

## *Godi v. Toronto Transit Commission: A Case for Court-Mandated Mediation?*

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1999

### I. Introduction

The subway crash of August 11, 1995, resulted in the legal dash of *Godi v. Toronto Transit Commission*, when two Toronto Transit Commission ("TTC") subway trains collided near the St. Clair West subway station. Just as the collision of these subway trains was unique in the TTC's 44 year operational history, so was the legal outcome for the victims of this accident. Three people died in the accident, and many more suffered injuries ranging from severe (one passenger lost both legs), to minor abrasions, whiplash and shock.<sup>2</sup> This incident, the first significant accident to involve TTC subways, was distinctive from several perspectives. First, the TTC subway crash was one of the largest personal injury cases, to date, in Toronto, with more than one hundred commuters claiming damages against the TTC.<sup>3</sup> Second, the numerous claims in this case were combined in a class action suit under the *Class Proceedings Act*, 1992.<sup>4</sup> It represented one of the first such "mass tort claims" to be heard in Ontario, since the legislation allowed for such actions beginning in 1993. Further, resolution of the TIC case occurred almost entirely outside of the formal court system. On the consent of the parties, the court directed the parties to seek resolution through a system of alternative dispute resolution (ADR). Specifically, this involved two ADR techniques, mediation and arbitration, in a resolution model designed by the parties and the presiding justice to accommodate a mass tort claim. In essence, resolution of this dispute was achieved by combining the effective, time-proven elements of litigation with the more flexible, collaborative elements of ADR. The significance of this model cannot be overstated, as it has potentially far-reaching implications for the resolution of future civil disputes.

1 (O. Ct. J. (Gen. Div.)), Winkler, J., September 20, 1996 [Hereinafter "the TTC case"].

2 D. Lees, "Justice out of court" *The Financial Post Magazine* (May 1998) at 22..

3 R. H. McLaren & J. P. Sanderson, *Innovative Dispute Resolution: The Alternative*, looseleaf (Scarborough, ON: Carswell, 1994) at 6(15) [Hereinafter *Innovative Dispute Resolution*.]

4 R.S.O. 1992, c. 6.

What follows is an exploration of *Godi v. TTC* through a detailed analysis of the case, including an examination of the roles played by each of the parties, namely; the judiciary, counsel for the accident victims and their families, and counsel for the defendants - the TTC .

### II. Establishing a Class-Action Suit

From the media's viewpoint, the TTC subway crash was high profile. A news crew from CNN was just one of many to report from the accident scene, and the story was broadcast as far away as Hong Kong.<sup>5</sup> Due to the nature and location of the, accident, accurately determining the number of passengers on each of the trains would be difficult. An estimate, based on average ridership statistics for those particular routes at that approximate time, as well as eye witness accounts, was compiled by the TTC . However, as McLaren and Sanderson point out, it would be "impossible to determine the number of those who actually suffered physically or psychologically as a result of the Collision." Indeed, the reports varied widely: "As many as 700 people were injured,"<sup>7</sup> according to the *Globe and Mail*. By contrast, the

*Financial Post* reported that "one hundred and eighty passengers suffered neck and back injuries, scrapes, bruises and the lingering trauma of being trapped on the subway trains for up to two hours."<sup>8</sup> When the TTC conducted its own investigation following the accident, however, the Commission found "that there were two hundred and fifty to three hundred passengers on the two trains and of those one hundred and seventy-eight people made claims."<sup>9</sup> A mass tort case was rapidly unfolding.

<sup>5</sup> Letter from B. Leck to N. Furmston (16 October 1998, 5 February 1999 and 11 February 1999).

<sup>6</sup> *Innovative Dispute Resolution, supra*, at 6(15).

<sup>7</sup> G. Abbate, "TTC claims nearing end" *The Globe and Mail* (7 May 1998) at A18.

<sup>8</sup> Lees, *supra*, at 22.

The logical approach to resolve the numerous legal claims arising from the accident appeared to be an action under the *Class Proceedings Act*, 1992. Although a well established component of the justice system in the United States, class action suits occur less frequently in Canada.<sup>10</sup> To date only three provinces have passed legislation which allows for class proceedings: Quebec enacted class action legislation in the 1970's, Ontario's *Class Proceedings Act* came into force in 1993, and British Columbia has allowed class actions since 1995.<sup>11</sup>

The Ontario Law Reform Commission set out its recommendations regarding class action legislation in the 1982 *Report on Class Actions*.<sup>12</sup> This report ultimately led to the expansion of class action proceedings embodied in Ontario's current legislation. The Commission's goals in promoting reform of the Ontario class procedure included increasing potential claimants' access to the court system and judicial economy.

The Commission is of the view that many claims are not individually litigated, not because they are lacking in merit or unimportant to the individual claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights. <sup>13</sup>

Further, the Commission further recognized that:

Injuries to many persons in the same or similar positions are, of course, a characteristic and inevitable risk of a highly developed industrialized society. However. . . we have concluded that the traditional method of dealing with such injuries - individual, two-party litigation - is not inevitable and cannot be regarded as sacrosanct in all circumstances.<sup>14</sup>

<sup>9</sup> Letter from B. Leck, *supra*.

<sup>10</sup> This is due, in large part, to the constitutional division of powers, as such matters fall under provincial jurisdiction.

<sup>11</sup> Lees, *supra*, at 22.

<sup>12</sup> Volumes 1,2,3 (Toronto: Queen's Printer, 1982) [Hereinafter Report on Class Actions.]

<sup>13</sup> *Ibid.* vol. 1, at 139.

14 *Ibid*, vol. 1, at 4.

Consequently, in those situations, where, among other conditions, "an action raises questions of fact or law common to the members of the class", a court should certify an action as a class action for the benefit of individual claimants and the court system alike.<sup>15</sup> That is not to say, however, that establishing the TTC claim under the 'class action umbrella' was a routine matter. McLaren and Sanderson comment:

Class actions go through three stages: certification, trial of common issues, and individual assessments as to causation and damages. Certification is the most difficult stage and it takes considerable time and preparation to ensure the requirements under the Act are met.<sup>16</sup>

Less than 5 years old, class action suits are a newly emerging trial technique in Ontario. Therefore, at the time of the subway accident Ontario's *Class Proceedings Act* was relatively new and untested. Despite this fact,

the TTC crash was exactly the kind of accident the legislation envisioned. Few of the complaints were serious enough to justify individual lawsuits, but collectively, according to the class action suit plaintiffs' lawyer Michael McGowan would eventually file, they were worth \$50 million.<sup>17</sup>

What began as an action by four of the passengers injured on the subway trains, became a class action representing, initially, one hundred and eighty claimants.<sup>18</sup> In Toronto, the Honourable Mr. Justice Warren Winkler of the Ontario Court (General Division) presided over class action proceedings.<sup>19</sup> It was Justice Winkler who was chiefly responsible for "steering" the TTC lawsuit away from the traditional route of courtroom litigation, toward a primarily out-of-court model utilizing ADR techniques. This third unique aspect of the TTC case is the most significant, particularly in light of the scope of the case and of current developments in Ontario regarding court-mandated mediation. The resolution model will be the subject of Section *if*i, to follow.

15 *Ibid*. vol. 2, at 374.

16 Innovative Dispute Resolution, *supra*, at 6(15).

17 Lees, *supra*, at 22.

18 J. Melnitzer, "Steering Class Action Lawsuits toward ADR" *Law Times* (3-9 March 1997).

19 Justice Winkler is a highly respected proponent of ADR, and, as such, has been actively involved as a jurist at Toronto's ADR Centre, a pilot project of the Ontario Ministry of the Attorney General.

While new to Canada, the concept of court-mandated mediation is more developed in the United States. Indeed, several mass tort claims have been resolved through ADR in recent years. Of note is the personal injury and property damage claims that resulted when Hurricane Andrew hit Florida in 1992.<sup>20</sup> As well, claims for personal injuries that occurred through the use of the diet cocktail "Fen-Phen" are scheduled to proceed in a similar manner in the near future.<sup>21</sup>

### III. ADR and the Justice System - Developments in Ontario

Various jurisdictions in the United States have incorporated ADR into their systems of justice. For example, the New Jersey Supreme Court has recognized that ADR is "part and parcel of the practice of

law and constitutes a tool of equal rank with litigation."<sup>22</sup> Although Ontario hasn't gone that far, it does seem to be following the American lead with recent developments that marry our traditional system of public justice with a more private system of justice employing ADR techniques, chiefly mediation.<sup>23</sup> The distinction between public and private justice can be illustrated by examining Ontario's traditional system of resolving legal disputes between parties (litigation) which differs from the methods of ADR that have been employed in cases such as *Godi v. TTC* .

Traditionally, two parties in dispute bring their claim in front of an adjudicator (a judge) who is unbiased and who applies statutory and case law, as relevant, to each particular set of facts. A primary element of the adjudicative process is that it is held in an open forum, because "not only must Justice be done, it must be seen to be done." Barring the presence of extraordinary circumstances, such as harm to the parties, our courts are open to the public and judicial decisions are published.

20 C. Fazzi, "Disaster When it strikes, ADR can come to the rescue in resolving mass tort claims" *Dis. Res. J.* (Feb 1998)16.

21 *Ibid.* (Also see generally the May 1998 volume of *Dispute Resolution Journal* for further discussion of resolution of mass tort claims through ADR.)

22 "ADR Ranked As Equal to Litigation" *Dis. Res. T.* (Summer 1994) at 1.

23 S. Hanna, "What's New in Alternative Dispute Resolution?" *Canadian Lawyer* (May 1997) at 35. For further information regarding Ontario's Mandatory Mediation Program, please see: Ministry of the Attorney General of Ontario (1998), online:<[http:// www.attorneygeneral.us.gov.on.ca/](http://www.attorneygeneral.us.gov.on.ca/)> (last modified: 29 March 1999).

A second element of adjudication is the inherent slowness of this system. This is due to the adversarial nature of litigation combined with the fact that new civil disputes (that is, disputes between private parties, such as *Godi v. TTC* ), filed in Ontario each year number approximately 85000.<sup>24</sup> Consequently, litigating cases takes time. So long, in fact, that according to the Attorney-General of Ontario, "the average civil court case takes five years to resolve."<sup>25</sup> Litigation is also expensive. Again, according to Ontario's Ministry of the Attorney General, "a typical two-party civil suit that goes to trial in Ontario results in a judgment of \$55 000 and legal fees of \$38,000 for each party."<sup>26</sup> These amounts do not include the administrative costs of maintaining our present legal system, borne by the parties directly through fees and the taxpayers indirectly through taxation.

In response to the recognized need of Ontarians for a "more efficient, less costly, speedier and more accessible justice system,"<sup>27</sup> Ontario's Mandatory Mediation Program formally commenced in the Ottawa and Toronto regions on January 4, 1999. (Pilot projects have been operating in these two locations since January, 1997, and September, 1994, respectively.) This program is slated to be implemented province-wide by the year 2003.<sup>28</sup> The procedure for mandatory mediation sessions is set out pursuant to Rule 24.1 of the *Rules of Civil Procedure*.<sup>29</sup>

A detailed examination of the new program is beyond the scope of this paper, rather it is mentioned to provide a context for the discussion of Justice Winkler's court order regarding YFC which follows in Section IV. The new program will mandate three hours of mediation for civil (non-family) disputes, including personal injury claims.

24 *Ibid.*

25 Ministry of the Attorney General of Ontario (1998), online: <<http://www.attorneygeneral.jus.gov.on.ca/>> (last modified: 29 March 1999) Hereinafter Ontario Attorney General's website

26 *Ibid.*

27 Ontario Court of Justice and Ministry of the Attorney General. "Civil Justice Review Supplemental and Final Report" (November 1996).

28 Hanna, *supra*, at 35.

29 O. Reg. 24.1/98. (Rule 24.1 amends Regulation 194 of the revised Regulations of Ontario).

Personal injury law is among the practice areas that will be referred to early mandatory mediation under the new rules recently announced.. . however mediation of personal injury lawsuits is not new. The Ontario Court (General Division) ADR Centre in Toronto has been mediating personal injury cases from its beginning. 30 *Godi v. TTC* is one of those cases.

#### **IV. Developing the Resolution Model: Justice Winider's Judgment**

Just over one year after the accident, on September 20, 1996, the Honourable Mr.

Justice Warren K. Winider handed down a settlement order in the lawsuit. Two individuals representing the class of passengers were identified as plaintiffs in the title of the proceeding. The original claimant to commence proceedings against the TTC was Mr. Antal Godi. A second claimant, Ms. Carol O'Connor, was subsequently added as a representative plaintiff in the action when the TTC raised concerns with Justice Winkler and plaintiff's counsel regarding whether Mr. Godi was actually a passenger. As a result, the class action proceeded with two representative plaintiffs.

Justice Winkler set out the "class" of individuals for certification purposes as all passengers on the subway trains (excluding TTC employees,)31 the personal representatives of those deceased in the accident, all claimants as defined by s.61 of the *Family Law Act* and personal representatives of deceased family members "where such a family member died after the accident."32 In doing so, Justice Winkler essentially "made" the class fit the certification requirements, by adopting a liberal interpretation of s. 5 of the Act.

30 *Sword, supra*, at 10.

31 TTC employees were "carved out" of the class action, because, unlike passengers, they were injured in the course of employment. As such, employees were owed a differing duty of care, rendering it impossible for them to be included in the class.

32 *Winkler Judgment, supra*.

The composition of the now certified class was a matter of close scrutiny by the TTC . The Commission maintained that from the accident scene onward, identifying those who had legitimate claims remained forefront. Several reasons were articulated for this. First, "most of the claims were for psychological harm, which lends itself to fraud because of lack of obvious physical symptoms."33 Second, those claimants who could prove that they suffered injuries caused by the accident would be eligible for compensatory damages, as per paragraph 7 of the judgment: "the settlement provides that the TTC will

pay for property damages, physical injuries, psychological injuries and expenses caused by the accident."<sup>34</sup> The TTC and its employee, subway train operator Robert Jeffrey, had admitted liability soon after the accident occurred, on or about November 6, 1995. However, the claimants would not be entitled to punitive and exemplary damages, pursuant to paragraph 8, as plaintiffs counsel agreed in r about mid 1996 to a dismissal of such damages as part of the overall ADR model. Without the TTC 's admission of liability, it would have been impossible for the bulk of claims (that were small) to have proceeded, as it is unlikely these claims would have been pursued individually. Further, the judgment awarded costs for the plaintiffs (the TTC would pay all legal costs as determined by the court). <sup>35</sup>

While it was dearly desirous that all accident claimants did come forward, these settlement provisions caused the TTC to be vigilant, through confirmation that each class member had actually suffered harm in the crash. To that end, the TTC set up a information hot line through the police for claimants, used police reports of the accident and employed private investigators to verify claims that they believed were suspicious. One of the most effective means employed to detect legitimate passengers, was the TTC's use of a large number of insurance adjusters who obtained written and signed statements from many of the alleged claimants, shortly after the accident. In *fact*, the TTC requested that these procedures be built right into the resolution process. This was a necessary step, the Commission felt, both to avoid paying damages to the undeserving, and as a deterrent to those seeking to to profit from the "financial gravy train"<sup>36</sup> of the class action.

<sup>33</sup> Lees, *supra*, at 28.

<sup>34</sup> Winkler Judgment, *supra*.

<sup>35</sup> *Ibid*.

The fear of fraudulent claims would normally have been addressed had the TTC case gone through the court system. That is because an important element of litigation is its veracity for testing the legitimacy of claimants' stories through examination and cross-examination. Litigation is the best method devised to achieve these results. Consequently, the TTC reserved the right, and in some instances exercised the right, to conduct Examinations for Discovery with individual claimants, due to the inability of the ADR process to handle fraud. Rather, the very nature of two parties mediating on an equal or near equal footing is possible only when both parties act in good faith. Considering that a third, more than fifty claimants, dropped their action against the *TTC* at various stages of this process, it would appear that the TTC 's concerns were borne out. Without this built-in safeguard, some individuals could have received a monetary award without ever being a passenger on either subway train! (It is important to note, however, that no criminal charges of any kind were laid against any of the "drop-out" claimants.)

The common issues that connected the class did not require all claimants to remain bound by the results of the class action. Paragraphs 4 to 6 set out the procedure for those claimants who wished to "opt out" of the class action and resolve their action against 1TC individually. Notice was required in writing under the time restrictions set out. Advertisements in both newsprint and on radio were required to inform claimants of this option and instruct them accordingly. Those claimants choosing to do so had until November 19, 1996 to inform legal counsel for the class, McGowan and Associates.

<sup>36</sup> J. Daw, "Claimant wasn't in TTC crash" *Toronto Star* (7 May 1998).

Within a further fourteen days plaintiffs counsel was required to serve on the defendants and file with the court, an affidavit listing those claimants who would not continue their action as part of the class action. Brian Leck, associate general counsel for the TTC noted that twelve claimants did opt out. This

group included the representative claimants for the three deceased passengers, as well as several others whose injuries were considered to be of a more serious nature than the class as a whole.

One class member who opted out was Roberto Reyes, whose wife was killed in the accident, and who lost both legs. His claim was the largest, and as a result, he chose to resolve it through individual negotiations with the UC. It is significant to note that while the 'opt out' claimants felt their actions would be better dealt with outside of the class action, (because the majority of the claims were for those suffering minor injuries,) most of these claims were still resolved using mediation. Due to the confidentiality of the process, none of the settlement amounts awarded have been released. 37

After setting out the requirements for certification of claimants, the opt out provisions, and the possible claims for damages arising from the action, Justice Winkler's settlement order departs from the norm (litigation), by incorporating mediation and arbitration. The result is a testing of the limits of what is successful about litigation and ADR. It is a flexible and collaborative party-designed model that ultimately brought the counsel for each representative party together to solve the outstanding issues of the claim. Initially, however, both sides were resistant to Justice Winkler's call for mediation. To counsel for the plaintiffs, mediating the class action "looked like an extra and possibly unnecessary step in the process - time wasted if the TTC proved to be unreasonable - before the case was finally settled in court."<sup>38</sup> Defence counsel also had reservations: "for Leck, an aura of therapy clung to mediation; he associated it with marital counselling where the object is not merely to settle differences but to leave both sides feeling good about themselves."<sup>39</sup> Despite this resistance "no lawyer likes to tell a judge he's misinformed,"<sup>40</sup> so both sides consented to referral of the case for resolution by ADR.

37 Letter from Brian Leck, *supra*.

38 Lees, *supra*, at 22.

As set out beginning in paragraph 10 of the judgment, *op consent*, *Godi v. TTC* had been referred to Canada's largest private ADR providers Toronto's ADR Chambers, and placed squarely in the laps of five experienced litigators and former jurists, identified as "the mediators and arbitrators" in the settlement order. It is important to clarify the key role played by these five individuals (former litigator Brian Wheatley, and retired justices the Honourable G. M. White, the Honourable R. E. Holland, the Honourable R. S. Montgomery and the Honourable W. D. Griffiths). Structured as a two-tier procedure whereby mediation proceeds initially and is followed by binding arbitration if unsuccessful, the mediators in this case were actively involved in assessment of the "demeanour and credibility"<sup>41</sup> of the claimants. This role does not reflect the neutral third party role that a mediator traditionally fills. Rather, as McLaren and Sanderson state in their case study on the ITC, "the process which was designed has been mislabeled as ultimately it reflects the process of Early Neutral Evaluation."<sup>42</sup> Semantics notwithstanding, the process unfolded in a private forum employing an effective combination of litigation and ADR techniques.<sup>43</sup>

Mediations began in early December, 1996, for those claimants who had not settled as a result of direct negotiations with TTC insurance adjusters or who had not been "eliminated as fraudulent."<sup>44</sup> The first meeting was a Mediators Introductory Hearing held on December 2, 1996.<sup>45</sup> Here, defence counsel presented an "overview of the TTC crash" to the mediators and plaintiffs' counsel McGowan "briefed the panel on the findings of a British inquiry into the lingering trauma suffered by passengers in a 1987 subway accident in London."<sup>46</sup> Once the mediations began, as per paragraph 13b of the judgment, the TTC could request medical reports and loss of income documentation at least 5 days prior to a particular claimant's mediation meeting. As well, the Commission could have access to clinical notes and records from individual claimant's doctors for the two-year period preceding the accident. Further, they could request that a discovery or "mini-discovery" be conducted following each mediation. The mediators

were also authorized to adjourn mediation sessions at their discretion to carry on "some form of discovery" (as outlined in paragraph 13, subsections (j) and (g)).<sup>47</sup> Adjournments occurred in several instances, primarily at the TTC 's prompting.

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*, at 28.

42 McLaren and Sanderson, *supra*, at 6(18).

43 *Ibid.* (See generally Chapter 3 of *Innovative Dispute Resolution*, *supra*).

44 Lees, *supra*, at 28.

45 McGowan & Associates. "Summary of Procedure for *Godi v. TTC* Mediation/Arbitration Process" (20 November 1998) [unpublished] at 2 Hereinafter Summary of Procedure.

Where mediations resulted in a settlement, the court order required the mediator to issue a report pursuant to Rule 54 of the *Rules of Civil Procedure*, and for both parties to confirm the result by consenting to the report after issuance.<sup>48</sup> The reports did not disclose any of the confidential information disclosed during mediation, rather they served as written confirmation of the settlement of particular claims.

Only one claim has proceeded to arbitration to date. This arbitration was not on the merits of the case, however. From the outset, the TTC questioned the claim made by the original plaintiff. They were of the belief that there were inconsistencies in the information Mr. Godi had provided to investigators about the evacuation of the crash site.<sup>49</sup> Following discovery and mediation sessions, this uncertainty remained. As a result, the arbitrators were asked to rule on a motion as to whether or not the original plaintiff had previously agreed to drop his claim against the TTC . The arbitrators found that this claimant had earlier agreed to drop his claim and was ordered to pay \$2500 to the TTC for its legal costs.<sup>50</sup>

46 Lees, *supra*, at 28.

47 Winkler Judgment, *supra*.

48 *Summary of Procedure*, *supra*, at 2.

49 Daw, *supra*.

Defence counsel stated that the mediation process took 7 to 8 months in total to complete (at a rate of up to 4 mediation sessions conducted per day). Leck further noted that approximately 98 per cent of the class action claims were resolved well within two years of the subway accident. As of early February 1999, all of the class action claimants have settled except one, however, this claimant is expected to settle soon. The delay in resolution of this claim, which is very small, was due to non-accident related problems which prevented the claimant from participating in the ADR process to date. Another outstanding claim, a family of four (husband, wife, son and nephew) who opted out of the class action, will be proceeding to mediation in June, 1999.<sup>51</sup>



The original \$50 million dollar action expected to take four years to litigate is instead nearing closure through an ADR model in just over two years! The total amount paid out in claims is also significantly less than originally estimated. The TTC has paid out approximately \$6.5 million to claimants to date, which includes partial payment for the plaintiff's solicitor's fees. An assessment of costs for the balance of the plaintiff's fees should proceed in the near future.<sup>52</sup>

## V. Views of the Parties and Some Concluding Remarks

For the TTC's Brian Leck, mediating instead of litigating gave the defence an unexpected opportunity to contribute to the "humanizing process" that is ADR. He observed that "a lot of people wanted to hear a simple apology. It became a ritual after awhile - I attempted to apologize on behalf of the TTC, to express regret about the incident."<sup>53</sup> Ongoing public relations with its customers is crucial to the service-oriented TTC. Leck also stated that by mediating the claims it was possible to build "trust and rapport" to sustain TTC's image with the public following the accident.

<sup>50</sup> Abbate, *supra*.

<sup>51</sup> Letter from Brian Leck, *supra*.

<sup>52</sup> *Ibid*.

<sup>53</sup> Lees, *supra*, at 28.

For the plaintiffs, counsel Michael McGowan found that based on his experience litigating personal injury claims, "the final settlement amounts were in line with awards that would have been made in court" although, as the claims were not settled in court, it is not possible to accurately predict whether the court awards would have been comparable. McGowan also commented on the substantial savings in process costs.<sup>54</sup> Again, it is difficult to directly compare the costs of this ADR approach versus traditional litigation. For example, the TTC were able to schedule mediation sessions in blocks of time to achieve cost savings and, further, all of the mediators and arbitrators were given the same review of the accident at an introductory hearing. In doing so, the process tried to address the problems of duplication and unpredictability that could have arisen in a litigation setting.

It is important to point out that the experience of the mediators and arbitrators lent considerable legitimacy to the process and to the parties willingness to participate. Not only does one observe the blending of public and private justice in this case, but also the combining of the essential ingredients of litigation into the flexible, more informal model of mediation based on a trust relationship. To that end, Justice Winkler praised counsel on both sides for accepting and buying into this unique resolution concept. Respective counsel "provided constructive suggestions... and made it work in individual cases."<sup>55</sup> This suggests an expanded role for counsel from the traditional advocacy role in the courtroom.

Court-mandated mediation may have larger, more far-reaching implications than simply resolving disputes in a timely, less expensive forum. Justice Winkler and counsel for both parties to the dispute suggested that resolution of *Godi v. TTC* reflects positively on the public's perception of the legal profession specifically, and our justice system, generally. McGowan & Associates associate counsel Dorothy Fong wrote that "the settlement model presents. . . other options by which justice can be achieved."<sup>56</sup> Defence counsel Leck responded to that same question in the following way: "the resolution of this case reflects positively on the legal profession and the Canadian justice system as the model generally involved cooperation and compromise rather than confrontation."<sup>57</sup>

54 *Ibid.*

55 Letter from The Honourable Mr. Justice W.K. Winkler to N. Furmston (4 November 1998).

Cooperative and compromising also describes the involvement of the TTC's insurer, according to Leek. The UC acknowledged the active role of their insurer, American International Group (AIG), and cited a very high level of cooperation throughout the process. Counsel for AIG, Mr. Gary Peacock, "attended at all of the cases conferences and was involved extensively in negotiating and drafting the resolution model." Leek went on to describe this type of partnering within a class action context as "both novel and innovative." AIG's proactive approach to help achieve a quick and reasonable resolution to the action included making advance payments and funding various claimants' medical and rehabilitation expenses. Expanding the role traditionally played by an insurance company in a mass tort claim also reflects the uniqueness of the resolution model employed here.<sup>58</sup>

Both Fong and Leek identified participation by the individual claimants in the mediation sessions themselves as an extremely beneficial outcome of the settlement model. Claimants were a "real part of the resolution." By contrast, such active participation by claimants in the litigation process is rare. But through ADR, "the claimants perceived the process to be fair and felt that it provided a cathartic this action achieved completion, not just settlement for the claimants.

56 Letter from D. Fong to N. Furmston (19 October 1998).

57 Letter from Brian Leck, *supra*.

58 *Ibid.*

59 Letter from D. Fong, *supra*.

Further, as the TTC case illustrates, because ADR expands the number of people who will benefit from this type of dispute resolution, it is anticipated that the amount of new claims initiated will also increase. Gregory commented on this likelihood: "if disputes can be resolved more cheaply and satisfactorily by ADR than by the current method - litigation - then will instituting ADR bring out claims that are not now disputed because of the cost of doing so."<sup>60</sup>

Another concern articulated by this author relates to the risk of frivolous litigation whereby parties may "sue without merit in order to be paid off."<sup>61</sup> This second concern can be adequately dealt with by designing safeguards into the resolution model, as was done in the TTC case.

The ability of the parties to contribute to the design of the resolution model allows flexibility that is simply not possible in the courtroom:

[By] allowing the mediators and arbitrators to discuss types of cases and appropriate ranges of awards... there was an exchange of ideas and a general consensus among all those involved as to the appropriate approach to cases, the principles to be applied and the appropriate ranges of damages.<sup>62</sup>

Clear and open communication between all parties was the key.

The outcome of the TTC case strongly supports an argument for incorporating ADR as a fundamental element in our justice system. The success of combining the proven elements of litigation within a mediation/arbitration framework can provide a model for the resolution of similar mass tort claims, such

as the Swiss Air disaster that occurred in early September, 1998, when Flight 111 crashed off Canada's east coast and resulted in a huge loss of life.

60 J.D. Gregory, "Government Use of ADR - Examples and Issues" CBA Symposium, Vancouver, B.C., 11-12 March 1994) ADR in Action in Canada at 8.

61 *Ibid.*

62 B. Leck, "ADR In Action" *Canadian Insurance* (May 1997) at 32.

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*Last Modified: April 17, 2001*