Session 3: Finding the Right Balance: Making Mediation Efficient *and* Fair

Moderator: Heather Gibbs, ELTO - Environmental Review Tribunal

Speakers: Suzanne Gilbert, SJTO - Child & Family Services Review Board
Leslie Macleod, Leslie H. Macleod & Associates

In this session Leslie Macleod and Suzanne Gilbert explored mediation as a tool to assist in the delivery of proportional justice.

Leslie Macleod opened with a review of proportionality in the administrative context. She discussed the importance of proportionality with respect to access to justice, and highlighted that the achievement of the right result needs to be balanced against the expenditure of the time and money required to achieve that result. The most simple way to look at the proportionality equation is to define what is at stake – this should be reflected in the time and expense invested in the case. The monetary value, complexity, and importance of a dispute will all go towards indicating the appropriate time and resources to be spent on a case.

Ways of building proportionality into the judicial system include limiting discovery, employing Alternative Dispute Resolution ("ADR") techniques, simplifying the rules, proceeding by way of class action suits, triaging, charging contingency fees, and other changes that put some restrictions on process in the interests of efficiency. These measures ideally achieve a positive qualitative impact on the outcome, including results that are fair and are seen to be fair, better procedures, lower costs, speed, responsiveness to user needs, and perhaps most importantly, transparency.

Ms. Macleod went on to make the connection between proportionality and using ADR. In the context of the civil justice system, without being labelled as a "proportional" measure, cases that were previously litigated in courts were moved to tribunals. This had a positive and proportional effect - ADR generally costs less, is faster, more flexible in format and resolution, offers specific substantive expertise, frees up court resources, and leads to party deference to the outcome. In the tribunals themselves, proportionate measures include settlement, negotiation, proportional responses, pre-hearing conferences, mediation, MedArb, case management, telephone mediation, and video conferences. Ms. Macleod reminds us that mediation is a million different things to a million different people - It is important to look at what is in dispute and tailor the process to best fit the situation – one size does not fit all.

Ms. Macleod was part of the team that introduced the first pilot project for mandatory mediation in the Ontario civil courts in 1994. This was seen as a radical move at the time, and when mediation became part of the Civil Rules of Procedure five years later, there was much controversy and negotiation with the bench and bar. However, the change resulted in 55% of civil court cases settling in full within 90 days of filing the first statement of defence. The change also provided timely access to a process that responds to the needs of the users. Other benefits include the opportunity to be heard by an objective credible third party and participate meaningfully in discussions, to have input and control into the final resolution, and to generate options that address the parties' own interests – options that may not be available through a litigated result.

In the administrative context, mediation provides for more opportunity to respond to needs of parties, better case management, potential cost and time savings, and innovative results. Talking ahead about the possible range of outcomes if the case proceeds to hearing often encourages parties to engage in the mediation process, and participants are more accepting of outcomes of mediation since they are involved in the resolution.

In order for each tribunal to utilize mediation techniques, it is important to tailor mediation to the mandate of the tribunal, and review the enabling and umbrella legislation to ensure that mediation processes are within the parameters of the tribunal's powers. A tribunal must consider the selection of mediators, whether or not mediation will be an adjunct or stand alone measure, and ideally create a detailed internal policy to assist with consistency of process.

Ms. Macleod wrapped up by enumerating some mediation myths, including:

- Members should not be mediators
- Mediation is not appropriate for certain kinds of cases
- If a case is not resolved through mediation, it has failed
- Mediation is a narrowly defined process
- Mediation requires legislative authority

However, time ran out before the mythical nature of these assertions could be addressed.

Next Suzanne Gilbert spoke about the successes of mediation in achieving proportionality in the context of her work at the Child and Family Services Review Board ("CFSRB"), which was recently clustered in the Social Justice Tribunal of Ontario.

The 27-member board, 24 of whom are part-time, deal with 500 applications a year from multiple jurisdictions. The applications concern appeals and reviews of decisions concerning children, family, foster homes, prospective adoptive parents, school board expulsions, custody and placement. The majority of reviews concern decisions made by the Children's Aid Society.

In 2006, the CFSRB complaints process against Children's Aid Societies was streamlined to unify similar but different processes, and the act and regulation were modified accordingly. At that time the CFSRB reviewed the procedure of the internal complaint process in order to determine where mediation would best fit in. They found that immediately sending a three-panel member board to conduct a hearing was not a proportional expenditure of resources. Instead the CFSRB introduced a pre-hearing mediation stage, as they had the express statutory authority to do so.

The CFSRB dubbed the new step "pre-hearing settlement facilitation conference", which consisted of a pre-hearing where there would be a mediation preceded by a letter of explanation to offer the mediation and explain how it works. The Board decided that in-person mediation would be more effective than telephone, even though more resources would be invested in travel and venue. At the mediation, the member meets with the parties, addresses any questions, and has the parties sign the participation agreement. The parties are able to opt out of the process at any time.

The introduction of pre-hearing mediation has been a great success - 90% of CFSRB users agree to the mediation, and the statistics show that the number of settlements has greatly increased. Ms. Gilbert believes this system of mediation worked for the CFSRB because it created an effect of proportionality, not only in terms of efficient use of resources, but also due to balanced outcomes: travel time and costs were reduced, much investment in decision writing was eliminated as parties were given a copy of their agreement on the spot, preparation time for hearings was saved, and there were minimum files that went to non-compliance. The system of mediation works for the parties because they do not need to proceed internally with the complaint. Communication has also improved, and terms of agreement and timelines are more likely to be respected. Not only has the mediation process solved many financial issues, but overall a better, and more proportional, result is achieved for both the CFSRB and the parties.