

# **SURPRISE AT SMALL CLAIMS COURT: MEDIATION THE MORNING OF TRIAL**

## **OSGOODE PRO BONO MEDIATION PROGRAM**

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The unrepresented parties sit anxiously in the packed Small Claims Court on the morning their trial is scheduled, folders of evidence stacked on their lap. Exhausted from the evenings spent preparing for this day, they are uncertain of the outcome: will they win and receive what they have claimed, or lose and be forced to pay their opponent? Court is called into session and the parties stand nervously. The Deputy Judge asks whether anyone is interested in trying to settle the case that morning with the help of Pro Bono mediators. The parties exchange glances and come to a quick agreement: they are willing. Mediators are called and given the court file. Several minutes later the parties are called into a small room and the mediation commences...

So may begin a morning at the Brampton and Toronto Small Claims Courts, both of which host the Osgoode Law School Pro Bono Mediation Program (the “Program”). Supervised by Professor Martha Simmons, the Program affords some Small Claims Court litigants an opportunity to mediate their case on the day of trial.

Fifty-four cases were mediated by the Program in the 2017-18 academic year, averaging just over an hour and a half, and a settlement rate of approximately 44%. 43% of cases involved only one party with representation, parties were both represented in 22% of cases, and the remaining cases involved entirely unrepresented parties. Contracts and related issues were the primary subject matter of the mediated disputes, with debt collection, real estate matters, consumer issues, landlord-tenant and solicitor-client matters following behind.



The unique Program plays an important role, allowing the parties a last-ditch chance for settlement at a point when they have scrutinized their case, and prepared for trial as fully as they are able. Being more aware of their own strengths and weaknesses than they may earlier have been at the Pre-Trial stage, many parties acknowledge and appreciate the ability to resolve matters on terms over which they have some control. In some cases, the mediation allows the parties to improve their own relationship, as opposed to damaging it further during cross examination and positional arguments.

The Program also frees up Court resources, taking potentially lengthy trial matters off the docket, allowing Judicial resources to be dedicated to other matters, and ultimately reducing the waiting time for other trial dates.

The mediators themselves are also beneficiaries of the Program. The students are predominantly from Osgoode Hall Law School, or the Osgoode Alternative Dispute Resolution Master of Laws Program. Two people serve as co-mediators. A more experienced mediator coach is also present to assist, if needed, during the mediation, and to later provide feedback

to the mediators.

The learning opportunities for the student mediators are immense as the cases, issues, dynamics and parties are as diverse as the people of Ontario. Students have a first-hand chance to grapple with issues that face all mediators, for instance: how quickly a party's trust can be lost from a perception of mediator bias (and how one might regain it); whether and how to balance power in the mediation when only one party has legal representation; the profound impact on the parties from feeling that their positions are understood; how to move parties from an apparent impasse; strategies for being effectively persistent; what to do when the parties have an opposing view of the facts; determining when it would be unethical for a party to enter into a settlement agreement without independent legal advice; and whether and when to caucus with the parties.

As a mediator and now mediation coach in the Program, it has been a privilege to be a part of it. I particularly relish witnessing the moment of relief when a settlement seems possible to each party for the first time; their physical relaxation is obvious and humour often springs into the room. Such settlements really do feel like the parties, Court and student mediators have found a win-win-win.

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*A lawyer for over 15 years, **Jennifer Egsgard** is a mediator with Egsgard Mediation, helping people resolve conflict efficiently, fairly and on their own terms. She mediates civil court cases including contract, commercial, insurance, employment, personal injury, product liability and other disputes. Jennifer also practises law with Sills Egsgard LLP.*

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