this outcome

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Mediation has the potential to change the way we think about conflict

- Mediation moves parties and professionals from an exclusively normative right/wrong frame to a problem-solving frame
- Over the long term, cognitive change and behavioral change go hand-in-hand
- Mediation is often a surprising process – the energy that clients bring to the process, the “real” underlying cause of the conflict, and what is proposed as an acceptable outcome

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