

Notes from the Editor**Issue No. 42, April 15, 2003**

I wanted to include several mediation case studies this month because it is only through the sharing of this type of information that the universality of the mediation process becomes more widely known and appreciated. The privacy and confidential nature of mediation, although critical to the potential success of the process, often means that details of what goes on during the mediation cannot be freely discussed or published. This characteristic has been used by some to criticize mediation in its entirety.

The criticism is usually rooted in the understanding that mediation is a process that escapes scrutiny because of strict confidentiality rules (and ethics), and it therefore runs the risk of trampling on the rights of the individual or parties to participate in a fair negotiation. What many critics, who typically have not experienced a mediation themselves overlook, is that the process is voluntary and so is the decision by either party to agree to a partial or complete settlement and the withdrawal of further claims.

A professional mediator will not coerce anyone, be it in private or in joint session, to settle on or accept an agreement that they may not find acceptable under other circumstances. The proof of this statement is found in the positive follow through of obligations agreed to by each party to the settlement, following a successful mediation. Subsequent disputes as to the fairness of the

agreement, or unwillingness to make the payments settled upon during the mediation, are very rare.

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*Case Study 1 - I first met **Tom Lanczi** at an Association for Conflict Resolution (ACR) conference that was held in Toronto just after the 9/11 (2001) terrorist acts in New York and Washington. Tom is a practicing mediator, facilitator and mechanical/electrical consultant with 46 years experience in the construction industry. He conducts his mediation practice in Toronto, Ontario, Canada and serves as a Roster Mediator under the Ontario Mandatory Mediation program for civil cases in Toronto, Ottawa and Windsor. He can be contacted at toml@epcenergy.com.*

*Case Study 2 - **Tom Oswald** is a commercial mediator and ADR consultant. He is also the Co-Chair of the Commercial Section of the ACR. His "Impasse Breaking Tip" article narrates his experience with an effective technique he applied to a stalemated mediation with breakthrough results. It was recently published on the mediate.com web site. Tom can be contacted at Toswald@MediationTransformation.com.*

Joe Grynbaum, P.E.

Construction Mediation Case Study**by Tom Lanczi**

The case study reported here is about a mediation I conducted recently as a Roster Mediator, under the rules of the Ontario Mandatory Mediation program. The mediation program is highly structured, requiring that each party submit a statement of issues – the mediation brief – to each other, and the mediator, at least seven (7) days prior to the mediation session. This particular

mediation was completed in just three (3) hours and the lessons we learned were as follows:

- ☐ *In order to start negotiation, large lump-sum claims must be broken down and estimates must be distinguished from the actual cost of damages.*

- ☐ Cost estimates of remedial measures must be supported by preliminary design and contractor's costs.
- ☐ When there is a long-term working relationship between parties and interest to continue, a mutually acceptable resolution is more likely.
- ☐ Identifying key issues early, helps focusing attention on them.
- ☐ Agreement to drop unsubstantiated claims, reduces the total settlement.
- ☐ When the engineering solution is unclear, cooperative effort can result in cost savings and improved relationship between parties.

The Ontario Government as claimant filed suit against the respondent, a consulting engineering firm, claiming breach of contract and/or professional negligence. The claimant contracted with the respondent to perform detailed design, construction, contract administration, and site supervision. He claimed that it was the respondent's fault that the new entrance to the highway was distorted and sinking due to peat deposit in the sub-soil. To remedy the problem, hot-mix patching was applied to 12 locations, and \$500,000 was claimed for damages.

The claimant also claimed that the respondent, 1) failed to design the bridge for the speed specified, 2) failed to supervise construction, resulting in settlements along the highway, 3) failed to provide a curved-design to fit the highway, and so a straight bridge was constructed and did not provide a detour.

The respondent's counsel and the insurance adjuster requested a detailed breakdown of the damages claimed. They pointed out that:

- the claimant's schedule forced winter construction,
- options to locate the bridge were constrained by the landscape,
- field adjustments were made to mitigate damages,
- they could not foresee the peat deposits,

- to remove/replace the peat would have been an additional cost to the contract,
- the detour was not part of the specification and would have added to the cost,
- highway settlements are the responsibility of the contractor, not the designer.

The mediation was attended by four (4) engineers and two (2) lawyers, representing the claimant, and the respondent was represented by one (1) engineer, one (1) insurance adjuster and one (1) lawyer. After hearing the opening statements by each party, I as the mediator summarized the key issues in question as follows:

- ☐ Was the defendant negligent in design and supervision?
- ☐ What were the actual construction deficiencies as a result of the faulty design?
- ☐ Is the condition of the highway further deteriorating?
- ☐ What were the actual damages the plaintiff suffered to date and what were the actual costs?
- ☐ What are the liability implications of the current bridge design?

After caucusing privately with each party to explore these issues further, they both agreed to reduce the number of issues to the following outstanding monetary components:

- ☐ Actual cost of hot mix patching of the surface of highway
- ☐ Potential cost of excavation and removal and replacement of peat

The claimant also agreed to drop its previous claims of negligent performance and failure of designing a detour by the respondent.

The actual deficiencies and costs up-to-date were: \$88,000 (patching), estimated costs of excavation and replacement of peat were \$350,000. No details or calculations of this estimate were shared before or at the mediation. The potential cost of future repairs (patching of highway settlements) was estimated at \$20,000.

A partial settlement was finally agreed upon and a written agreement was drafted by the lawyers with my assistance. The parties also agreed to continue and maintain their long-term contractual relationship; and collaborate in working together to:

-monitor the deterioration of the highway settlement;

-develop design-solutions to mitigate the highway settlement, including how much (if any) peat needs to be removed and replaced;
-develop a realistic estimate of liabilities concerning the existing bridge; construction (straight versus curved), costs and options to mitigate these;
-drop claims about negligent services and the failure to design the detour.

What would it Sound Like To You? An Impasse Breaking Tip.

By Tom Oswald

I anguished over whether to write this piece or not. On one hand, I wanted to share this experience with others. On the other hand, I was concerned some practitioners may find this concept too elementary and consequently think less of me for writing about it. Then I factored in a major concern I have about our profession: that we have a scarcity of casework discussion. There seems to be not enough inter-collegial sharing about mediation technique and casework. What works well, or what does not, and why. I wonder if we practitioners are so concerned about client confidentiality, or our reputations, that we are inhibited from even discussing general casework principles in an anonymous manner?

Once I factored in my concern about low levels of technique sharing, I resolved to write about this experience to expand our discussion of practice. This piece dovetails well with a Commercial Casework Panel Discussion I will facilitate this October (2003) at the ACR conference in Orlando. [Details of the Florida "World of Conflict Resolution: A Mosaic of Possibilities" conference can be seen on the ACR web site at www.acresolution.org.]

The following particular technique worked well to re-animate a rather stalled mediation with amazing results. It certainly saved the session, and likely the mediation. It is a minor variation on something

seemingly very basic that we probably all learned in freshman Interpersonal Communication 101. But the application of this technique to this case, in this particular moment, so extremely transformed the stances of the parties that I was very nearly stunned. We went from the brink of an acrimonious breakdown to candid communication and progressive momentum in just moments. This is how it went.

Like any good mediator, I strive to be persistent, patient, and creative in trying to facilitate communication between parties. This case was a rather 'hot' one with a lengthy, intense, inter-party history which had escalated and been exacerbated over time. The issue on the table was just one of many, and was symptomatic of other organic conflicts the parties had suffered. Plus, splinter issues frequently emerged to fracture our momentum and further complicate our progress. My preferred tendency to mediate in a facilitative-transformative mode (i.e. not evaluative mode) was increasingly altered by more directive tendencies.

In this highly tempestuous environment, Party A – the Claimant, simply could not get across to Party B – the Respondent, what they had to say about the issue we were trying to resolve. Even though different people had said it several times, in different ways. We worked that particular issue

forward, backward, inside out, and sideways for most of an afternoon. We took breaks. We caucused. By close to the end of the day, Parties A and B were just not able to connect on the same wavelength.

High emotions, damaged confidence, and fear all took their toll on the dispositions of the Parties. Rationality was scarce. However, I believed we could find a mutually successful resolution if only they could keep talking. As pain, disturbance, and frustration increased despite all efforts, emotional exhaustion became a significant factor in the process. It was clear that their joint interest to participate in the process was waning. I was concerned they would choose to walk away and leave our progress undone and the prospects for their future relations darkened. Then this rather basic technique came to mind. I believe that this intervention, working well at that particular moment, combined with other factors, principally saved the mediation from breakdown.

What would you like to hear them say back to you if they 'got it?' How would it sound to A if B were to 'get it,' and interpret 'it' back to A? Party A was asked what it would sound like to them if party B were to paraphrase their message. What does A imagine B would say, while paraphrasing A, which would convince A that B had understood A thoroughly? This slight turn of arrangement, this variation of interpretation, this particular alteration of 'the message' as A imagined it would sound if B were to outline it, did the trick. The lights of understanding went on in the eyes (and heart) of Party B. After that, it was reasonably

short work to find a temporary resolution that suited all the stakeholders to the conflict.

Probably a chief factor in the success of this tactic was that A, in responding to the question, altered the message as A imagined B might do, considering B's perspective. I believe this change of presentation perspective, A speaking from what A imagined B's perspective to be, instead of A speaking to B from A's own perspective, finally got the point across to B. Maybe the shared level of exhaustion precipitated the Parties understanding. Maybe it was the mutual knowledge that time was short and their self-interest dictated that an understanding be found. Maybe it was the sincerity B could read in A's presentation. Maybe all these factors combined in some ratio broke the impasse. In any case, the experience left everyone at the table surprised and even slightly dubious about the marvelous transformation of their relationship at that point. It was an extreme "Aha!" moment.

While I can't say that I could 'feel the love' at the end of session, I did sense the positive effects of the revelation in the relationship. There was a dramatic reduction of tension and hostility combined with a corresponding increase in demonstrated commitment to mutual problem resolution. This intervention re-energized their willingness to continue to work together. It was a certain kind of victory that they shared together.

This exhilarating event is a typical example of why I prefer to mediate.