



## RESOLUTION HOUSE 2008 Annual Report

### Shorter and Sweeter

Last year's newsletter (still on the firm website, if you want to read it) was several pages longer than usual, due to a number of major changes. In contrast, this year, not only is the newsletter shorter, it also is being sent out with seasonal greetings in paper form, in addition to being added to the website. It's worth reading!

### Client-Favourable Changes for 2009

The big change last year was the decision to go off the mandatory mediation roster rate, which has remained frozen since 1996; however, after careful analysis, I opted for a competitive, preferred/lower rate than is charged for private mediations, combined with a reduced continuation rate. The full rationale and analysis for the decision is found in last year's newsletter, and will not be repeated here. I have noted that the number of bookings has fallen off, due, I understand, to some stakeholders selecting the lowest-cost service provider. Noting that the choice of service provider is the prerogative of the "customer", I can only say that my training (including an LL.M. in ADR and continuing education programs, which I continue to take every year; see below) is far above and beyond what many mediators offer, and combined with over 30 years of experience as a practicing lawyer and as a mediator/arbitrator, I like to think that the relatively small extra amount is well worth it, particularly in difficult situations, whether they be related to procedural issues, human dynamics or substantive differences. The analogy that comes to mind is the difference between a seasoned litigator and a lawyer who has been at the Bar for two or three years.

**Experience counts!** With hundreds of mediated cases in a wide variety of topical areas under my belt, I continually draw upon this experience, and although there are many commonalities amongst cases, there often are unexpected twists and turns where experience makes a big difference.

This year, several **client-favourable changes** are being implemented, commencing in 2009:

**1) Resolution House Inc./Ian Szlazak availability dates soon will be available on line.** The system that will be used has not been determined as of "press time". While I personally like speaking to people in the course of booking cases, I gather that those charged with surveying mediator availability want instantaneous results. The availability calendar will be updated frequently and bookings will need to be confirmed by e-mail, facsimile or telephone, as is the case now.

**2) I am altering the Resolution House policy on cancellation charges for mandatory mediations, which can significantly reduce them.** Here's how it will work: the current policy for cancellations or adjournments on the day of a mediation or the last business day prior to a mediation will remain the same. However, during the period beyond the last business day prior (referred to the seven (7) clear calendar days before the date set for a mediation, **the \$500.00 fee can be reduced by one-half (to \$250.00) if the mediation is re-booked and conducted on a date within 15 calendar days of the original mediation date**, provided that I have the proposed date available, which is highly likely. The onus for rebooking will be with the party/representative who required the cancellation. The

party(ies)/representative(s) responsible for the cancellation fee will receive a refund cheque upon payment in full of their share of the mediation/cancellation invoice.

**Alternatively**, if there is a desire to reduce cancellation fees and a re-booking cannot be made within the 15 days, referred to above, there is another way to save! If the original case requiring cancellation still proceeds to mediation, but at a later point in time, possibly due to issues beyond the control of a party, and the same lawyer/representative who made the cancellation **books a new mediation within 10 calendar days that takes place within 90 calendar days**, Resolution House will issue a refund cheque to the party/representative making the new booking in the amount of \$150.00, payable upon the payment in full of the account for the new mediation.

There is nothing stopping anyone from using **both** of the procedures to effectively reduce cancellation charges from \$500.00 to \$100.00. In these hard economic times, Resolution House is making changes to make mediation easier on litigants and their representatives!

### Learning, Continued

2008 saw my participation at several conferences, amongst them the Canadian Institute program in Ottawa in January on Running a Fair Hearing and ending with a presentation in Austin, Texas in September at the annual ACR Conference. The latter took place during the US Presidential debates and it was interesting to be in Republican Texas amongst a primarily Democratic crowd. Oh, yes, I managed to get as close to the G. W. Bush ranch near Crawford (near Waco, for those familiar with the geography of Texas) as an uninvited person can get without being arrested - there did not appear to be much to the place, but why would that be a surprise?

### Statistics! An Interesting Phenomenon in '08

Every year at this time, I look back at the cases that I have mediated over the past year or so (in this case, January 1, 2008-November 30, 2008) to see whether there have been any developments of note. The vast majority of cases in this period were mandatory mediations, which historically have shown a pattern of settlement of between 50 and 55 percent, better than the once-available Attorney-General settlement rates (more about this below). I have always held the view that despite the "one out of two" ratio of early settlement at mediation being very respectable and a source of pride for litigators and mediators alike, there was room for improvement. And the big news this year is that even with the current time frames for early mediation, my cases have been settling at the rate of **66.2 percent (!)**, a significant jump from the pattern established for over a decade. It will be interesting to see what happens in 2009.

### The Court and Mandatory Mediation

In the course of doing some research, or rather, trying to do some research for a paper this past spring, knowing that the Superior Court of Justice in Ottawa, as well as in Toronto, kept statistics related to settlement rates and so on, I made inquiries as to what the latest statistics indicated. To my amazement, I was not only told that I could not have access to such information, but that much of the statistical data that used to be

kept is no longer being collected at all. Apparently, some of this has to do with the “new” Court data management system that came into being relatively recently. My understanding, however, is that this dearth of information cannot be blamed on a computer program, for a computer only will do what it is told to do when it is programmed. It appears that there is no desire to collect and keep the information that was being kept before; alternatively, this information, including data related to the varying success of mediation in different centers in Ontario, is not being shared, not just with me, but with anyone I spoke to. Makes one wonder what the thinking is behind such changes. I remember when mediation was discussed in the same breath as access to justice and the concept of rolling it out to all parts of Ontario, back in 1995-96. Could there be a linkage between some of the changes to the relevant Rules of Court/procedural changes in Toronto (with minimal or no consultation with all affected communities) and the above? It is difficult to discuss or debate systemic changes to anything without having a database of information upon which varying proposals may be measured. I am disturbed by the lack of transparency that these developments point to - whose purpose is being served and where does the public interest fit in?

### Questions of “Style”

There is a solitary side to the practice of mediation, and without regular feedback, it is difficult to know how one is perceived. My billing letters refer to an evaluation, which is not responded to nearly as much as I would like. I try to get a sense of what people are thinking from casual conversations and one theme that I have heard is that some individuals wished that I would be more forceful with the “other side”, presumably to help the others “see the light” or the lack thereof. In an academic sense, what I hear is that some people prefer a more directive/evaluative approach. I believe that a response to this point must touch on several points. Firstly, because many of the conversations that take place at mediation take place between the mediator and a party and their counsel in the absence of all others (in caucus) it is impossible for counsel or a party to know what is being said in their absence. I can assure all readers that I do my best to stay neutral, complemented by a non-coercive approach, but to be as helpful as I can to all concerned in assessing issues and making decisions. I take a cue from the well-known mediation maxim- “be hard on the problem, not on the people”.

A mediator’s job is not to brow-beat a party or counsel into submission. I know, from over a decade and a half acting in the role of counsel, that I would not like it if a mediator second-guessed my position on the issues. However, impartiality does not mean that I cannot ask probing questions about why a position has been taken, and so on. The reader may be assured that I try to deal with all concerned in the same fashion, recognizing that there are variations of personal style amongst counsel and parties. I try to address issues in a manner that I think will be most effective in provoking behaviour that keeps resolution in the foreground. To put it all another way, I do not think it is appropriate for a mediator to tell anyone what he would do or what they should do. There must be recognition that a mediator will not generally know all of the factors at play for a particular party or representative- he is not told everything, and must accept this. Thus, when a mediation fails to produce a settlement and a party or representative finds this frustrating or even baffling, that party/representative may want to take a hard look at the array of factors that can produce such an outcome. Blaming the mediator is just a little too easy.

Having said the above, I am open to helping the participants in a mediation who want more than facilitative mediation, but what this is called is not “mediation” but rather **non-binding “early neutral evaluation”**. I have always offered this complementary

service under certain conditions: the evaluation can only occur at the end of the mediation, once it is clear that my role as a mediator has come to an end; I must be satisfied that I have sufficient facts and legal knowledge to do justice to the request (on this point, noting that I am a labour arbitrator also, I am most comfortable offering my views in employment-related cases); and, of course, the evaluation can only take place if all concerned are in agreement that it should take place. I also am open to discussions on the suggested approach prior to the mediation, as long as they include the opposing representative(s). Assuming that a request will not cause an ethical breach on my part, I am open to a flexible approach to mediation, for I see it as a constructive problem-solving process.

### 30 Years at the Bar and Not a Drop...

I was called to the Ontario Bar in 1978. In some ways, it does not feel that it could have been so long ago. I currently am reading Martin Gilbert’s massive history of Israel, and I am repeatedly reminded that I actually have lived through and can recall many of the events in the book - from this perspective, the thirty years *does* seem to have been a long time. For well over half the period, I have been a member of the Bar, practicing as a prosecutor, labour and employment practitioner and corporate counsel, in Ontario and across Canada, both in the provincial and the federal sectors. Little did I know it at the time, but I have found that I continually draw upon my prior legal career as a mediator/arbitrator.

I have directed litigation, prepared for it, conducted it, been the subject of it and signed many bills for it(!). I understand the dynamics of lawyering and relationships with clients, particularly in cases where the involvement is lengthy, intense or repeated. I think that many people would rather not engage in litigation if they could help it, not only because it costs them a lot of time, money and personal angst, but because they are adverse to adversity. Given the chance, and if accorded a reasonable amount of compromise and civility, people respond well to a process that allows them to find answers efficiently and humanely. This is not to say that litigation is some dark force - I believe that adjudication must always be an option. We need the guidance of a wise judiciary to answer difficult questions of widespread interest, and the value of precedent is not doubted. But the complement or alternative of mediation is, without a doubt, something that is needed - it has completed the menu for disputing, and with good guidance, has demonstrated that it is capable of producing overall results that can be superior to what a court would produce.

### End Piece, or Should That be Peace?

As this is written, Canada is roiling from the political turmoil at the federal level. Ever the neutral mediator, I will not take sides, but will observe that all parties concerned suffer some common characteristics- a focus on their own egos and thirst for power when the business of the nation is urgently in need of attention; a propensity to escalate the situation through pointless personal attacks, stupidity and hyperbole, and a lack of sincere and enduring efforts to work together in a situation which demands a reasonable level of cooperative behaviour - a minority government. I hope that the Christmas period (remember the part about good will to all men?) will serve as a time of reflection and produce a new approach in 2009. Here’s to “peace, order and *good government*”, and here’s to 2009!

The firm website, [www.resolutionhouse.com](http://www.resolutionhouse.com), continues to be added to, so please visit. Your comments are welcome anytime - just write me at [iszlajak@resolutionhouse.com](mailto:iszlajak@resolutionhouse.com).

Ian Szlajak



## RESOLUTION HOUSE 2007 Annual Report

### Same Old, Same New

This, the second Resolution House Annual Report written for the firm website, continues the evolution of the firm to more internet-based forms of communication, the convenience and immediacy of which are undeniable. In 2007, I relied upon e-mail far more than in previous years to communicate with clients, and I often receive briefs via e-mail. Fax and hard-copy continue to be used, however, and it still is difficult to beat a well-presented, bound brief with tabs, setting out relevant documents, particularly in cases where reference to the documents at the mediation is highly probable.

Client feedback using the Resolution House website evaluation form was minimal, but I continue to believe that there should be an easy-to-use channel for client communications, and thus reference to the form in billing letters, while altered, will remain.

Perhaps most significantly, starting in 2008, Resolution House communications, including **billing letters**, will be transmitted by e-mail whenever possible. It is hoped that this will make for speedier account processing for clients and that receipt of payment by Resolution House will be faster. As it stands now, a considerable number of accounts are overdue, which results in reminder letters and administrative hassles for all concerned. It is possible that Resolution House will offer electronic **bill payment** also – this currently is being investigated, and those concerned will be advised if a change occurs.

### Mandatory Mediation – Coming Off the Roster

During 2007, I remained on the Ontario Superior Court of Justice roster, providing mediation services at the tariff rates, which have essentially been unchanged since 1996, when the Court-connected program first rolled out in Ottawa. In 1998, the tariff was put into regulatory form, coincident with the implementation of Rule 24.1, but the hourly rates essentially stayed the same.

I have thought long and hard about remaining on the roster for 2008 and beyond and concluded that I no longer can afford to do so. Being frozen at the same rate of remuneration for over 10 years has had an erosive effect- the Bank of Canada inflation calculator indicates that inflation alone has increased by approximately 25 percent in the period 1996-2007! An illustration of what this means is that \$187.50 in 2007 dollars is needed to match \$150.00 in 1996 dollars; put another way, the two-party mandatory mediation rate today, adjusted for inflation only, should be \$750.00, not \$600.00. That's not accounting for any increase in remuneration beyond inflation; I am hard-pressed to think of anyone else in Canada who has been frozen at the same rates for so very long. I understand that the initiative for any change would have to come from the Ontario Ministry of the Attorney General and I am sorry to note that there seems to be no interest in addressing this issue. The departure from the roster of the most experienced mediators, which has been going on for several years, weakens the

mandatory mediation program/roster and the faith that the public places in it, in my opinion. Should the tariff rates be changed in the future to fair and reasonable rates with a meaningful amending mechanism, I am prepared to consider rejoining the roster.

When I further note that the government has not been shy over the years to substantially increase a range of court-related fees which are unilaterally levied upon litigants, any argument that might be made that the roster tariff cannot be changed for "access to justice" reasons looks pretty hollow. No system can be expected to work well if it is not continually monitored and improved upon. The last time the government surveyed views related to mandatory mediation, including those of the public, was in 2001. Mandatory mediation has stopped in its tracks in three of the largest cities in Ontario, despite early plans to roll it out to smaller centers, province-wide. In some ways, insofar as it works hand-in-hand with a properly administered case management system, which I believe the public wants, mandatory mediation has regressed in recent years. Rule 24.1 could be improved to make it more responsive to the realities of much litigation and deal with anomalies in its application, but, as far as I can tell, there is no interest in amending the Rule. I have hung in there as long as I have and continue to serve on the Local Mediation Committee (which could be structured to do so much more than it does now) because I have believed all along that the changes which were implemented in the civil litigation system in the mid-nineties were some of the most significant, responsive and positive changes in the delivery of civil justice since the inception of courts in what is now Ontario. Mediation has had an enormous impact on litigation in Ontario.

That said, **effective December 31, 2007\*, I will be removing myself from the mandatory mediation roster for Ottawa.** To be clear, this only means that I will not offer my services at the tariff rates, but I most certainly want continue to do mandatory mediations, and. In addition, I will continue to do private mediations and arbitrations anywhere in Ontario and beyond.

Accordingly, I am posting on the Resolution House website the "**flat rate**" **fee schedule** that will apply to bookings of mandatory mediations, effective January 1, 2008- just go to Resolution House website, and on the home page, hit the appropriate box on the yellow bar, are you will arrive at the schedule. Please note that for the sake of simplicity, I have divided the schedule into **two parts**-1) the usual **half-day mediations**, and 2) **full day mediations**.

\* In recognition of the need for a **period of adjustment**, please note the following, which amends the above start date to a degree: all written retainers of Resolution House received by the end of business on Friday, January 11, 2008 and which are mediated by no later than April 30, 2008, will be mediated at the applicable tariff and continuation rates. Similarly, any cases already referred to me in writing but not yet scheduled, will be mediated at the applicable tariff and continuation rate provided that the mediation is completed by April 30, 2008.

Adjournments taking a mediation beyond April 30, 2008 will disqualify the file for this preferential treatment. If you want to enjoy the tariff with Resolution House, **book soon!!**

In setting the rates for mandatory mediations, I have closely canvassed the rates of other service providers. I continue to believe that access to effective and experienced mediation services is important to litigants and thus I have structured the new fees with great care. The good news is that mediation with Resolution House will continue to be competitive and cost-effective in comparison with other mediators with comparable training and experience - in addition to the inflationary factor referred to above, the cost increase for a half-day mandatory case in the 2008 schedule is in the order of 2.5 percent per annum over the period 1996-2008. While some service providers have only one rate, irrespective of whether the mediation is mandatory or not, I have decided to offer my services on mandatory cases at a substantially discounted rate from my **private mediation rates**, which **also have been revised recently and are enhanced by the addition of a new half-day private mediation rate for mediations in Ottawa**. I have developed the latter in recognition of the need for services in locations relatively close to Ottawa, where mandatory rates do not apply, but where a full-day private mediation may be unnecessary. And if the parties and counsel are willing to come to Ottawa, the savings are theirs! The Resolution House private mediation schedules are available upon request, as is the **also-revised private mediation schedule for Greater Toronto Area (GTA) cases**.

But back to my new mandatory mediation fee schedule - please note its **distinguishing features**:

- charges for time utilized beyond the applicable flat-fee rate (the "continuation rate") have been reduced significantly, and Resolution House, unlike many other service providers, will continue to bill continuation periods in half-hour increments, which I believe results in fairer billings for clients.

- Resolution House will continue to absorb disbursements on mandatory mediations taking place in Ottawa.

- the applicable flat rate will be applied by Resolution House irrespective of whether more time is spent reviewing briefs and administering the file that has been allocated under the tariff, which caps two-party preparation time at one hour, with slight incremental increases for larger mediations. This is done with the knowledge that the majority of files absorb more preparation time than the tariff recognizes, and that it always has been and will continue to be the policy of Resolution House to read all of the materials that are forwarded by counsel and the parties. The only exception to the application of the flat-fee approach to preparation for mandatory mediation cases is with reference to extraordinary meetings, teleconferences or other work that is required, which will be known to the parties and counsel beforehand and which will be billed out at a reasonable rate.

- the "stepped-rate" structure for mediations involving more than two parties has been adapted to the new Resolution House fee schedule, as I believe that it fairly reflects the increased complexity and challenges of such multi-party mediations.

I am aware that some institutional defendants may hold the view that the cheapest or lowest-charging mediator available should be used. I think that those who have experience as representatives will agree that an experienced mediator can achieve far more, generally more efficiently, than an appointee

who mediates infrequently and who is not familiar with the parties or the litigation cultures that they bring into the room. I hope that many will agree that experience with a huge variety of procedural situations and litigious causes of action, involving literally thousands of parties and hundreds of counsel, continues to make the choice of Resolution House a wise one.

I also have a suggestion for those parties/representatives who are finding that their mandatory mediation experiences are disappointing or feel like they are becoming somewhat routine exercises in futility: take a hard look at what you and your counsel are doing to control the timing of the process. A huge portion of failed mediations are due to premature referral, when insufficient facts are available, making intelligent negotiating and decision-making impossible. I also believe that if the parties are more prepared for their mediations, and the work that needs to be done prior to meeting is complete, the rate of "success", as measured by mutually satisfactory settlements or outcomes, will increase markedly.

### Stats '07

In order to facilitate timely posting of this newsletter on the web, this year's statistics cover the period from November 1, 2006 to October 31, 2007. The private mediation rate, based on a smaller sub-sampling, was 75 percent settlement, lower than last year but still significantly higher than the rate reported for mandatory mediations. On the mandatory mediation side, with a far larger sampling, if the cases that are known to have settled just prior to mediation or shortly thereafter are counted, the settlement rate is 53 percent, actually higher than last year. Without counting the cases that settled either before or after mediation, but only "at mediation" settlements, the rate of settlement drops slightly to exactly 50 percent – still very respectable, considering the hurdles faced by an early-stage mediation process which often is not the beneficiary of prior discovery.

Perhaps what is more significant, certainly more memorable than the statistics themselves, are the distinct memories of some mediations in particular, often ones relating to large, multi-party litigation and/or cases relating to very difficult issues – examples of the latter include two "memory-recalled" physical molestation cases that I mediated in 2007. Irrespective of who's "right" and who's "wrong", these cases bring to the fore the fragility of the human condition and the consequences that may flow from events that have gone unresolved for many years.

### "New Face on the Block" – Ian Szlazak, Family Mediator

I have immersed myself in litigious disputes for over a decade, and continue to find the cases I mediate to be of interest. However, when I ponder the variety that is mediation, I realize that I miss some of the elements and challenges that come with multi-session mediations which deal with interpersonal interests and issues. These mediations are significantly different from mediations related to most civil litigation where there is little or no prospect of a continuing relationship, and where, generally-speaking, the process centers on distributive, settlement-oriented negotiations.

While by no means am I abandoning my current mediation practice, I have decided to diversify and now offer services as a family mediator of financial issues, which includes an array of issues that arise upon separation, including asset division, child support, spousal support, living arrangements and so on. I also am willing to assist individuals who largely have worked out their parenting plans, either on their own or with a specialist

in parenting mediation. Of course, I also will draft separation agreements for the approval of clients and their counsel.

I did not come to this decision lightly. In fact, I have returned to university this past autumn for the fourth time in my career, auditing the Family Law course at the University of Ottawa Law School in order to become more knowledgeable about this interesting area of law. I also have taken the courses in family mediation endorsed by the Ontario Association of Family Mediation (OAFM), which are required in order to meet the requirements of an OAFM (Acc.FM) certification, which I aim to qualify for in 2008.

I believe that the breadth of experience which will be provided by family mediations will serve as an invigorating influence in my general mediation practice and in turn I think that the extensive experience I have gained from over 1,800 cases as a consensual mediator of litigious disputes will come in very handy as I move forward with family mediation. I have mediated numerous estate cases and family business disputes over the years and these cases often bring forward issues very similar to those encountered in family mediation.

To those counsel/firms who have used me for general litigious disputes but who also practice family law, and to the family law bar of Eastern Ontario, I say – “Here I am, trained up and ready to be of service to your family law clients”. My aim is to provide credible, neutral professional services which exceed the expectations of clients and their representatives.

### **The Wagman Case, Continued**

In the last Annual Report, I referred to a Law Society of Upper Canada proceeding (Wagman), which was relevant to lawyer-mediator relations. The case was under appeal and could not be conclusively reported on last year. The Appeal was heard early in 2007 and the Appeal Panel rendered its decision on July 10, 2007. The original decision found that Mr. Wagman had engaged in professional misconduct by communicating with three individuals over a period of approximately one year in a manner that the Hearing Panel found warranted a two-month suspension – his interactions were with a physician over payment for medical reports, an insurer representative at a telephone mediation related to a bad faith claim against the insurer and a roster mediator in Toronto, apparently regarding fees. Without getting into the details, the conduct complained of could be fairly described, as the Appeal Panel did, as “...the three incidents of misconduct escalate in their nature and severity, starting from curtness [the doctor] to discourtesy [the mediator] to completely inappropriate vulgarity” [the insurer representative]. The decision discusses the standard of review and, coming to a conclusion on the evidence that the original penalty was excessive, substitutes a reprimand for the suspension. Aside from supporting the proposition that the Law Society has jurisdiction to intervene in matters of a similar nature involving mediators and others, the decision underlines a concern that is worth reproducing:

Nonetheless, the Appeal Panel is concerned about the member's lack of civility in these three incidents and with the increasing lack of civility in the profession generally in its dealings with the public. The kind of language used by Mr. Wagman brings the profession into disrepute.  
[...]

The Appeal Panel also invites the Law Society to make an effort in its Notices to the Profession to underline the increasing concern of the Tribunal with

respect to maintaining decorum and civility in all professional dealings and at all times.

The decision was not unanimous, with the dissenting member of the Panel stating that the two-month suspension was reasonable in the circumstances [Case citation: Law Society of Upper Canada v. Shale Steven Wagman, 2007 ONLSLAP 0006].

What I take from the decision is the need for vigilance by all concerned to conduct ourselves in a civil and professional manner, despite personal issues which may make doing so challenging. Unfortunately, during the past few years, I have experienced some incidents where the level of civility fell below what I think the Law Society (and most lawyers/representatives I enjoy working with) is concerned about. I hope that such incidents are aberrations, not a trend.

### **Continuing Education**

Over the years, I have attended several annual conferences of the American Bar Association, Dispute Resolution Section. The 2007 conference took place in Washington, DC in April and I attended. These conferences are the richest smorgasbord of speakers and topics of ADR that I know of, surpassing, in my view, the offerings for lawyer-mediators of any other group, including the Association of Conflict Resolution (ACR), which also holds a large annual conference. It was a good conference, with one of the most interesting presentations entitled “Detecting Lies and Emotional Truths in Negotiation: Science vs. Folklore”, which is topical insofar as it is related to the bestseller by Malcolm Gladwell, Blink, and research done by Dr. Paul Ekman on the micro-expression of emotions. Lawyers, party representatives and mediators alike (to say nothing of judges and other adjudicators) can benefit from honing their lie detection skills. Believe me, there is more to this than meets the eye!

I also managed to recharge some brain neurons by taking Bernie Mayer's Advanced Skills for Dispute Resolution Practitioners, offered in Ottawa in May. While every program will to a degree cover territory covered elsewhere or learned from experience, programs like this allow one to check assumptions, connect with the thinking of others and appreciate that conflict has layers and a complexity that can defy easy analysis, let alone meaningful assistance. There's always more to learn.

### **Inquiry Hell**

As this Report is being written, in Canada stories swirl about the media related to this or that politician's/institution's acts and neglects of the past. An inquiry is put forward as the solution. Of late, we seem to almost have made judicial inquiries into a sort of Canadian mini-series or blood sport. Add to that aborted inquiries, inquiries to correct inadequate inquiries, inquiries that fail to ask or answer the real questions and so on, and what is the result? Alas, so little public benefit seems to come of these lengthy efforts to scratch for the “truth”. Could it be that the current methods for inquiring into controversy of various sorts need rethinking, perhaps including a review of the application of costs principles and the usage of alternative means to achieve some of the goals of inquiries? Who is assessing the efficacy of the processes we use today, using what criteria? Shouldn't inquiries have demonstrable benefits which are evident to the common man? Do we always need an inquiry to tell us what is obvious to most informed citizens? Shouldn't more energy be devoted to implementing meaningful change?

## Remembrance Days

During the summer I managed a trip to the Netherlands, Belgium and northern France with my wife. For a long time we have wanted to visit some of the sites of World War I battles, particularly those with a Canadian connection. I cannot recommend too highly a trip to some of the monuments and cemeteries in Belgium and France – Ypres, Vimy, Passchendaele, Beaumont Hamel, Tyne Cot, to name several. We found the part of the trip most sobering, where one's pride as a Canadian is mixed with the sadness of truly appreciating what an incredible slaughter the "Great War" was. The monuments in the cemeteries are interesting for the history buff too and it is most impressive how well the sites are kept, particularly the Canadian ones. We were glad that we took a few days to remember the fallen. A bonus is the food and beer of Belgium – in our view, some of the best Europe has to offer!

## Reader's Corner

Aside from reading backwards through almost everything that Ian McEwan has written, as well as his latest, On Chesil Beach, in 2007 I managed to knock off War and Peace, all 1400 pages of it, and a few lesser tomes too. On the non-fiction side, I have chosen to highlight two books worth reading – the first is Jimmy Carter's Palestine – Peace Not Apartheid, which has not been received with universal acclaim, perhaps because it says some things that a lot of people do not like hearing. I gained a better understanding of the historical and territorial aspects of the age-old Israel-Palestine conflict. A central argument of the book is that dialogue, mutual respect and fairness respecting territorial rights will get the parties a lot further than mutual retribution, violence and cement barriers, not a hard message for a mediator to buy into. The proof is in the pudding regarding the utility of walls and barriers in the history of mankind – what wall has not succumbed to events which eventually rendered it a sad footnote to the fear that built it? The walls of yesterday become the tourist attractions of today – surely there is a lesson here. Are we doomed to repeat history, over and over?

More well-written than the Carter book and certainly of interest to Canadians who may be wondering how America got to where it is today, is Al Gore's book, The Assault on Reason. This book analyses how the United States has lost its way as a superpower and how its sense of guiding values have been greatly eroded in recent years. It can be a depressing read, for the way back to a healthier, more admirable neighbor is not going to be easy, and it will take more than a simple change of government for a few years for real change to occur. I think that it will make the outcome of the 2008 US election more interesting than it otherwise would be.

I will end with Suite Française, by Irène Némirovsky, the story of French refugees living in occupied France during World War II alongside their Nazi invaders, written by the author while in hiding. I found the writing awkward at times, and it was difficult to relate to some of the characters, but where the book shone is its recreation of what it was like to be "on the run", a displaced person in one's own country, and the range of human reactions and emotions that accompany such status. Equally well done is the account of the different German soldiers we get to know – Némirovsky writes far beyond stereotypes, pursuing the complexity of human interactions in extraordinary circumstances. This in itself is remarkable, when one considers that the Nazis murdered her shortly thereafter. While not brilliant, this novel is unlike any other I have read and certainly is worth a read.

And so it goes! All the best to colleagues, clients and acquaintances, for a fine holiday season and a sunny '08.

Ian Szluzak

Don't forget to visit the whole website at [www.resolutionhouse.com](http://www.resolutionhouse.com) – there's a good deal of information that can be of assistance in your current or next dispute – and it's free! Comments about this newsletter? – write me at [iszluzak@resolutionhouse.com](mailto:iszluzak@resolutionhouse.com).



## RESOLUTION HOUSE 2006 Annual Report

### Hola!

Welcome to the first Resolution House Annual Report created for the web! Instead of mailing out the Annual Report, I am drawing it to the attention of as many stakeholders as possible and recommending a visit to the firm's website, which, I might add, has more to offer than the newsletter alone. One of the chief reasons for going electronic is the prevalence of the web as a search and information tool. Another is a part of my contribution to the reduction of paper waste, although I note that a recent Statistics Canada report indicates that the usage of computers has not had the oft-predicted effect of creating a "paperless office". Indeed, between 1983 and 2003, the use of paper for printing and writing more than doubled, it was reported. Oh well!

This is as good a place as any to acknowledge that I am happy to receive mediation briefs and correspondence by e-mail. I have not totally "gone cyber"; access to my availability/calendar is still by telephone, but I daresay the booking process is simpler and just as efficient using Alexander Graham Bell's trusty invention. Plus, it's a thousand percent more personal than a totally electronic relationship! And now, as if to bolster this point, it recently was reported in The Times of London that British researchers have found that the regular use of text messages and e-mails can lower one's IQ more than twice as much as smoking marijuana (and, I daresay, without half the fun!). The researchers, who label this phenomenon of "enhanced stupidity" as "infomania" explain that the noticeable drop in IQ is due to the constant distraction of "always on" technology, when workers should be concentrating on what they are paid to do. Thus, in addition to simple courtesy, turning off a Blackberry or phone actually means that the owner will be more effective, whether it be at a meeting or a mediation. Fewer distractions = better listening = optimal communication.

### The Feedback Drought

In years past, terminating at the end of 2005, I had been inserting Mediation Evaluation forms in all invoice mailings and had noticed a decreasing response rate. While reported satisfaction rates were consistently high, I found that the returned evaluations contained some useful insights into what counsel and representatives/parties thought of their mediations. As of last year, I

moved to a website evaluation form, which invoiced parties were directed to. The usage rate of this cyber-form has been dismal, but I will persist in offering it for the foreseeable future, as I really do value feedback. In the circumstances, I cannot report on the feedback for 2006.

Cognizant that repeat business is the best indication of client confidence, and that the rate thereof is high, I would like to thank all clients of all my services for your continuing reliance upon Resolution House.

### Statistical 2006

This year, I have gone back to November 15, 2005 and am reporting the statistics for a complete year, to November 15, 2006, separating mandatory mediations from private mediations.

Mandatory mediations are bound to have a lower settlement rate than private mediations, and year after year the statistics bear this out. This year, the **settled cases**, including those I know settled just prior to the mediation or shortly thereafter, came in at over 52 percent of the total, a very respectable number.

I cannot help remark on the obvious success of the mediation process, even when it is part of an early-resolution, case-managed process. Those who oppose mediation, I think, have to explain what better idea they have and honestly declare their motives. Of course, mediation works better when a sufficient amount of preparatory work and information-sharing has taken place, but to delay mediations unduly is a real disservice to clients who are looking for efficient results from the legal profession and justice system.

The private mediation rate of settlement was up from 2005, at 90 percent this past year, and at that it may be misleadingly low because a very recent case is still "in discussion" post-mediation and shows promise of settlement.

The rate of settlement at arbitration is even higher, with parties usually settling their disputes before or at the hearing, without need for an award.

## Habitat for Humanity

In late July, I was part of a group comprised largely of lawyers and their spouses, organized by Master Bob Beaudoin of the Superior Court in Ottawa, who went on a “build” in El Salvador. It was my first experience on a charitable work project, although through my travels over the years, I was aware of the poverty and inequality that prevails in much of the world.

The group was divided into two teams of ten people and off we went to our respective housing projects on the edge of a small town not far from the capital, San Salvador. We managed to build two (20' x 20') concrete-block reinforced homes in a frenzied week of mixing cement and mortar, working under the direction of Salvadorian masons and engineers. Working and living in close quarters with others, mainly from Ottawa, provided ample opportunity to build relationships and to share the rich experience, which also included some sightseeing and meetings with those involved in endeavours devoted to social justice, of which there is a shortage in El Salvador.

I can wholeheartedly recommend the experience to those who are curious and possibly interested in undertaking a project, which may take you to any number of interesting countries at various times of the year. The cost of the house, travel and accommodations are part of one's contribution to the project, and thus a foreign project represents a significant financial outlay. It's worth it!

Initially, I had harboured doubts about the efficiency of a group of soft-palmed gringos traveling to a Latin American country, but I must say that I came away with the overall view that the Habitat approach is worthy of support it because of the awareness-raising it fosters, the “third world” travel experience, often a first experience for many, and the sheer joy which is derived from building something palpable and useful. You will be dirty. You will be tired. You will not be eating your usual food. You may even get a little sick, but not necessarily, if you take all precautions. You will live communally without your usual comforts. And you will be treated to a wonderful “handing over of the keys” ceremony at the end of the project, both moving and most satisfying, as well as knowing you have personally contributed to international understanding and brotherhood. Clearly, the world needs more of the latter - here's a real opportunity to put sentiments into action.

So, instead of sending off cheques to charities where interaction with the eventual recipients is minimal or non-existent, consider the Habitat approach. Thousands of houses have been built in this fashion; millions of houses are needed. The work will never run out.

I would be pleased to speak with any curious readers who may have questions. The Habitat for Humanity website, including a link to the Global Village Program (which we were a part) is: [www.habitat.ca](http://www.habitat.ca).

## Legal Developments on the Mediation Front

A recent disciplinary tribunal hearing of the Law Society of Upper Canada (Wagman, August 1, 2006, stayed September 10, 2006 pending hearing of an Appeal) sent a message to the members of the Bar who consider their obligations of civility and responsibility to not extend to mediators. In this case, a lawyer was suspended for two months and ordered to issue satisfactory apologies to two individuals. What did he do? He was found to have engaged in professional misconduct by communicating with a third party and a Court roster mediator “in a manner that was abusive, offensive and inconsistent with the proper tone of professional communication from a lawyer” and failing to fulfill or promptly fulfill three financial obligations. It will be interesting to see what the final outcome of the Appeal is. As a member of the Law Society, I applaud its intervention, for if there is insufficient protection for mediators, who are placed in the middle of disputes, the mediation process can be abused and manipulated. In my experience, thankfully, the need for Law Society intervention is very rare, but it is good to see it exercising its jurisdiction.

I believe that the civility required of counsel and representatives is directly related to the key elements that are said to be the **hallmarks of good solicitor-client communications – honesty** (an assessment of possible outcomes based on the law and the facts as known); **accessibility** (having a good understanding of how and when contact is to be made and maintained); **accountability** (doing what you say you will do – “delivering”); and **respect** (empathy for client frustration, a willingness to deal with a reasonable amount of venting). I hold the view that these elements are applicable to mediators too, obviously in a different context, with neutrality substituted for advocacy. Thanks to the Lang Michner Supreme Court of Canada Law letter and Michael Crystal, who wrote the article highlighting the elements (see [accidentaljurist.com](http://accidentaljurist.com)).

I spotted two decisions related to mandatory mediation which were published in the Ontario Reports over the past year. Justice Power's decision in Hagel v. Giles et al. (2006), 80 O.R. (3d) 170, concerned an alleged oral settlement at mediation where the enforceability of the settlement was at issue. The decision makes it clear that the requirement of confidentiality at mediation cannot be used to prevent a party from attempting to establish that a settlement was reached at mediation. The

Court found that it had the authority to enforce an oral settlement (hence, unsigned agreement) reached at a mandatory mediation. I was heartened to read that the Court ignored an affidavit sworn by the mediator, finding that it was not needed to examine what transpired at the mediation. I would add that I continue to recommend that even when counsel are on the best of terms, a written settlement ought to be prepared. It need not be complex and it can be done on a piece of foolscap, but it seems to me that it provides the certainty that most parties crave and it minimizes misunderstandings and prevents reversals of positions the next morning.

The Ontario Divisional Court heard Rudd et al. v. Trossacs Investments Inc. et al. (2006), 79 O.R. (3d) 687, another case relating to a settlement, but this time dealing with whether a party was party to the settlement agreement. A Motions Judge issued an order compelling a mediator to give evidence on a motion to enforce a settlement agreement. It will come as no surprise that my reaction to the original decision, to borrow from Borat Sagdiyev of Kazakstan, was "NOT"! (more on Borat later). Thankfully, the Divisional Court agreed. Relying on Rule 24.1.14 of the Rules of Civil Procedure, which provides that all communications at a mediation session and the mediator's notes and records are deemed to be without prejudice settlement discussions, the Division Court noted that in an earlier case, Rogacki v. Betz (2003), 67 O.R. (3d) 330, the Ontario Court of Appeal concluded that the above rule codified the common law principle that communications made in an attempt to settle a dispute are inadmissible in evidence "unless they result in a concluded resolution of a dispute". Turning to four established conditions from Wigmore on Evidence to determine whether communications are privileged (at 693), the Divisional Court reviewed the Canadian caselaw on communications at mediation and noted that they have been held to be privileged unless there were overarching interests to disclose (for example, to protect a person at risk from criminal activity). The Divisional Court found that the Motions Judge did not analyse the Wigmore conditions properly (at 697):

The fourth condition of the Wigmore text requires a balancing of the public interest in disclosure against the public interest in preserving the confidentiality of the relationship at issue. In this case, there is an important public interest in maintaining the confidentiality of the mediation process that, in all circumstances of the case, outweighs the interest in compelling the evidence of the mediator. [emphasis added]

Accordingly, the appeal was allowed and the order of the Motions Judge was set aside. Bravo!

## Reader's Corner

Having enjoyed Anna Karenina last year, I thought I would tackle Tolstoy's War and Peace, which sometimes is described as the longest novel in print. It's very good, but boy, is it long! Cannot say too much more because I am not even half-way as I write this, and so Reader's Corner is replaced this year by a couple of recommendations on films to see.

Babel is the first one, and it is not a stretch to say that it belongs in this newsletter, because it is a complex, intelligent film about, amongst other things, communications and the consequences of its breakdowns. I have long since lost count of the number of disputes I have become involved with where a failure to communicate effectively (and civilly) has contributed significantly to the problem. While theoretically avoidable, communications issues are but one aspect of the complexities human beings bring to their interactions. It is a start to at least be aware of how one's communication style might be improved upon. While some might say that Babel also stands for the horror of international travel in an increasingly frightening world, I would argue that in fact, it really is more of a statement why we must travel and better know those in other countries and of other cultures and circumstances. To isolate oneself is to turn one's back on reaching understanding, to say nothing of fostering stereotypes that often are simply wrong and racist.

The comedy Borat, Sacha Baron Cohen's hit film, takes aim at many views and attitudes, coming at them in a way that is bound to irritate and offend some viewers. Yes, the film is unflinchingly vulgar at times, perhaps even mean-spirited in how it belittles some attitudes. But there definitely are different ways of interpreting the film; an example is the treatment of women – some will say it is blatantly misogynistic, others that it exposes how tragically far behind women in many parts of the world have been left. Depending on what you think he is trying to accomplish, you will either love Cohen or hate him, but I am quite certain that you will at least smile at some of the skits. And it's hard to argue against a good smile or laugh now and then, perhaps particularly if it makes us more aware of attitudes which require exposure and ridicule.

All the best in 2007.

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2005 marks the 10<sup>th</sup> Anniversary of Resolution House. It also marks another milestone, my 1,500<sup>th</sup> mediation. Many of my mediations were booked and attended by “repeat customers”, both counsel and parties. I would like to thank one and all with whom I have worked during the past year, especially the “repeaters”. And here’s to the next ten years!

Although it is increasingly difficult to do so, I have decided to **continue** for the foreseeable future providing **mandatory mediation services**, which you may be aware are governed by an antiquated government tariff that is less and less realistic in terms of compensation. I do not hold out much hope for a change in rates. My rates for continuations of mandatory mediations will be increasing moderately, but in comparison with what is being charged by others, the Resolution House rates will continue to be very competitive.

### Changes at Resolution House

2005-06 marks some new and altered procedures. The Resolution House website, [www.resolutionhouse.com](http://www.resolutionhouse.com), has been “beefed up”, with more help for prospective attendees on the Guidance pages; my C.V. has been updated, including a full listing of **labour arbitration awards**; there is more “fun” on the site too, especially if you like poetry – have a look – go to the “Quotable, Curious and Fun” pages; I have introduced a **flat-fee private mediation rate** for the **Greater Toronto Area**, offered, of course, on highly competitive terms; and the Resolution House **Mediation Evaluation form** that has been inserted into accounts for years soon will be moving to the website, allowing those still wishing to provide feedback on their mediation to do so. This last change was prompted by a desire to cut down on the amount of paper wasted on the evaluations that are not sent back. I still hold the view that feedback is a good thing and I will continue to review with interest all evaluations that are sent in.

An additional word about the poetry. There actually is a **poster/sayings contest** on the website and I encourage readers, or the children of readers, to take a crack at creative word-play. Who knows, you could become more famous than you already are or maybe you’ll discover you have a Byron or Keats in the family and you did not know it! And, of course, writing poetry can be very satisfying and relaxing, and there’s nothing wrong with that – so wax poetic! Your chances of being a winner are far better than Lotto 649, although the prize structure admittedly is more modest.

### What’s Up With Mediation?

I realize that most readers have their own priorities in terms of keeping up with whatever interests them or is occupationally required of them. For example, lawyers must stay abreast of new practice directions, developments in caselaw and so on. Those who are interested in knowing more about mediation are encouraged to visit the Resolution House website, referred to above, and click on the “Links We Like” page where I have listed some of the leading websites in the ADR world. I try to keep up with what is going on elsewhere, attending international conferences and though the web/e-mail contacts, and I cannot help but notice that there seems to be a considerable amount of activity, which may be describable as the “evolution” of ADR, in many jurisdictions throughout the world. This is particularly so in parts of Europe and the U.S. I have a colleague in Scotland and know that mediation is continually expanding in the U.K. – visit [www.core-solutions.com](http://www.core-solutions.com) for more information. An example of a U.S. site with an ADR news service is [www.adrworld.com](http://www.adrworld.com) (a subsidiary of the American Arbitration Association).

It is conceivable that the relative dearth of promotional activity related to mediation in Ontario may be a consequence in the legal system taking it for granted as a process. There are those who would prefer to do away with mediation, and go back to the old ways of dispute resolution. Rather than retrench, I believe that the way forward is to continually address and improve the mediation process. What has been built in parts of Ontario, particularly Ottawa, is a responsive system of dispute resolution that time and time again I see working in the interests of parties to litigation.

Over the years, I have read some highly misleading articles on mediation, written by detractors who appear to have very limited exposure to the process. When all is said and done, I cannot understand how anyone cannot agree with the proposition that alternative/appropriate dispute resolution, particularly mediation, has not enriched the repertoire of dispute resolution methodology, making the litigation process more responsive and efficient. Cases that truly require adjudication are not impeded; proof positive is that one of my “failed” mediations is about to be argued before the Supreme Court of Canada.

### Milking Mediation for All You’re Worth

Those who are repeatedly engaged in the mediation process, including the mediators, can become complacent in a personal sense because they find so little to be new to

them, thus thinking of the process, if not cynically, certainly as one that is predictable, both in terms of negotiation strategy and with respect to outcome. If you are one of these individuals, I plead that you pause and reflect on how you are employing the process, not on the process itself. I have found that behavioural factors, fatigue, situational pressure and other reasons may serve to narrow the outlook or approach being taken at mediation. The result is that the usefulness of the process is effectively diminished when it does not have to be.

By recollecting your experiences and rethinking your assumptions, I believe that you can adopt new strategies and outlooks that literally refresh your ability to get more out of mediation. I attend more mediations than anyone I know and while I sense similarities of behaviour, patterns in negotiation style and so on, I never cease to be fascinated by the variability of the process. The human element is a big part of this variability – and I believe that mediators and counsel/representatives who are repeat attendees must check the impulse to make assumptions about what something means or what someone is likely to do, based upon a past experience. Leaving room for the unexpected serves all concerned well, for it is part of the template of a **flexible listener**. I am continually reinforced in my belief that this is the preferable mindset to have at mediation and that it is not inconsistent with having firmly-held views of the merits of the case and holding true to one's goals.

#### **Statistical 2005**

Remembering that data collection is fraught with pitfalls, especially when comparing things like “success rates” (e.g. the Ontario Ministry of the Attorney General counts a “settled” mediation differently from how I do, because it counts partial settlements), I offer up, as usual, the 2005 picture, which is from January 1, 2005 to November 15, 2005. The private mediation settlement rate during this period was 66.6 percent; the overall mediation settlement rate, meaning settlements achieved at mediation or shortly thereafter (if known by me, another problem with the accuracy of the data), including both private and mandatory mediations, was 54.4 percent, which actually is up from years previous! The settlement rate for mandatory mediations by themselves, based on a good-sized sampling, was 53.3 percent, which is very respectable and also up from years past.

#### **Evaluations 2005**

During the January 1 to November 15 period, the percentage of evaluations returned to me indicated a rating of “4” or “5” (out of 5) 91.6 percent of the time. I hope that the migration of the evaluation form to the website will not mean that no one will bother to send them in – doing so plays an important role, in my view, in the continuing dialogue that should take place between a service provider and those who use their services. Please participate at least once in 2006. If you are a repeat user, even one response would be appreciated.

#### **Reader's Corner**

Last year, the “Reader's Corner” grew to what more accurately could be described as the “Reader's Column”, I suppose a reflection on my increased interest in reading, both fiction and non-fiction. The book of mention in the ADR field this year is one I am currently reading and have used as a facilitator – **Overcoming the Five Dysfunctions of a Team – A Field Guide** (P. Lencioni, Jossey-Boss: San Francisco), published in 2005. It has much to offer the time-pressed managing partner who senses that her law firm could be a more cohesive and effective business organization, for example.

On the enjoyment side, I have found Ian McEwan's books to my liking and have devoured four in short order, his most recent one being **Saturday**. For those who are wondering what is going on out there with reference to global health and the subject of pandemics, which, believe me, are actually much more scary if one reads up on them, I can refer you to **The Great Influenza** (J. Barry, Penguin Books: London), a historical accounting of the greatest pandemic of all time (1918), misnamed “the Spanish Influenza”. I picked it up on a trip to the U.S.; it may be published by someone else in Canada. The book is not particularly well-written, but it does explain how the flu moves between animal and man, what it does to the body (yuck) and why another pandemic would have severe, life-changing consequences for everyone. Let's hope it does not happen, or if it does, it is not too virulent.

#### **End Words**

In Canada, it is possible that 2005 will be remembered as the year we all suffered from “Gomeria”, perhaps not going mad, but just plain getting angry. I turn to another judge for the end words this year:

Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for the law, it invites every man to become a law unto himself.

~ Louis D. Brandeis

As this newsletter goes to print, it looks like a winter election is upon us. Does this mean that politicians are going to become parties in “slip and fall” litigation? But will they need a patch of ice to slip and fall? Will all the promises being made, which of course will be broken, cause children to lose faith in Santa Claus? I suspect that all of us are going to be bumping into a few polls this winter. Be careful out there!

All the best in 2006.

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This report marks the eve of the **10<sup>th</sup> Anniversary of Resolution House**, now Resolution House Inc. It's been a great 10 years, marked by numerous disputes (over everything from love to money), significant developments in Ontario dispute resolution (particularly in the Superior Court) and most of all, repeated confirmation that mediation and other ADR have a meaningful role to play in helping people to get beyond their problems and move forward. I can say without hesitation that I really like what I do. God willing, I look forward to another 10 years.

**Thank you** – to all readers who in one way or another participated in a 2004 mediation or intervention involving Resolution House. Thank you especially to the “repeat customers” – you are the core of my practice. Your repeated confidence in my services spurs me on to do better, not the same. And, if there are some readers who are disenchanted but have not communicated why, please let me know what you would like done better or differently. Within the bounds of third-party ethics and professionalism, I believe there is room for adaptation and flexibility.

### **I.D.R.P. – Imaginative Depute Resolution and Prevention**

While **mediation** is the major activity of Resolution House, **labour arbitrations**, a major **workplace harassment investigation, training, coaching and facilitation** work rounded out the other services being called upon in 2004. The fact that these processes, all different, may borrow from each other, makes what at first appears to be unrelated experience most relevant indeed. An example – the lessons learned from a difficult dispute can be dissected and analyzed to help in training and/or coaching individuals to avoid the slippery path from conflict to a dispute of their own. There are many situations where a **preventive approach** can work wonders for groups and organizations seeking to find better ways of working together, with major dividends in terms of morale and productivity. And the adaptation of ADR goes far beyond workplace situations – it may involve all types of entities and address a wide range of problems.

An example of the imaginative use of facilitation was its application to a **focus group**, assembled by legal counsel to assess his client's case prior to a jury trial. The process allowed real people, sitting as a mock jury, to hear the facts, size up the party present, hear the arguments and say what they thought, and why. It proved to be useful not only to counsel but to the party's family, who observed.

When the mediation of an **employment matter** is unsuccessful, the parties need not automatically treat the matter as a litigious case, putting it in the Superior Court. Resort to **mediation-arbitration** (med-arb) can go a long way towards quickly and relatively inexpensively settling employment disputes, particularly if the process is contractually provided for ahead of time.

### **The Trials and Tribulations of Mandatory Mediation Part \_?**

Depending on who you speak with, the stories one hears about developments respecting mandatory mediation, particularly in Toronto during the latter half of 2004, vary from the outrageous to the plausible.

**Case management**, which was introduced to many lawyers and parties contemporaneously with mandatory mediation, may have seemed almost to be one and the same, certainly “joined at the hip”. Experience over the past few years has shown that they are not Siamese twins but rather akin to cousins who can get along without each other. And now it looks like they may be going their own way. Toronto case management as we knew it is coming to an end.

I believe that case management in Toronto ran into trouble for a variety of reasons, not all of which were unpredictable or unavoidable. While it is not without its warts, case management appears to have worked better in Ottawa, than in Toronto. Case management has some wonderful features for the people who sometimes get lost in the debates on legal process – the parties/the clients/the customers. Unfortunately, the customer does not appear to have had much say in terms of influencing the direction of change in Toronto. In time, those who use the legal system repeatedly, as institutional defendants do, may conclude that they ought to have been more vocal and organized about changes to the legal process, since they are the ones paying for a good part of it.

So, what's next? Mediation is too good a process and concept to be thrown out with the bathwater of case management. In Toronto, mediation is going to be a considerably more expensive process. The Toronto roster of mandatory mediators appears to be dead, as are regulated rates in Toronto, rates which, it is noted, have not changed since they were introduced several years ago under Rule 24.1.

The impact on the Ottawa mediation scene is yet to be seen. Will it follow Toronto? Or will it go back, with modifications, to work in concert with modified case

management, perhaps resembling the Practice Direction of a few years ago? I am told that the changes for Ottawa will be known early in the New Year.

It has been apparent for a long time that many referrals to mediation (perhaps with the exception of employment litigation) have been too early to be useful venues for meaningful negotiations. If less time was wasted on managing case deferrals and more on getting clarity on the facts and facilitating settlement discussions, it still is possible to see disputes being resolved relatively quickly, in a matter of months, not the years and years it used to take people to get answers from the legal system. Let's not forget how little most people liked the old ways. I hope that the Ontario government, which did so much to make mandatory mediation happen in the first place, and which has the ultimate responsibility for how legal process is organized, will not turn its back on proven, effective and economical processes like the mediation of litigious disputes.

Whenever I go to international ADR conferences or receive information on mediation developments from colleagues overseas, I am struck how others are now doing what we in Ontario were doing about a decade ago. This fact should provide further impetus to Ontario stakeholders to stay ahead or with the curve, not regress.

### The Statistical Picture

Resolution House data from January through November 2004 indicates a lower rate of settlement than years previous, with cases settling before, at or shortly after mandatory mediation 41.5 percent of the time. The contrast with the settlement rate for private mediations is, as usual, quite marked - 62.5 percent of those settled at mediation this year. This data reflects only **complete settlements**, not partial ones. Perhaps more interesting is noting **what is settling. Most large, multi-party cases**, with all the pressures that such cases entail, **are resolved** at mediation. It would seem that the very complexity of the case, and the risks and costs of the alternative to a negotiated settlement, together serve to drive counsel and parties together to find common, acceptable ground. On the other hand, some of the smallest files, involving a relatively trivial amount of money, are driven by...?...sometimes it's hard to say - is it emotions, the phases of the moon, or what? Whenever I have a series of cases that perplexingly do not settle, the moon theory takes on more prominence! And as I drive home those nights and look up at the sky, there seem to be a lot of full moons.

### Performance Feedback<sup>2</sup>

My feedback on the feedback, from the evaluations sent back, which represents only those who bothered to fill in those pesky evaluation forms sent out after every Resolution House mediation, indicates that 91.7 percent rated the service received as a "4" or "5" out of "5", with most indicating "5". By the way, if you would rather not receive these forms, I am prepared to help save a tree and no more will be sent. Just tell me - and you will be on the "delete evaluation" list.

### In Memoriam

Earlier this year, word came of the untimely death of Stephen Latté, who had worked both as an Ottawa private practitioner and more recently, as a federal government lawyer. Stephen also was a fine mediator and he will be missed.

### Reader's Corner

It has become a bit of tradition to refer to a book or two in this newsletter. In a rushed world/life, where reading for pleasure seems to be one of the first things to fall to the wayside, I increasingly have found it to be a wonderful refuge, well worth preserving. I have been turning to the "classics" lately, and what could be more appropriate than to read James Joyce's Ulysses during the hundredth anniversary of the story's unfolding? I have tried to read this book before and failed to get into it - maybe it was the 85 pages of dense introductory notes (I read Danis Rose's "Reader's Edition", a Picador paperback, 1997). Anyway, I have to say that it was wonderful yes it's a difficult book yes I did not always understand fully what I was reading yes it takes months to read if you read relatively slowly but it was brilliant worth it and memorable well yes it was all of those things and more yes you do not want to miss a work which speaks so eloquently to the human condition oh do try it - say yes!

Okay, so you refuse to read Ulysses. Another worthwhile and much easier read, especially if you like history or current events, is John Keegan's Intelligence in War, which is about the value and limitations of what the military can learn about the enemy. Keegan takes the reader through selected military history from Nelson to the present, including some fascinating chapters on WW II code-breaking and the like. I cannot resist the last word by noting that "true intelligence" in war might better be defined as the efforts beforehand to avoid the fray in the first place; put another way, is there not a failure of intelligence inherent in all war, which really is the apparent inability to find or maintain peace?

### End Words

Fear less, hope more; eat less, chew more; whine less, breathe more; talk less, say more; hate less, love more; and all the good things are yours.

~ Swedish proverb

All the best is 2005.

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