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Ontario Decision Shines Light on Under-Resourced Mandatory Mediation

Rick Weiler (Weiler ADR Inc.) · Thursday, March 22nd, 2012

If you're in a jurisdiction with some sort of mandatory mediation program its worth reading the reasons of Mr. Justice Sloan of the Ontario Superior Court of Justice in Cornie v Security National and three companion Actions. Many lessons can be drawn from this decision depending on your perspective, but to me one clear lesson is that if government is going to establish mediation mandatory in any setting there will be an inevitable access to justice issue when that mediation process is not adequately resourced.

Under the Ontario Insurance Act auto insurers are required to provide certain "no fault" accident benefits to those who have been injured in a motor vehicle accident. When a dispute arises regarding those benefits the legislation provides a dispute resolution regime requiring the injured person and their insurer to first mediate that dispute. If the mediation fails the parties may proceed to arbitration under the legislation or have recourse to the Courts.

A mediation is deemed to have failed if it has not produced a settlement within 60 days of the application for mediation having been filed with the Financial Services Commission of Ontario (FSCO), the government agency charged with oversight of this regime.

In these four cases applications for mediation were filed with FSCO but had not been processed within the 60 day period due to a systemic backlog that has been ongoing for years. The plaintiffs' lawyer (the same lawyer represented the plaintiff in each of the four cases) requested a certificate of failure of mediation from FSCO which declined to issue the certificates. The plaintiffs commenced Actions in the Superior Court and the defendants collectively brought this Motion to strike or stay those actions for failure to comply with the Insurance Act.

The moving insurers advanced an array of creative arguments as to why the Actions should be stayed all of which were considered and dealt with by Justice Sloan. The Motion was dismissed and the Court Actions will continue. But it seems to me there are broader lessons to be drawn from this decision.

There was a time in the 1990s when mediation was perceived by some as a panacea to the problems of overly taxed dispute resolution systems – be they Courts or administrative regimes. This perception was fed by enthusiastic if, in hindsight, somewhat naive promotors of mediation (yes, guilty). What perhaps was missed was the basic economic reality that if you lower the barriers to pursuing disputes you will increase the number of disputes coming into any system. Or,

to misquote Shoeless Joe in Field of Dreams, “if you build it, they will come.” (the actual quote is “if you build it, he will come.” but the misquote seems to have stuck.)

The failure of policy makers in Ontario to adequately resource FSCO to deal with the volume of benefits disputes has led to the situation seen on display in this decision. Justice Sloan suggests a number of steps that could be considered to alleviate this situation including seeking increased resources for this mediation regime.

Where are those resources to come from in this day in age? Well, as we say in mediation, that’s a good question. Let’s talk about it.

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