Kluwer Mediation Blog

Canadian Summer Mediation Roundup

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

As Ella Fitzgerald used to sing, Summertime and the livin' is easy. Your faithful Canadian correspondent knows you are craving mediation-related reading to help you while away those lazy, crazy-hazy days of summer. Four recent Canadian judicial decisions should fill the bill.

Supreme Court of Canada encourages *Pierringer Agreements*.

In June the Supreme Court of Canada released it's unanimous decision in *Sable Offshore Energy Inc. v. Ameron International Corp.* As set out in the headnote, "Sable Offshore Energy Inc. sued a number of defendants who had supplied it with paint intended to prevent corrosion of Sable's offshore structures and onshore facilities. Sable also sued several contractors and applicators who had prepared surfaces and applied the paint. The paint allegedly failed to prevent corrosion. Sable entered into *Pierringer Agreements* with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable's claims against the non-settling defendants to continue."

"*Pierringer Agreements* allow one or more defendants in a multi-party proceeding to settle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused. All of the terms of those agreements were disclosed to the remaining defendants with the exception of the amounts the parties settled for. The remaining defendants sought disclosure of the settlement amounts. The trial judge dismissed the application seeking disclosure of the settlement amounts, concluding they were covered by settlement privilege. The Court of Appeal overturned that decision and ordered the amounts disclosed." The Supreme Court reversed the Court of Appeal confirming that the settlement amounts need not be disclosed.

Justice Rosalie Abella, writing for the Court, begins her judgement as follows, "*The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.*"

Canadian mediators are pleased with this judicial endorsement of a helpful settlement tool. It has been my experience in certain multi-party cases that the mere threat by one or more defendants that they will reach their own settlement with the Plaintiff if the other defendants are not prepared to chip in their fair share is enough to reboot the negotiation and lead to a global settlement.

An excellent review of Multi-Party settlement techniques in the Canadian context by Peter Cronyn

and James Brown can be found here.

Ontario Court of Appeal supports mediation.

In *Williston v. City of Hamilton*, the Ontario Court of Appeal upheld an augmented cost award by the trial judge based on the Defendant's refusal to participate in mediation. Section 258.6 of the *Ontario Insurance Act* gives the Court the right to consider such refusal when awarding costs. In this case the refusal resulted in $20,000 being added to the amount the Defendant had to pay towards the Plaintiff's costs, not to mention an additional $15,000 for the costs of the appeal.

As you will recall, Canada has a "loser pays" cost system in which the loser in a judicial proceeding is required to pay a portion (usually between a half and two-thirds) of the actual costs incurred by the winner. In this case the cost award relating to fees (as opposed to disbursements) before augmentation was just over $40,000 and was thus increased by almost 50%.

Superior Court Judge riffs on justice system in decline.

Justice David Brown's frustration with the Ontario civil justice system was on full and eloquent display in his decision in *York University v. Markicevic et al*. The case involves an action by the university against one of its former executives claiming damages for fraud as well as return of severance monies paid at the end of the employment relationship. The University also sued the former executive's wife and daughter claiming they were involved in the fraud – a claim they are vigorously defending.

The daughter brought a motion before the Court to allow her to sell or mortgage her home to obtain funds for the cost of her (and her mother's and father's) defence. Justice Brown allowed the application to access the equity in the home on certain conditions but not before lambasting the civil justice system in Ontario.

I encourage you to read the following passage from Justice Brown's decision.

> *"[5] Achieving access to the civil justice system requires taking concrete steps. The most concrete and most readily available step to improving access to justice involves judges consistently making greater use of their inherent powers to control the civil justice process to ensure that those who seek justice actually end up in a court room where justice is dispensed, without encountering financial exhaustion before reaching the threshold of the court room.*
>
> *[6] Why do judges not exercise greater control over the civil justice process to achieve that end?*
>
> *[7] Are they fearful that if they try something creative to move a case along, they will be slapped down by an appellate court? Perhaps that thought lingers in the recesses of their minds, but decisions of appellate courts of this province in recent years have supported such efforts by trial and motion court judges, as long as the creative solutions are fair.*
>
> *[8] Are judges becoming indifferent to the task of attempting to control the civil justice system? Here we are moving closer to the present day reality on the ground. One cannot overstate the oppressive effect on judicial morale of the endless waves of cases which seem to be going nowhere in a civil justice system that is sinking. Why try to be creative when the system, with a life of its own, grinds relentlessly on and downward?*

[9] Have judges lost touch with how to move a case along to a final adjudication? For the better part of 20 years the relentless mantra has been – trials are bad, mediation will solve all problems. Of course, it hasn't. As a prominent Toronto litigator, Mr. Alan Lenczner, observed in a speech last year about the current state of the Canadian justice system:

"There is an unavoidable message, much as we do not wish to hear it – We are in a decline!"

Let me venture the view that judges, as a collective, are losing the will and ability to move cases along to trial because we are led (wrongly) to believe that trials represent a failure of the system."

Later after finding there is a prospect that total defence costs will reach in excess of $800,000, he writes, *"If we have reached the point where $800,000 cannot buy you a defence to a $1.2 million fraud claim, then we may as well throw up our collective hands and concede that our public courts have failed and are now only open to the rich."*

Interesting reports and commentary on this case can be found here, here and here.

Mediation Confidentiality and Deceit – BC Court supports integrity of mediation

Finally, from the Supreme Court of British Columbia, a recent decision touches on the scope of mediation confidentiality. *Ramsden v. Ramsden* involved a hotly contested matrimonial dispute. The wife brought a motion to compel production of documentation that was created for and/or produced in the conduct of a mediation. It's an interesting decision because it appears that the documents produced in mediation were not, shall we say, quite as accurate as they could have been. One of the documents was a Form 8 (Financial Disclosure form) and it appears that an updated version of this form had now been produced in the litigation. We are left to speculate whether the version produced in the mediation somehow underrepresented the finances of the husband.

In ordering the production of the documents the court noted, *"Where, as here, there is every appearance of evasiveness at best and deceit at worst the court must rally to support the integrity of the true mediation process in order that the immediate, as well as future, participants in that process may have assurance that it is a process with legitimacy, not simply a shell game where they 'pays their money and takes their chances'. This is all the more the case where the parties have no alternative but to attempt mediation before they can have access to the court system."*

Again, you may find this commentary on the case by Kari Boyle, Executive Director, Mediate BC Society, interesting.

Hopefully these interesting decisions will provide something of a cure for the Summertime Blues.

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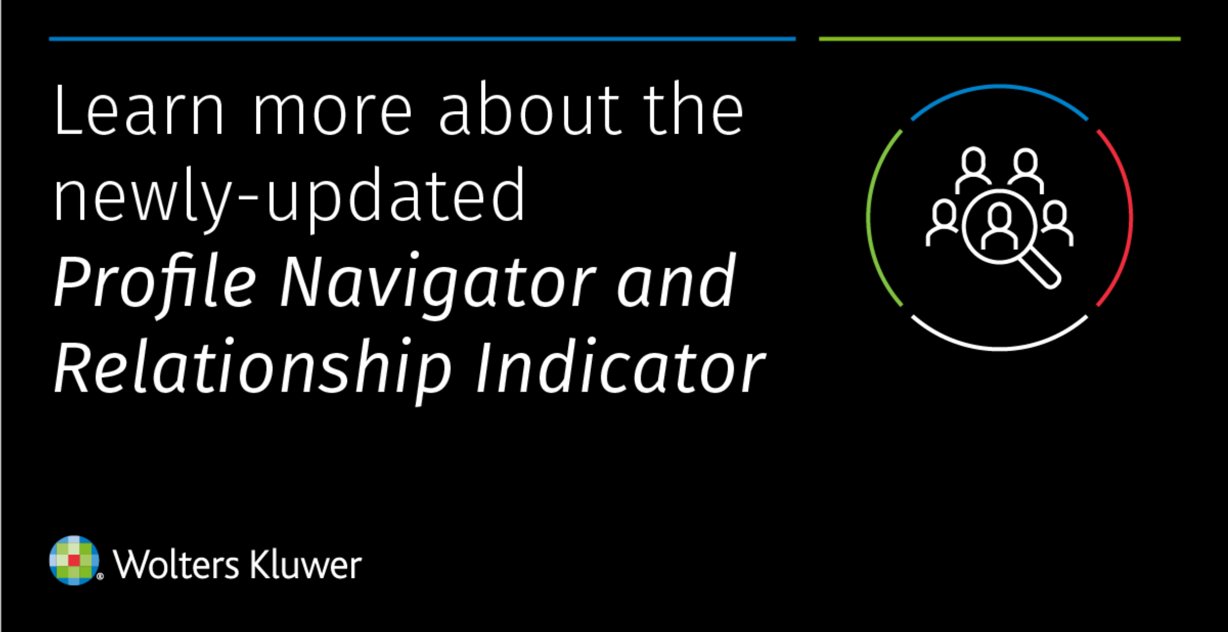

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