
Kluwer Mediation Blog

Mediation Evolution

Rick Weiler (Weiler ADR Inc.) · Tuesday, May 22nd, 2012

Two stories in the Canadian media caught my eye this past month.

New Rules for Bank Mediators – The Federal Minister of Finance has indicated that the Canadian federal government will not require banks to mediate their disputes with customers through mediation services offered by the Ombudsman for Banking Services and Investments (OSBI). OSBI is an independent and impartial office founded in 1996 and funded by the banking industry. In recent years certain banks have abandon OSBI in favour of private, for profit, mediation firms. This move has drawn criticism from some quarter on the theory that the impartiality of ADR providers may be in doubt if the bank is paying the full cost for the mediation. Nonetheless, the Minister has confirmed that forthcoming regulations will allow banks to access private sector mediators. See the story [here](#).

\$9 Billion to be Divied up in Nortel Bankruptcy Mediation – Ontario Chief Justice Warren Winkler is mediating the distribution of Nortel assets in an effort to avoid full blown litigation of a host of creditor claims in Canada and internationally. The controversy here, as some see it, relates to the appropriateness of judicial mediation in a jurisdiction (Ontario) which has a thriving private mediation industry – including many retired judges. See the story [here](#) and [here](#). Justice Winkler is [on record](#) promoting an increasing role for judicial mediation in the Province.

For many, these stories frame around the ***impartiality*** issue. Impartiality is considered the cornerstone of mediator effectiveness. Anything that raises a concern about that impartiality inevitably erodes confidence in the mediation process. At the same time the early development of the private commercial mediation industry for civil disputes in Ontario was founded on a defendant (read, auto insurer) pays model. While current mandatory mediation rules in Ontario require parties to share the cost of the mediator it is also generally the case that when an insurance-related matter settles at mediation anywhere in this province the defendant insurer will pay the full cost of the mediator.

Another framing is economics. In Ontario, the Ontario Bar Association, prompted by Chief Justice Winkler's musings, has a [task force](#) looking at the pros and cons of increased judicial mediation in the province. Some private commercial mediators are concerned that a growing trend towards Ontario judges conducting mediations (at no charge to the parties!) represents a threat to the financial health of the private mediation industry in the Province.

Even though commercial mediation is well established in Canada and particularly in the province of Ontario where I live and work, it's clear that evolution continues with many vested interests in

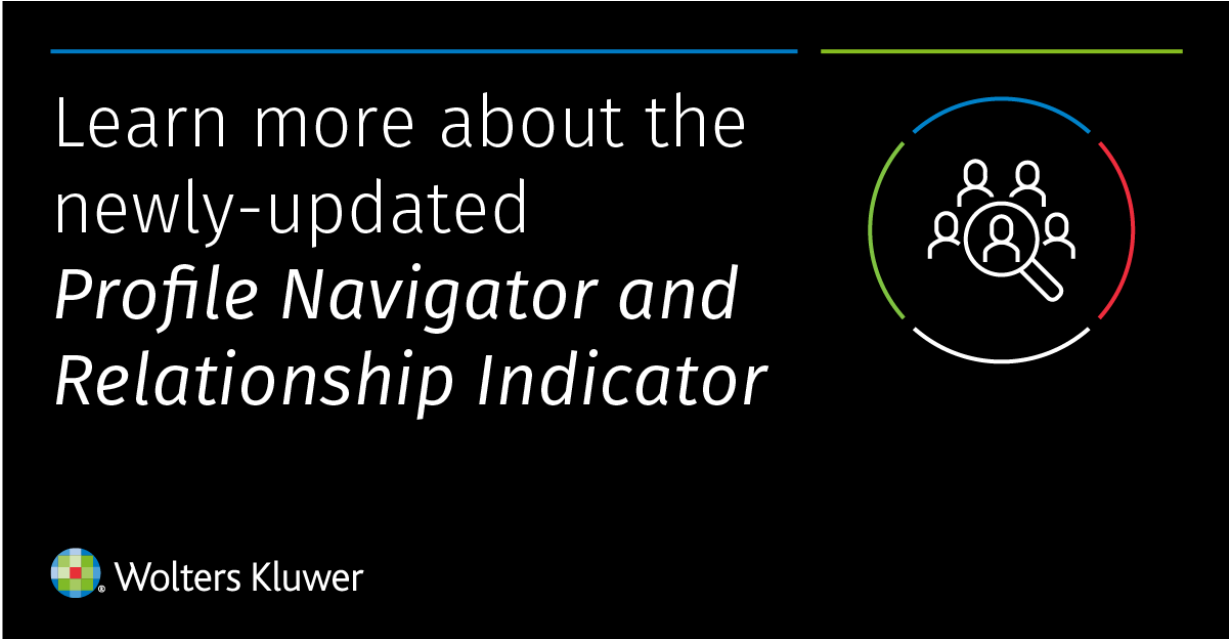
where that evolution will take us.

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