Kluwer Mediation Blog

Durability of Mediated Settlements and More

Rick Weiler (Weiler ADR Inc.) · Monday, April 22nd, 2013

In what I hope readers of this blog will consider a deft segue, I want to shift from the successful judicial mediation that I highlighted last month to one that didn't proceed quite so smoothly.

Deals negotiated in mediation tend to hold or, at least, that's been the conventional wisdom. The theory is that because of the consensual nature of the process parties tend to abide by the agreements they've struck in mediation.

In Ontario we've just had a rare high profile example of a situation where that wasn't the case. A news summary of the decision in ***Kidd v. The Canada Life Assurance Co***. can be read here and the full decision of Justice Perrel can be seen here. Both the article and the case are worth the read for those interested in such things.

Essentially this was an Ontario class action in which the plaintiff class claimed the surplus in the Canada Life employees pension; a surplus which, at the outset of the litigation in the mid-2000's had an estimated value of $100 Million.

A mediation of this complex litigation was conducted by Justice Warren Winkler in April 2007. Regular readers will recognize the judge's name as he was also the mediator in the recent high profile Nortel mediation.

The settlement arising from the 2007 mediation finally received Court approval (as must all settlements of Class Actions in Ontario) in January 2012.

No sooner was the settlement approved than it became apparent that, for a variety of reasons, the real actuarial surplus in the pension had shrunk from $100 Million to $14 Million. For this and other reasons the originally approved settlement could no longer be implemented. Further procedural jousting ensued culminating in a second judicial mediation by Mr. Justice Strathy of the Ontario Superior Court in December 2012.

The parties then applied to the Court for the approval of this amended settlement arising from that second mediation. Justice Perrel, one of the stars of the Ontario Bench when it comes to Class Actions, refused to approve the amended settlement finding that it was, "substantively, procedurally, circumstantially, and institutionally unfair".

In the course of so-doing Justice Perrell noted, "The fact that a judge, in this case, Justice Strathy, or an experienced mediator facilitated a settlement is in my opinion, nothing more than a narrative

fact. I do not know what Justice Strathy's views are about the fairness of the Amended Settlement and his involvement is no testimonial for the Amended Settlement."

Justice Perrel found that the original 2007 settlement was fair but was no longer fair. Nonetheless, as a Court-approved Class Action settlement it remained binding. The problem was that the original settlement had become impossible to implement.

Justice Perrel clearly indicated the further changes to the Amended Settlement that would make it fair but he lacked the jurisdiction to further amend the settlement himself. It will be interesting to see if the parties accept his suggestions and come back a third time for approval of the settlement of this litigation.

In Ontario, as far as I'm aware, it is rare for a mediated settlement to subsequently fall apart. One of the few reported cases in this area actually involves a case in which I served as mediator. The reported decision in ***Boulanger v. The Great-West Life Assurance Co***, upholding the settlement agreement, can be seen here .

My understanding is that the situation is a bit different south of the boarder. A very interesting essay by Professor Jacqueline M. Nolan-Haley, ***Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent?*** (that can be downloaded here) notes, "Research on mediation litigation conducted by Professors James Coben and Peter Thompson of the period 1999 through 2003 shows that the highest number of litigated mediation cases involve challenges to enforceability of mediated agreements. Their follow-up studies through 2007 also show that parties, not always pleased with their agreements, sought to avoid enforceability."

I appreciate there is a significant distinction between mediated settlements that prove not to be durable due to unforeseen changes to interest rates and financial markets, on the one hand, and mediated settlements whose durability is called into question due to "buyer's remorse". Still, I think this is an issue calling for more reflection on the part of mediators. Good practice requires that we ask ourselves, "what can I appropriately do to enhance the durability of this settlement?"

Update on Cynthia Vanier.

I first blogged on the plight of Canadian mediator Cynthia Vanier here. There was a huge development in her case in Mexico last week with the Mexican Supreme Court ordering her immediate release. A media report can be seen here. Also, for a more detailed analysis of the whole affair you can watch an excellent one-hour documentary prepared by the Canadian Broadcasting Corporation's 5th Estate program here.

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