

Power in Mediation: An Analysis of St. Stephen's Community House

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"Because mediation is understood as the preferred alternative to patriarchal, hierarchical law, the defects of mediation - especially those that relate to hierarchy and domination - are not taken seriously"

I. Introduction

Heralded as a tremendous breakthrough in dispute resolution², the risk of mediation to subtly coerce³ and actually *disempower* disputants has not been adequately addressed. While mediation has been applauded for its informality, which allows for a quick, inexpensive and flexible process, this informality may also exacerbate or even create a power imbalance. Critics have suggested that the informal process of mediation may result in such negative outcomes as increased ethnic or racial prejudice⁴, cultural domination⁵, disempowerment for women⁶ and the facilitation of coercion and manipulation of weaker disputants.⁷

Perhaps our enthusiasm to embrace a resolution system alternate to inflexible and cumbersome litigation, has, as Catherine Wells suggested, undermined the effort to understand mediation experientially and to correctly diagnose its failures and successes.⁸ As mediation emerges as a more utilized dispute resolution system, however, its ability to effectively manage power must be assessed and improved in order to meet one of its primary goals of "empowerment". It is the aim of this study to explore some of the major issues in the effective management of power that face a community mediation centre in downtown Toronto, and assess its techniques in addressing these issues. Examining the approach of *Conflict Resolution Service, St. Stephen's Community House* (hereinafter *St. Stephen's*)⁹ and suggesting improvements with respect to a more effective management of bias and power can reveal practical implications which could further the goals of mediation. It will be argued that though *St. Stephen's* has adopted numerous techniques which are useful in addressing issues of implicit bias and power, there are areas in which improvements can be made.

¹C. Wells, *The Theory and Practice of Being Trina: A Remembrance of Trina Grillo* (1997), 81 Minnesota L.R.

1381 at 1383.

²J. Rosenberg, *In Defence of Mediation* (1991) 33 Ariz. L.R. 467 at 467.

³C. Wells, *supra* at 1384.

⁴R. Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*

(1985) Wisconsin L.R. 1360.

⁵S. Merry, *The Discourses of Mediation and the Power of Naming* (1990) 2 Yale L. J. 1.

6 T. Grillo, *The Mediation Alternative: Process Dangers for Women* (1991) 100 *Yale L.J.* 1545.

7R. Baruch Bush and J. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) 22.

This analysis will proceed in the following stages: 1) A brief discussion of power and neutrality which will serve as an analytical framework 2) A critical analysis of each of the major stages of the mediation process of *St. Stephen's*. and 3) Recommendations and conclusions

II. A Brief Theoretical Introduction to Power and Neutrality

(a) Power

It is inevitable that power, exerted either consciously or unconsciously by both the disputants and the mediator, will be a factor in mediation.¹⁰ Definitions of power vary, but Weber's definition being "the probability that one actor within a social relationship will be in a position to carry out his own will"¹¹ is viewed as one of the most widely accepted¹² and will be relied on for the purposes of this analysis. The critical aspect of power that is emphasized in this definition is that it cannot be empirically determined, but is relational¹³. The external indicators of power, such as access to resources, self esteem, gender, race and a host of others, then, will only represent power to the extent that there is a corresponding *perception* of power in the disputants. Power exerted in a mediation setting may be reduced to two broad categories, which have been described as the two "faces" of power.⁴ The first "face" of power is the manifestation of power in overt actions of coercion and domination. This may be exercised implicitly or explicitly by a disputant, or by the mediator. The second "face" of power is the *suppression* of conflicts and differences⁵, which also can be exercised by both the mediator or the disputants. Normally, however, the first face of power is associated with the impartiality of the mediator (that they do not coerce or impose), and the second associated with a mediator's attempt to "balance power" by attempting to ensure that the interests of the weaker party are adequately forwarded.⁶

8 C. Wells, *supra* at 1383. The sources of information about *St. Stephen's* used in this analysis consists of 2 personal interviews conducted on March 15 and April 8, 1999, the mediator training manual entitled *Interpersonal Mediation Reference Materials*, and the mediation screening intake form.

¹⁰B. Mayer, *O*The Dynamics of Power in Mediation and Negotiation (1987) 16 *Mediation Quarterly* 75.

¹¹M. Weber, *The Theory of Social and Economic Organizations* (New York: Oxford University Press, 1947) 152. ¹²G. LaFree, *The Effects of Participant's Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases* (1996) 30 *Law & Society Review* 767 at 767.

¹³S. Cobb, "Empowerment and Mediation: A Narrative Perspective" (July 1993) *Negotiation Journal* 245 at 247.

The assertion of power, both consciously and unconsciously, will be discussed in the following sections which assess the various stages in the process of a *St. Stephen's* mediation. It is important at this point, however, to emphasize the complicated and cross-cutting nature of "empowerment" and the problematic assumptions that are often related to it. Though empowerment has been waved like a banner around mediation, its definition is remarkably vague and its process greatly mystified.¹⁷ While the notion that "balancing power" is implicit in empowerment, the premise that this can be achieved relies on the

problematic assumption that a mediator can recognize the *perception* of power (given our relational definition) and that there exist effective methods of boosting power. This is problematic since a mediator must *infer* the power imbalance, by "privileging their own account of power over that of the disputants", and in trying to rectify the problem will, paradoxically, "disempower (deligitimize) disputants by usurping their authority (their right to author themselves)."⁸

⁴S. Cobb and J. Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) *Law and Social Inquiry* 35 at 46 citing P. Baruch & M. Baratz, "The Two Faces of Power", 56 *Am. Pot. Sci Rev.* 947. 15 S. Cobb and J. Rifkin, *supra*.

16 *Ibid*.

(b) **The Paradox of Neutrality and The Policy of St. Stephen's**

The view of neutrality that is adopted in mediation will be crucial to the conduct of the mediator(s) and the integrity of the process. Neutrality is a hallmark of mediation since it is essentially what distinguishes it from adjudicative, fault based systems of dispute resolution. Yet, views of neutrality vary, and are often contradictory. Moreover, there is little guidance beyond intuition to act as a guide to the mediator in applying these standards.⁹

The two definitions of neutrality most prevalent in mediation are those of "impartiality" and "equidistance". In their discussion, Cobb and Rifkin identify impartiality as the absence of bias, and equidistance as ensuring general symmetry between the parties for the purposes of the mediation.²⁰ The *St. Stephen's* model incorporates both these views distinguishing them as *neutrality of the mediator*, and *neutrality of the process*.²¹ While the mediator should remain unbiased (to the degree possible), the mediator also has the responsibility to ensure that the parties are treated "according to their need for empowerment" in the process²². These dual responsibilities of the mediator(s), however, create an inevitable paradox of neutrality.²³ The activism that can help promote the neutrality (symmetry) of the process will undermine the neutrality (impartiality) of the mediator.

The limit that *St. Stephen's* imposes on the duty of neutrality is when there arise issues which carry a "moral imperative".²⁴ Their mediators are under a duty to intervene in the mediation process by challenging a disputant where, for example, overt racist or sexist behaviour or language is used. This inevitably creates acute problems in maintaining a perception of impartiality. Furthermore, *St. Stephen's* does not provide any precise guidelines as to how to identify issues which carry a "moral imperative", (therefore leaving it up to the discretion of the mediators). While this policy exacerbates the paradox of neutrality that exists for mediators, it also creates further inconsistency between the mediators' approach at *St. Stephen's*.

¹⁷S. Cobb., *supra* at 245.

¹⁸ *Ibid* at 249.

⁹S. Cobb and J. Rifkin, *supra*.

²⁰ *Ibid* at 41-45.

²¹ Interview, April 8, 1999.

²² Interview, April 8, 1999.

23 S. Cobb & J. Rifkin, *supra* at 48.

IV. St. Stephen's Process of Mediation: A Stage by Stage Analysis

(a) Intake

The intake process at St. *Stephen's* primarily serves the following 2 functions:

1. Assessment of the dispute to determine if it is appropriate for mediation;
2. To assign mediators.

1. Assessment

This assessment includes a consideration of *the nature of the dispute*, and the *nature of the disputants and their relationship*.

1. *Nature of the Dispute*

That mediation is, by its very nature, inappropriate for certain kinds of disputes, has been suggested by critics, particularly in relation to issues affecting the advancement of minority and women's rights. One argument is essentially that there exist situations where mediation, since it is private and based on an ideology of consensus,²⁵ is inappropriate, since it can "disempower" the wider constituents of their communities. Laurie Woods has suggested that the growing trend to use mediation in family law disputes dissipates legislative and common law gains. She writes that the private nature of mediation denies women "the opportunity to enforce and consolidate their victories and to empower themselves further through the development of new rights in the legislature and the courts."²⁶

²⁴ *Ibid* at 48.

²⁵ J. Rifkin, *Mediation in the Justice System* (1989) 1 *Women and Criminal Justice* 41 at 49.

Though Woods comment is primarily in reference to mediation which is a *replacement* to the legal process²⁷, others have expressed similar views with regard to mandatory mediation *as part* of the court process²⁸ and when mediation is entirely voluntary.²⁹ That the broad advancement of the rights of the disadvantaged may require a formal and public process (such as litigation) instead of an informal and private one (such as mediation which can be seen to circumvent formal rights) is a familiar theme in the leftist critique of ADR.³⁰

Janet Rifkin has aptly noted that the disagreement between supporters and critics of mediation on this issue stems from a fundamental disagreement on the value of law and the interpretation of empowerment. She writes:

The supporters of mediation argue that empowerment is linked to an individual's ability and opportunity to participate in the dispute settlement process and to actively shape acceptable outcomes to the problem. In contrast, the opponents of mediation link empowerment to the legal protection model of law in which the rights of women will be protected and expanded through authoritative decisions and interpretations of rules by judges and other official legal agents.³¹

This divide also illustrates the emphasis which supporters of mediation place on the *individual* in

contrast to the emphasis placed by the critics on the community as a whole.

26 L Woods, OMediation: A Backlash to Women's Progress on Family Law Issues (Summer 1985) Clearinghouse Review 431 at 431.

27 *Ibid* at 435.

28 T. Gallo, *supra*.

29 R. Delgado *et al*, *supra*.

30 R. Delgado, *supra*.

31 J. Rifkin, *supra* at 52.

The approach of *St Stephens* can be seen as falling between these two positions. While the scope of cases where mediation is deemed appropriate is quite extensive, there are limits. As a policy *St. Stephen's* will not mediate in cases which involve a victim offender situation, or issues of child custody. This reflects a recognition of the limits of mediation. In terms of situations where opponents of mediation may suggest that the rights of a disadvantaged group as a whole may be better realized in a public process (such as litigation), *St. Stephen's* will only canvass the option with the disputant, (explaining that mediation cannot establish 'precedent' or identify "wrong" behaviour³²) but it will not refuse to offer its mediation services on this basis. Ultimately, the decision to mediate in this situation will be left to the disputant. This policy is consistent with the view of empowerment favoured by proponents of mediation, that the individual's ability and opportunity to participate in the dispute settlement process through the active choice of mediation is critical to their empowerment.

ii. Nature of the Disputants and their Relationship

It has also been suggested that mediation should only be undertaken in cases where there is competency of the disputants to enter and carry out agreements and that there exists a "relative parity between the parties".³³ This view assumes that significantly unequal distribution of power between the parties is inimical to effective and fair mediation, and that there do not exist techniques which could adequately redress the balance of power between the parties for the purposes of the mediation.

St. Stephen's rejects this view and employs decidedly more limited criteria in accepting to mediate a dispute. *St. Stephen's* requires only that the disputants be *capable and willing to negotiate in a flexible manner*. Assuming that the mediation will not threaten the physical safety of the disputants and neither party is overtly prejudiced, *St. Stephen's* will proceed with the mediation. While their approach acknowledges that power imbalances short (short of threatening safety) will affect the mediation, their philosophy is that the well-trained and sensitive mediator can address these issues sufficiently for the purposes of a fair mediation. This is evident in the following statement in the manual:

32 *St Stephen's* Interpersonal Mediation Reference Materials, p.29.

33 L. Woods, *supra* at 435.

Even though power imbalances may continue to exist, it may be possible to facilitate a mediation context where a powerful party does not feel the need to use this power destructively and may learn how to treat the other party with respect.³⁴

While there do exist techniques which may assist in the managing of the use of power in a mediation setting, this statement does not adequately address the limits to these techniques. In particular, there is not a sufficient recognition of subtle coercion that exists in narrative", or the *unconscious* exercise of power which arises out of attitudes of prejudice.³⁶ The very fact that these influences are *unconscious* challenges the notion espoused by *St. Stephen's* that a mediation setting may be created where the power is effectively addressed when "a powerful party does not feel the need to use this power destructively".

2. The Assignment of Mediators

The second role of the intake process is to select mediators, which is critical in ensuring the continued integrity of the process. The choice of mediator will have implications for the disputant's perception of their impartiality, the mediator's degree of influence over the disputants, and the effect of the mediator's implicit bias.

³⁴*St. Stephen's* Interpersonal Mediation Reference Materials, p.29.

³⁵ I. Gunning, Diversity Issues in Mediation: Controlling Negative Cultural Myths (1995) 1 *Journal of Dispute Resolution* 55 at 69.

³⁶ *Ibid* at 59.

i. Perception of Impartiality

The integrity of the mediation process requires, in part, that the disputants perceive the mediator to be impartial towards them. This perception of impartiality can be undermined by the identity of the mediator, particularly if the disputant views them as different (and potentially hostile) to them. This may be exacerbated if the mediator's culture and identity, in addition to being different from one disputant, is viewed to be the same or very similar to the other disputant. This issue is acknowledged by *St. Stephen's*, and the intake phase takes into account the "cultural background" of the disputant and attempts, where possible, to "match" it with mediators of the same culture (*St. Stephen's* always assigns at least two mediators, and will "match" one to each disputant in some circumstances) While additional factors such as religion and sexual politics may occasionally be taken into account in the assignment of mediators in attempt to "match" them to the disputants, the only characteristic of this type which is formally included on the *Case Intake Form* is "cultural background". This limited investigation is problematic, since given this broad, open ended category, cultural background is likely to be conflated with ethnicity by the disputant. This type of process is, "of limited significance because it ignores the impact of other sources of diversity".³⁷ In illustrating this point Savage provides a real mediation example where the disputants were (in no particular order) white, middle-aged, Jewish, Russian immigrants of varying language ability and income class. The mediators were two law students and a faculty advisor. Of the difficulty of determining if there is a cultural "match" between the disputants and the mediators, Savage writes:

Would identifying the ethnicity of each of the mediators sum up their cultural identity? One mediator is black, but he is not African American. He is also a law student, becoming acculturated in the legal profession. The two women are white and American, but of different generations, different religions, different geographical regions and different levels of acculturation into the legal profession. Of course all the participants have their individual personality and experience differences as well. Defining cultural identity as being the same as ethnicity misses certain potential similarities in culture between the mediators and the parties³⁸

If the aim at this stage is to attempt to reduce the perception of bias of the disputants through "matching" the culture of the mediator, a more thorough investigation should be conducted. While this attempt to "match" will always be problematic, the exceedingly limited and vague approach of St. Stephen's exacerbates this problem. Savage suggests an approach that "synthesizes the effects of multiple cultural, subcultural and individual influences on the identity of the individual participant"³⁹. In practice, implementing this approach will be a difficult task. The above example illustrates the multitude and variety of factors that can cross-cut and interplay to constitute a disputant's identity. A more detailed *Case Intake Form*, however, that takes a broader variety of factors into account, such as education, income, religion, etc., may provide a broader picture of the disputants, and therefore will assist in their selection of mediators to maintain the perception of impartiality.

The task of attempting to "match" the mediator to the disputants, however, may raise two additional problems. Firstly, in some cases, a mediator of the same "culture" as the disputant may be viewed as *more judgmental* than a mediator of a different culture in certain circumstances. This issue arose in a St. Stephen's mediation which involved a relationship dispute between a Chinese woman and a non-Chinese man. In this case she specifically requested a *non-Chinese* mediator, since she feared a negative bias towards her given her relationship with a non-Chinese man. The request was accommodated, and though the risk of a

perception of impartiality on the basis of a "matched" mediator always exists, it could be canvassed with the disputant in this manner to minimize this risk.

Ibid at 273.

Secondly, matching mediators may cause the problem of creating the perception that each disputant has "their own mediator" who has been matched to them. St. Stephen's has acknowledged this difficulty and attempted to address it by including a third mediator (who is not the same culture as either of the disputants) to address it.

ii Professional Experience of Mediators in the Area of the Dispute

St. Stephen's also selects mediators with an eye to their training and their degree of familiarity/experience with the type of dispute. The aim is that in disputes which raise specialized issues, the mediator should, (where possible) have professional familiarity with the content of the dispute. The belief is that this is valuable in a mediation setting since the mediator's experience allows them to have an understanding of the issue and the impact it can have on disputants, as well as in certain cases, provide specialized information to the disputants to help resolve a dispute.

This approach can increase the risk that the mediator's influence will subtly coerce the disputants. Firstly, the rationale that the mediators should draw from their previous experience in interpreting and guiding the mediation actually encourages "countertransference" (imposition) of the mediator's experience on to the disputants⁴⁰. In a conflict which involves financial issues such as bankruptcy, for example, *St. Stephen's* will attempt to assign a mediator with experience in this area, because it is important "to know what it means to go into bankruptcy" and the related personal impact.⁴¹ The ability of the disputants to frame their stories in their own terms may be undermined by the mediators preconceived, and countertransferred views. Trino Gallo comments that this is particularly problematic in the mediation setting since mediators normally do not possess the training or have the time to try and minimize the impact of these unconscious opinions, yet still possess an authority that may make it

difficult for the disputants to disagree with the way their stories are summarized by the mediator She writes:

39 *ibid* at 274.

40T. Gallo, *supra* at 1591.

Countertransference and transference occur in mediation. When transference occurs in mediation, however, there may not be the time, the commitment, or the expertise to study it and help the client learn what it reveals about her personality structure or orientation to the world. For this reason, a client in mediation might be far more influenced by what the mediator says than would be expected under the circumstances. It is not an answer to the problem of coercion in mediation, then to say that the party does not have to agree with what the mediator says; she might not agree but go along with it for reasons that are situated in her past and are quite beyond either her or the mediator's understanding.⁴²

The problem of the natural authority that a trained mediator possesses in a mediation setting may be exacerbated by selecting a mediator who is also an expert in the area of dispute. Having a real estate professional, for example, mediate a dispute about the location of a fence between properties (an actual example provided by St. *Stephen's*) will imbue the mediator with additional authority as an "expert", making it more difficult for the disputants to feel they can disagree with the mediator, and make it more likely the mediator will subtly control the process. As well, there will always be the temptation of the mediator to attempt to "settle" a specialized issue which she has knowledge of, in order for the mediation to progress to other truly contested and ambiguous issues. This intervention, though discouraged by St. *Stephen's* generally, is occasionally recommended if it can move the parties along in their resolution in a positive way.

41 Interview, April 8, 1999.

This type of intervention, however, drastically shifts the role of impartial mediator towards that of an arbitrator, and could cause irreparable harm to the mediation process and resolution which is supposed to be owned by the disputants. Having disputants obtain legal advice or other professional advice, or mutually agree on a third party expert should be the practice of St. *Stephen's* rather than occasionally permitting the mediator with trained knowledge to intervene.

iii. implicit mediator bias

A mediator will always be influenced by her/his own values and experience. Though the mediator may take every precaution to examine these values and attempt to keep them out of the mediation (which is a practice advocated in most mediation models) these values necessarily remain to some degree and will influence the mediation process. Including, among other things, values of prejudice⁴³, or societal assumptions of gender roles", these values may be unconscious, and therefore not easily correctable (or not correctable at all). Moreover, preconceived values will play a role in the mediator's good intentions of ensuring the process is "fair" to the disputants. Though fairness may appear to have the virtue of clarity to the mediator, the content of fairness will vary considerably among different people, and the mediator's imposition of their notion of a fair process may undermine the notion that the parties "will be in control of the normative issues at stake in the mediation".⁴⁵

The St. *Stephen's* model addresses this issue squarely and effectively (to the degree possible) by employing the use of multiple mediators. A minimum of two and occasionally three mediators are assigned to each dispute. This practice has numerous benefits in reducing the impact of inherent

mediator bias in mediation. Firstly, it exposes multiple points of view of the mediators to the mediation process minimizing the risk that one biased view will dominate the process. Secondly, it creates a checks and balances system where each mediator can be attuned to the degree to which inherent values appear to be affecting the other mediator's role. Finally, the task of "checking" the behaviour of other mediators will make each mediator more aware of their own biases, and work to prevent their influence to the extent that is possible.

42 T Gallo, *supra* at 1591.

43 R. Delgado, *supra*.

44 T. Gallo, *supra* at 1593.

45 T. Gallo, *supra* at 1593.

(b) **Pre-Mediation and the Power of Narrative**

St. Stephen's employs an extensive premeditation stage when the mediators communicate with the disputants prior to the mediation. Its purpose is to provide the opportunity for the disputant to tell their narrative in isolation from the other party and for the mediator to fully explain the mediation process including its limits, and assist disputants in identifying their priorities, needs, sources of power and other alternatives that are available.

This stage is critical in managing the use of power in mediation for a number of reasons. Firstly, it provides an opportunity for the mediator to attempt to destabilize the dominance of certain narratives. Cobb and Rifkin suggest that any examination of power in mediation should pay greater heed to the tendency of certain types of narrative to dominate. This, according to the authors, requires a shift in the notion that

language *represents* reality toward the notion that language *constitutes* reality... It requires an examination of the process in which and through which meaning is managed, the way that dominant discourses are brought forth, reconstituted in practice and contested and how alternatives to them are marginalized and on occasion, transformed⁴⁶.

46S. Cobb & J. Rifkin, *supra* at 50.

This examination reveals that while the opportunity for parties to "tell their own stories" is one

of the primary strengths of mediation, it may also be a source of ultimate disempowerment.⁴⁷ The narratives of disputants must compete for legitimacy or primacy in the mediation, and' narratives are rarely on an equal footing. Certain narratives, such as those that are more coherent⁴⁸ or which play into cultural myths which the parties are familiar⁴⁹ (i.e. those which are a part of the dominant societal narrative) will have a greater tendency to dominate the mediation.

In addition, the order which the disputants speak is also of immense importance. The initial narrative functions to dominate in the vast majority of cases.⁵⁰ Sarah Cobb writes that the first speaker does "more than just 'take their turn' - they construct the semantic and discursive space on which all subsequent speakers must stand by providing a set of coherent relations between plots, characters and themes"⁵¹. What essentially happens, Cobb suggests, is that the second speaker becomes "trapped in their adversary's narrative."⁵²

The Pre-Mediation stage at St. *Stephen's*, in which the disputants tell their narratives to the mediator outside the joint setting, provides a good opportunity for the mediator to begin destabilizing a tendency of certain narratives to dominate. It will provide the less coherent disputant an opportunity to explain at length their narrative without the influence of the more coherent (dominant) narrative, and will, in general reduce (but not eliminate) the tendency of the first narrative to dominate. This tendency cannot be eliminated, in part, because the *mediators* must still hear one story first, and will therefore be influenced by the framework which is established. This framework will influence their approach towards the second disputant, particularly in the way questions are framed. The information provided to the second disputant about what the other disputant said, will influence the narrative told by the second party. Still, this tendency will not be as great as it would be in a joint session, and these pre-mediation sessions can provide "more opportunity for the mediator to" open "narratives by constructing sites where narrative transformation is possible". Becoming aware of the different narratives will allow the mediators to better address the issue of narrative dominance when it arises in a joint session.

47 I. Gunning, *supra* at 68.

48S. Cobb, *supra* at 251.

49 I. Gunning, *supra* at 68.

50S. Cobb, *supra* at 250.

51 *Ibid* at 250.

52 *Ibid* at 253.

Another function of the pre-mediation stage is to assess whether modifications can be made to the mediation setting which could address (and attempt to balance) power imbalances between the parties. This may include, for example, the suggestion that the parties seek professional advice (legal, financial, etc.), or that they ask support persons to attend. This opportunity to explore the "sources of power" of the disputants and canvass options may reveal a great deal about their perceptions of themselves and the other party which will prove useful once the parties are in joint setting.

(c) Managing Power During the Mediation Session

The primary objective of the St. Stephen's mediation process is to provide an effective forum for disputants to solve their own problems. It is anticipated that through the integrity of the mediation process, an agreement which is satisfactory to both parties will be reached, and strained relationships may be improved. St. Stephens maintains that disputants who possess a willingness to communicate with each other through mediation will more likely be able to find a common interest and share in the responsibility of resolving their dispute.

53 *Ibid* at 253.

The narratives which unfold during the attempts to resolve a dispute are, as discussed above, constructed in relation to familiar, pre-existing, stories and myths, which interact and may become the dominant story within the context of the mediation.⁵⁴ According to Dorothy Smith, these pre-existing stories and myths are predominantly created by men who are overwhelmingly responsible for the "making and dissemination of the forms of thought we make use of to think of ourselves and our society."⁵⁵ The problem lies in the fact that the forms of thought imbued in the pre-existing stories and myths often

devalue the life experiences of marginalized groups through negative stereotypes, which has the effect of influencing the disadvantaged client's own narrative in the context of the mediation.⁵⁶ Thus, the client whose narrative is influenced by negative stereotypes becomes disadvantaged in her effort to legitimize her narrative, and may ultimately succumb to her adversary's narrative, if it happens to be related to the "stronger cultural and historical myth"⁵⁷

The disputant's story is also influenced by the mediator and the other participants in the mediation. According to Parry & Doan⁵⁸:

No one ever fully becomes the author of her/his story; any such assumption can only lead back into the illusions of control, individual autonomy, isolated selfhood, and single truth. The person goes forth instead to join with others in the universal human action of multiple authorship.

Gunning, *supra* at 68.

Dorothy Smith, *The Everyday World as Problematic* (Toronto: University of Toronto Press, 1991).

⁵⁶ Gunning, *supra* at 68.

⁵⁷ *Ibid.* at 73.

⁵⁸ A. Parry & R. Doan, *Story Revisions Narrative Therapy in a Postmodern World* (New York: Guilford Press,

The disputants narratives are not only influenced by who speaks first in the context of the

mediation.⁵⁹ They are also influenced by the mediator's questioning and other characteristics, such as the mediator's age, race, disability, etc. For example, a disputant whose narrative is normally coloured by blasphemous statements against the church, may feel restricted from expressing himself fully where the mediator is a representative of a church run organization⁶⁰. These influences may limit a disputant's ability to participate fully in the mediation process and result in an unfavorable settlement for one of the parties involved.

St. Stephens acknowledges these problems and attempts to deal with them in a number of ways. *St. Stephens* begins by recognizing that the mediation process is western-centric and biased and thereby privileges direct verbal communication over other forms. Secondly, *St. Stephens* concedes that mediators have their own biases but maintains that it is only the disputants' *perception* of neutrality that is important. In order to uphold this perception, a *St. Stephens* mediator attempts to create a "transparent" process, which essentially means that the mediator will actively intervene in the mediation to check with the clients as to whether he is successfully maintaining his neutral status. The mediator will also intervene in attempts to balance an unequal division of power between the parties. For example, where a party has a much stronger BATNA than his adversary and is adamant about going to court, the mediator will begin probing her with questions such as, " what will the consequences of this action be?" in order to ensure that the client is making a reasoned and informed decision. The mediator is also obligated to probe the weaker party with similar questions when he believes that the disputant's best interest is not being represented in the negotiated agreement.

The specific interventions outlined which are undertaken by the *St. Stephens* mediator during the mediation, necessarily involve a paradox of neutrality.⁶¹ The impact of the interventions on narrative are examined by Elizabeth Gunning⁶² in her article "Diversity Issues in Mediation". She states:

If the mediator is allowed to intervene actively, the likelihood is that he will

intrude his own interpretive framework and thus benefit whichever narrative is in accordance with his own interpretive framework. However, if the mediator does nothing and the parties enter the mediation with societal power imbalances, with uneven collections of cultural myths from which to use in their narrative struggle, the mediators "neutrality" or silence will benefit the more powerful party.

St. Stephen 's position clearly advocates intervening in the "best interest" of both the weaker and the stronger party to arrive at a negotiated agreement. What always remains a possibility, however, is whether the intervention is *really* in the best interest of the disputants or whether the mediator has subtly (and unintentionally) coerced the disputants with her own views.

During the final stages of the mediation process, the *St. Stephen 's* mediators attempt to facilitate the generation of a negotiated agreement between the disputants. If the disputants are deadlocked and/or silent and are therefore unable to reach a resolution, the *St. Stephen 's* mediator may check in with the clients again and possibly suggest a resolution of their own. Once a resolution is accepted by both parties, an agreement is drafted and worded in such a way as to de-emphasize the power relations between the parties.

St. Stephen's was originally affiliated with the church but is now an independent secular organization.

A general criticism of a negotiated agreement through mediation is articulated by Trina Grill in her article "The Mediation Alternative"⁶³. Grillo argues that unlike litigation, mediation does not set a precedent from which mediated agreements in the future can be measured. She cautions that this may result in disputants entering agreements which may or may not be fair. More importantly, there may not be the perception of fairness since there is no precedent with which to compare.

62 Gunning, *supra* at 83.

63 Grillo *supra*

The intake workers at St. Stephens are obligated to ask a party interested in mediation to obtain legal advice if their problem sounds like it may be covered by an act or statute (e.g. a landlord tenant matter). The problem with this approach is that the obligation to inform is under the complete control of the intake worker who has little or no legal knowledge and therefore may not be qualified to make the required decision. A more consistent and formal policy which require intake workers to inform all prospective clients of how to obtain their legal rights before any mediation is commenced would provide a simple solution to the problem.

V. Training

The training which prospective mediators undergo addresses the nature of explicit and obvious power imbalances, but it does not address the subtle or unconscious use of power found in narrative. As demonstrating in the foregoing analysis, this can have a critical effect on the effectiveness of a mediation to reach its goal of empowerment. For this reason, it is recommended that this be undertaken as part of the initial training process or as a subsequent intensive module.

V. Evaluation

St. Stephens does not currently use a formal evaluation process after each mediation session. An

evaluation by both the participants of the mediation and of the mediators would be extremely beneficial for both training and statistical purposes. Through mandatory anonymous questionnaires, the disputants and mediators could express their views on the entire process from the initial intake to the final settlement. It would provide *St. Stephens* with information which could be included in future training modules to assist in mediation, as well as provide information on the individual skills of the mediators. Furthermore, correlative studies which compare the disputants race, gender as well as other identifiers of the settlement would be extremely useful in determining the results achieved by marginalized groups and whether they were comparable to other groups.

Summary of Techniques Which are Useful in Managing Power

Through the course of this analysis, several effective techniques in managing power were identified. They include:

- 1) The use of multiple mediators to reduce the impact of an implicit bias
- 2) The use of pre-mediation to deconstruct a client's dominant narrative
- 3) Final agreements which are written in a balanced manner

There are also a number of areas in which *St. Stephens* could create a system which more effectively manages power in mediation. These include:

- 1) Creating and implementing a more comprehensive (and ongoing) training program which takes into account subconscious exertion of power and the effect of narrative.
- 2) Redesigning the intake form/questionnaire to identify a broader range of factors including for eg., race, educational and socio-economic background, religion etc.
- 3) Refraining from their practice of selecting mediators with professional experience in the area of the dispute. The benefits of a quicker process are outweighed by the influence of the trained mediator's increased power as a result of their expertise.
- 4) At the resolution stage, if the parties are unable to generate ideas or arrive an agreement, should encourage parties to return at a later time. When the mediator suggests an agreement, or begins the discussion his/her narrative will be dominant, and the parties may find it difficult to refuse on account of looking unreasonable.
- 5) There should be a formal evaluation process by the parties and the mediators as well as with the *St. Stephen 's* staff.
- 6) Detailed statistical data should be kept correlating the parties and the types of disputes with the results to assess on a more long range basis whether disadvantaged groups are arriving at particular types of resolutions. This may help assess the degree to which mediators are effective in "balancing" power.

(b) Conclusion

The leftist critique that mediation has the potential to *subtly coerce* parties and therefore *disempower* them is well documented. Nevertheless, there exist techniques which may be effective in reducing the

subtle influence of the mediator. This may allow for the parties to mediate their issue in a more balanced manner. Awareness of the possible detrimental effects of mediation is critical in arriving at these techniques. It was the aim of this analysis to examine the *St. Stephen 's* model with the critiques in mind and to assess the degree to which they have been successful in this regard. The services of *St. Stephens* are widely used and provide a valuable opportunity to resolve disputes in an accessible forum and in a transformative manner. However, there are still ways in which *St. Stephen 's* may improve in more effectively managing the issues of power that arise in the mediation setting. Several recommendations were made here, with the goal of improving their services. This may allow *St. Stephen 's* to come closer to one of their principal goals: empowerment of the parties.

Bibliography

Baruch, R. Bush and J. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass, 1994) 22.

Cobb, S. "Empowerment and Mediation: A Narrative Perspective" (July 1993) *Negotiation Journal* 245 at 247.

Cobb, S. and J. Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991)

Law and Social Inquiry 35 at 46 citing P. Baruch & M. Baratz, "The Two Faces of Power", 56

Am. Pol. Sci. Rev. 947.

Delgado, R. et al., "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" (1985) *Wisconsin L.R.* 1360.

Fiss, O.M., "Against Settlement" 93 *Yale L. J.* 1073 at 1076.

Grillo T. "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale L. J.* 1545.

Gunning, I. "Diversity Issues in Mediation: Controlling Negative Cultural Myths" (1995) 1 *Journal of Dispute Resolution* 55 at 69.

LaFree, G. "The Effects of Participant's Ethnicity and Gender on Monetary Outcomes in

Monetary Outcomes in Mediated and Adjudicated Civil Cases" (1996) 30 *Law & Society*

Review 767 at 767.

Mayer, B. "The Dynamics of Power in Mediation and Negotiation" (1987) 16 *Mediation Quarterly* 75.

Merry, S. "The Discourses of Mediation and the Power of Naming" (1990) 2 *Yale L. J.* 1.

Parry, A. & R. Doan, *Story Revisions: Narrative Therapy in a Postmodern World* (New York:

Guilford Press, 1994).

Rifkin, J. "In Defence of Mediation" (1991) 33 Ariz. L.R. 467 at 467.

Savage, C., "Culture and Mediation: A Red Herring" 5 Journal of Gender & the Law 269 at 273.

Smith, D. *The Everyday World as Problematic* (Toronto: University of Toronto Press, 1991).

Weber, M. *The Theory of Social and Economic Organizations* (New York: Oxford University Press, 1947) 152.

Wells, C "The Theory and Practice of Being Trina: A Remembrance of Trina Grillo" (1997), 81 Minnesota L.R. 1381 at 1383.

Woods, L. "Mediation: A Backlash to Women's Progress on Family Law Issues" (Summer 1985) Clearinghouse Review 431 at 431.

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