Kluwer Mediation Blog

Judicial Dispute Resolution in Ontario

Rick Weiler (Weiler ADR Inc.) · Sunday, September 22nd, 2013

The Civil Justice system in Ontario is broken; badly broken.

Not a week goes by without another report decrying the sad state of affairs in our Courts. Consider the article from the most recent Law Times entitled, ***"Lawyers frustrated as motion delays hit 7 months".*** The articles quotes Roger Oatley, one of the deans of the Ontario personal injury bar, as saying, "It's completely unacceptable that the court tells a litigant who is ready for a trial that they have to wait 2-1/2 years." For him and many others the solution is spending more money on the administration of justice.

While the problems are universally recognized there is less consensus when it comes to causes and solutions. For example, in my July post I referred to a recent decision of Justice David Brown of the Ontario Superior Court who has been a consistent and outspoken critic of the status quo. He wrote, "*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*". For him, a big part of the solution is giving judges more control over the Court system (and having Judges more effectively utilize the control they already have over the litigation process).

In this environment the release in July of , **A Different 'Day in Court' – *The Role of the Judiciary in Facilitating Settlements***, *a* Report of the Ontario Bar Association Judicial Mediation Taskforce is worth taking note of.

The Taskforce's purpose was to explore and determine whether judicial mediation is in the public interest and if so to outline, from the perspective of lawyers, the optimal role of the judiciary in facilitating settlements. The Taskforce did not restrict their exploration to techniques that are technically labeled "mediation" and for that reason used the term "Judicial Dispute Resolution" or "JDR" throughout the Report.

What were the Report's conclusions?

1. Formal Recognition – "Although JDR should not supplant private mediation, it should be formally recognized and made available to participants in the legal system in a consistent, appropriate, and transparent manner."

2. The General Role of JDR – "It is neither necessary, nor realistic to design a program of judicial settlement facilitation that would replace or supplant the current private mediation system, including the OMMP. Limited judicial resources require JDR to be used only where a judge's

involvement can yield particular advantages.

These include cases in which:

(a) the lack of a fee is particularly advantageous;

(b) a judge's evaluation of the case or the trappings of the court are what is necessary as:

i. a case is ripe for settlement but a party needs something approaching a "day in court" to feel vindicated; or

ii. the characteristics of one or both parties make "hearing it from a judge" important;

(c) lawyers have determined that parties would benefit from a "reality check" provided by a judge in order to get clients to a reasonable position that lawyers have been unable to achieve;

(d) settlement is desirable for various reason, including economic or timing factors but the case is sufficiently close that a judge's opinion would significantly enhance the chances of a settlement; or

(e) a judge has subject-matter expertise that is not available with private dispute resolution services.

What should be the features of the new JDR system according to the Taskforce Report?

- "The use of judicial settlement facilitation should be voluntary.
- The Rules of Civil Procedure should separate the judicial settlement facilitation process from the pre-trial process.
- Either by rule or practice direction (which would allow for flexibility among judicial districts), the procedure for accessing JDR needs to be transparent and available to all counsel.
- It is important for judges who engage in mediation to undergo formal ADR training with particular sensitivity to the unique elements involved in JDR.
- Parties should be allowed to indicate the choice of judge to provide settlement facilitation and that choice should be accommodated to the extent possible.
- A pro bono or modest-means program dedicated to judicial settlement facilitation conferences would give unrepresented parties access to JDR, which they would be unable to access on their own, while avoiding the dangers for the court and parties of having an unrepresented party appear before a judge in a closed-door process."

Time will tell whether or not this interesting Report is just another band aid being applied to a patient on life-support.

One thing seems clear to me: the system is unlikely to see significant improvement until the stakeholders (judges, lawyers, high volume users (banks, insurers, etc.), civil servants, politicians and, yes, mediators) follow the well-known advice from scripture: *"why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?"* (Matthew 7:3). Considering those beams may shed light on why the focus of will necessary to fix things has not materialized.

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