

# ADR Flash Bulletin



ADR Institute of Ontario, Inc.  
ONTARIO DISPUTE RESOLUTION CENTRE

## Mandatory Mediation Update OBA Section Meeting Report

*by Roger Alton, C.H.R.P., C.Med.*

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The good news is that as the Court Registrar begins to enforce Rule 48, used to ensure civil litigation proceeds in a timely fashion, opportunities to mediate will increase!

The overriding message at the December 12 Ontario Bar Association meeting, attended by many ADRIO members affected by the significant drop in mediation cases in Toronto, is that mediation is alive and well and that the demand for skilled mediators is growing.

The meeting was an important opportunity to learn about the government's Civil Justice Reform Project, and plans to further change the way litigation and ADR intersect. This article highlights the issues of foremost interest to ADRIO members.

Speakers included: The Honourable Mr. Justice Warren K. Winkler, Senior Regional Justice, Alan L. Rachlin, Rachlin & Wolfson LLP (Personal Injury Counsel), Richard M. Bogoroch, Bogoroch and Associates (Personal Injury Counsel). Paul M. Iacono, Q.C., Beard Winter LLP and Christine Hart, Accord/Hart & Associates Inc. co-chaired the event.

The Honourable Mr. Justice Winkler kicked off the evening by indicating that the justice system was in a 'melt down' state – with 60 missed 'long trial' dates in 2004. The practice direction was designed to broaden the base of mediation resources and, with the inclusion of cases under the Simplified Rules, settle even more cases. Mandatory mediation remained but was not required as early in the process.

Justice Winkler reported that the success rate moved from 40% to 80% with these changes (a statistic many ADRIO participants believe was over stated). Mediation was enforced by indicating that lawyers were to mediate or, they would not get a trial date. The result was a drop in the 'long trial' waiting period from 36 months before the new practice direction to 18 months. Justice Winkler concluded that the changes achieved what they were intended to achieve.

Richard M. Bogoroch indicated that the Bar is extremely pleased with the new practice direction. As Justice Winkler indicated, prior to the practice direction, the system was on life support and lawyers just couldn't get cases to trial in a timely manner. Mandatory mediation was not efficient, was scheduled far too early and was expensive. Now, lawyers are enthusiastic participants in the mediation process. They now have enough information at mediation to settle cases. Ninety-

eight per cent settle before trial. The new direction allows lawyers to behave as adults. Rather than going to a case management Master with every issue, issues are resolved in a collegial way between lawyers. The new rules are much better for litigants with trial dates in 18 months where it used to be 36 months.

Alan L. Rachlin agreed with Richard's comments and indicated that he believes that since the Status Notices are just now going out that we can expect a run on engaging mediators in the next few months. He agreed that the new process better serves the clients. He too believes that defence counsel who were, resentful of the mediation process are now supportive.

Paul M. Iacono (Co-Chair and mediator) spoke from his group's perspective, indicating that: when the new direction came into effect in January '05 new mediators were 'cut off at the knees' and said that as of late spring 2006 mediation work started coming back to life. Status Notice will have a big impact for lawyers as they will have three options:

- o Call the other lawyer and agree on a schedule
- o Call a Master and get a case conference, or
- o Arrange a mediation

Paul invited David Lipton (non-lawyer mediator – commercial matters) to comment. David indicated that there is a great and growing demand for mediation of commercial matters; that lawyers are now willing and ready to pick mediators; that business for mediators is growing, and that adding Simplified Procedure matters has been a plus. He believes that the roster of mediators (OMMP) will always be viable and that under the new direction, matters are ready for mediation.

The Honourable Mr. Justice Winkler stated that there was a serious 'access to justice' issue given the cost of case management; that case management was so resource heavy that cost drove the entire case and legal cost got in the way of settling. Mandatory mediation under the new direction is set up to make it easy to settle when you turn up the heat.

### Questions and Responses

**1) Barbara Landau (ADRIO Board of Directors) agreed that 60% of the cases involving personal injury were not ready for mediation early under OMMP but asked what the remaining 40% that were ready were paying in added costs because of the delay?**

Paul M. Iacono responded that since personal injury files were being worked on and others were not, there was really no difference in costs.

The Honourable Mr. Justice Winkler agreed that, with the bottom layer of cases, where there was no activity, there would be no costs. He indicated that he has instructed the Master that there will be no case conferences and that the options are to agree on a timetable or go to mediation, or the action will be dismissed.

**2) Barry Fisher (Past chair OBA-ADR Section) expressed the view that it is unfair that defendants in wrongful dismissal cases are not compelled to attend the mediation sessions. Most often they send a representative who is not authorized to settle the case, which is very unfair to the plaintiffs.**

Mr. Justice Warren K. Winkler fully agreed with Mr. Fisher that the decision maker should attend, that the committee came up 'light' on this point and that this should be rectified at the first opportunity. He also indicated a recognized need for 'specialty' mediators (*with subject matter understanding*) and confirmed that the system works best when lawyers have the opportunity to choose mediators they want.

**3) Corrine Sklar (Member ADRIO) asked if, as a new mediator who felt cut off at the knees when the practice direction came in, it was worthwhile making the effort to be added to the roster at this point?**

Paul M. Iacono's advice was to get on the roster. He indicated that he believed that it is once again becoming viable to be on the roster since if the lawyers cannot agree on a mediator, the roster will be used.

**4) Leslie Macleod (Leslie H. Macleod & Associates) asked what we can all do (lawyers, judges, mediators) to embrace voluntary mediation.**

Alan L. Rachlin stated that people have been mediating for a long time, long before mandatory mediation. Paul M. Iacono thought that mandatory mediation has helped to encourage lawyers and their clients to embrace mediation. Mr. Justice Winkler indicated that under the mandatory mediation rules we sent parties to mediation against their wishes and that some lawyers saw mandatory mediation as a cheap form of 'Discovery'. He noted that OMMP increased the pool of mediators. He indicated that there is no difference in settlement rates for non-lawyers and lawyers.

**5) Heather Swartz (ADRIO Board of Directors) expressed the concern that the practice direction pushed all cases (personal injury: 60% others: 40%) into a delayed time line for mediation. She asked if the practice direction was not, therefore, unfair to the 40% that are ready for mediation earlier.**

Justice Winkler stated that we simply do not have the resources to analyze each case so they must be treated generically. He also said that what we have to look at is that what we have now (new practice direction) is working and two years ago we were in a 'melt down'.

Richard M. Bogoroch also indicated that the principle of the greatest good for the greatest number of litigants must be applied.

**6) David Price (Mediator) asked for comments on the fact that there has been no adjustment in the mediation tariff fees and no movement by the rules committee to make it easier for mediators to collect the fees. It falls on mediators to collect fees.**

Paul Iacono indicated that The Attorney General's office did not want to 'go there' and that this has not been an issue. Justice Winkler indicated that this was a matter for the AG's office rather than the rules committee.

**7) Paul Jacobs (Past Chair, OBA-ADR Section) thanked the OBA-ADR Section executive who worked diligently with Justice Winkler as the new practice direction was being drafted and wanted to give credit to those who worked hard during this time. He said that most of the recommendations offered were incorporated into the practice direction.**

Justice Winkler stated that The Bar and mediators stepped up and made it work. That the community got in step with the culture shift (with the new practice direction) and that consultation with the Bar was very important with most of their recommendations being put into the practice direction.

**8) Hilary Linton (OBA-ADR Section Chair & Principal Riverdale Mediation) asked if, going forward, Mandatory Mediation would be expanded?**

Justice Winkler explained that many court jurisdictions are struggling with backlogs, that there have been many enquiries about what was done in Toronto to relieve the backlog situation. He stated that while the practice direction implemented should be used in other jurisdictions, there is some reluctance to use a concept developed in Toronto.