

ONTARIO ON THE CREST OF CHANGE

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Ten years ago the final report of Civil Justice Review in Ontario was issued. One year earlier the first report set out a “blue print” for a civil justice system intended to meet certain criteria which had been established. Those were fairness, affordability, accessibility, timeliness, accountability, efficiency and cost effectiveness and a streamlined process and administration.

Extrapolating from that report, there was reference to three procedures which were to assist in meeting the seven goals set out above. These three procedures were pre-trials, settlement conferences and trial management conferences.

The pre-trial was to consider the possibility of settlement and of obtaining admissions, of simplifying issues and addressing liability, of quantifying damages, and then estimating trial times, advisability of using experts, fixing dates and so on. The pre-trial, of course, was conducted by the judge with counsel, and sometimes clients, present.

By comparison, settlement conferences were held with judge and counsel with a view to attempting to resolve the dispute or parts of it. The intention was that interest-based mediation, and rights-based pre-trial directions, might come from the judge. Of course, the extent of the mixture would depend on the skill, training and experience of the judge and the counsel involved. The settlement conference was necessary before a case was put on a trial list. Mediations became mandatory and would be conducted by private mediators.

The trial management conference was a new concept in Ontario and was focused on exchange of witness lists, agreed statements, chronologies, admissions, and document briefs. These were conducted by judges.

Civil Justice Review in the 1990’s reported that it was necessary for judges alone to perform these functions and that judicial support officers with proper training might be able to participate in some settlement conferences and trial management conferences.

That system was implemented but it was tied to a system of case management by the courts. Inevitably, this kept control of matters with the courts. Procedural difficulties arose and always had to be resolved by motions and court orders. The system slowed down just as it had before Civil Justice Review. By 2004, the system was in considerable difficulty and in Toronto where the largest number of cases in Ontario occur, the Regional Senior Judge decided the system had broken down. After considerable input, His Honour made the decision to divorce case management from mandatory mediation.

It should be said that during the mandatory mediation programme, while tied to case management, there was a settlement rate of approximately 40% of all cases. It should be also be emphasized that mediations during that time were obliged by rule to occur within 90 days of the

first defence delivered. In many cases, of course, that was too early for all practical purposes.

In January 2005, the system was changed to allow mandatory mediations to occur before pre-trial when counsel thought they would be most effective. In the course of the last two years, this change has led to an 80% settlement rate at mediation. While there have been fewer mediations during the last two years than there were in comparable years prior to the change, the results are startling. By putting control of the timing of mediation back in the hands of counsel conducting the cases, and through the use of private mediators, not tied to case management, the success rate of mediations doubled. In the scheme of things, that doubling was almost overnight.

There was another factor which might have had some effect on the change. During the first seven years of the mandatory mediation programme, mediators were assigned from a panel in cases where counsel did not choose the mediator. In the last two years, it is fair to say that most mediations have been conducted by mediators of choice, selected by counsel and not assigned.

In Ontario, much has been learned over the last ten years. In particular, counsels' selection of mediator and selection of timing for the mediation have had dramatic results by way of doubling the success rate of settlement at private mediations.

But this degree of success apparently, is only the beginning. There is currently a Civil Justice Reform Project underway, being conducted by a former judge of the Ontario Court of Appeal. The mandate of this project is to propose options to make the civil justice system more accessible and affordable to Ontarians. Apparently, despite the success rate of settlement recently enjoyed in the three cities where mandatory mediation exists in Ontario, the system is still most accessible to those with the financial ability to pay legal costs, or to those who have literally no resources and whose expenses are paid through the Legal Aid system. It is often joked that most lawyers couldn't afford their own fees if they had to pay them.

A study has been made of the Civil Justice Council which operates in England. This body was established as a result of the Access to Justice Report by Lord Woolf in 1996 in England. It is a voluntary body established to oversee and coordinate the implementation of proposals by Lord Woolf. As many will know, this has led to a system of pre-action protocols including mediation before a claim is issued.

Although it is early in the current Ontario project, it is not expected that the British approach will be used.

The task force of the Ontario Bar Association has made certain recommendations to the Civil Justice Reform Project. These include expanding the Ontario Mandatory Mediation Programme throughout the Province from those three cities which are now served, introducing mandatory mediation into Small Claims Court, and introducing mandatory mediation into the Family Law system.

The submission also included reference to pre-action protocols, proportionality

(connecting costs of the proceeding to the amount in dispute), expanding Collaborative Law (agreeing not to go to litigation) and the use of a Notice to Mediate as an alternative manner to commence proceedings.

The ADR Professionals Committee also made reference to an article which had been written as a speech by the Associate Chief Justice of the Court of Appeal for Ontario, delivered at the Canadian Forum on Civil Justice Conference in May 2006. In that speech there was a study of lessons that the public civil justice system could learn from the private system. The lessons may be summarized as follows:

1. The market is demonstrating that Canadians wish to select their dispute resolvers with expertise in the type of matter at issue. While the public system does not necessarily provide judges with expertise in a particular area, in the private system counsel are able to choose a mediator with such expertise.
2. Timing, in particular the avoidance of delay is crucial. Unlike adjournments that happen frequently in the public system, when a mediation is arranged, the date is fixed and it is the only matter on the mediator's list. Mediations virtually always proceed when scheduled.
3. The public system has too few resources for too many cases and long list cases consume a great quantity of court time still. The time and expense of private dispute resolution is far more effective and efficient.
4. Complexities need reduction and flexibility needs to be increased in the public system. In the private system, the methodology is simpler and faster largely because the rules are simpler.
5. Multi-jurisdictional disputes can be more simply resolved through a private system than a public civil justice system in the complexities of a growing global economy.
6. The private system is informal and user-friendly. Unlike formal litigation procedures, the informal system whether mandatory or voluntary, offers an option, an option which, as it turns out, has a proven success rate.

If these lessons learned are considered in the Civil Justice Reform Project, then the road to this point will have been wisely travelled.

Interestingly, the current project seems to be addressing the issues from the perspective of the party involved in the dispute. Among many other considerations, it appears to be looking at the benefits of mediation, including mandatory mediation, the differences between rights-based and interest-based approaches, the costs of the process, the manner in which self-represented litigants are dealt with, the use of mediation in different types of litigation, and the question of added value to the parties in the settlement outcomes by the use of a mediator.

It is certainly appropriate that we all remember that the system of civil justice is here for the use of the parties in the litigation and not just for counsel or the courts.

It would appear that Ontario is on the right track. It is looking at recent history and learning from it. It is looking forward from the perspective of the ultimate user of the system of administration of justice. From where I stand, the future for mediation in Ontario looks even brighter still.

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