Ontario Deputy Judges Association

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ODJA

From the Editor

By Beverley A. Martel

For those who don't know me, I sit (or used to in pre-Covid-19 times) in Brampton (Central West) where I am also the administrative deputy judge.

I'm also the new editor of the ODJA Newsletter.

Having sat in this chair in the past (as editor of "Peel Briefs ", the Peel Law Association newsletter and as a former editor of this newsletter) I know first-hand that the hardest part of the job is persuading people to provide material for me to edit and publish. Not this time!

You have been wonderful in providing submissions and I thank all who contributed. Hopefully this is just the beginning. As you can see, we welcome everything from the academic to the fanciful; stories of travel and your poetic musings. Normally the Fall/Winter issue is published much earlier but the vacancy left by our former editor's departure (we miss you Marty) took a while to fill.

Instead of writing a separate article I thought I'd just share some of my Covid-19 musings here (one of the perks of my being editor)!

Having virtually closed my practice in early 2019 (just three files left to wrap up) I happily settled into my Deputy Judge role as my sole focus. Between regular sitting days, administrative duties, and trial management conference calls I was busy. On March 17, 2020 I suddenly found myself unemployed. For the first time in my adult life, I had no employment income. I have become a 'kept woman' (I joke), courtesy of my darling husband who refuses to retire. In fact, he hasn't missed a beat and is busier than ever, albeit with new protocols in place. As a veterinarian he's deemed an essential worker.

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Mediation and Settlement Conferences

By Deputy Judge Jack Zwicker

Many of us, in addition to judging, also practice law and act as private mediators or arbitrators. It probably comes as no surprise that as the years pass the job doesn't become easier. On the contrary, the more experience we have the more difficult it is to deal with the shenanigans in which parties and their legal representatives sometimes engage. Just because we know where we want to go to assist parties in settlement conferences is no guarantee that the public is prepared to follow. And even if parties show us deference in court, the norms of legal representation can be all over the map.

I hope to convey some sense of optimism, especially during this trying period where face to face processes are suspended and reliance on video conferences is now the necessary norm. I have become comfortable with Zoom and appreciate that there is no better alternative at his time. One of the visual disadvantages of video conferencing is lack of formality. Working from a home office and dressing down does not generate respect for us as judges or for the judicial process. The formality of a real courtroom encourages respect for the forum and for us as judicial officers.

In order to maximize the strengths, we bring to the judicial process we may have to re-imagine the processes we follow almost by rote. When we preside at a settlement conference it is probably a good idea to do more than provide lip service to the basic purposes of these conferences. We generally advise parties and their representatives that we are prepared to deal with procedural bottlenecks by making orders at the outset whether asked to do so, or on our own initiative.

Of course, we spend most of our allotted time trying to facilitate settlement. I like the fact that our small claims court regulation does not label these conferences "pre-trials. And in those situations where a Plaintiff's Claim or a Defendant's Defence is a stretch, we can offer our opinion as to the likelihood of a party's success or failure at trial.

I am in my 8th year of judging. I find myself scoring the likelihood of a successful conference almost as soon as parties enter the conference room. As over the top as it may be, I score the chance of success highly when a party addresses me as "your majesty". I don't react and it doesn't happen often! On the other hand, I score the likelihood of success at the low end when parties and their counsel blow into the conference room like a windstorm.

I say little at the beginning and listen a lot. Where the style of cause is *Hurricane v Tornado,* I look at my watch and speculate as to who will lob the first verbal grenade. If this happens, especially early on, I reach the conclusion that I am dealing with unwilling participants who have no intention of settling unless settlement is on their own terms. This kind of behavior tells me that compromise is not in their vocabulary. Sadly, I have presided at conferences involving as many as eight parties, one Plaintiff, seven defendants and D1 claimants where the claim is for $25,000.00. Experienced counsel, at my urging, announce that their fees will likely reach the $60,000.00 mark because of the technical complexity of the case and the sheer number of parties. More often than not in such situations I end up delivering a Finance 101 lecture. Pounding away at financial self-destruction usually persuades everyone to compromise, including the Plaintiff who gets to hear the old refrain about 'putting water in his wine'.

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Mediation and Settlement Conferences continued

By Deputy Judge Jack Zwicker

I generally debrief as I leave the Court at the end of the day and think about the following.

1) clients who are uninformed about process;

2) lawyer-combatants who are uninformed or dismissive of mediation;

3) clients who by reason of the work they do are unlikely to do any research about mediation;

4) clients whose education and/or culture predisposes them to see the world in strictly binary terms [i.e. win-lose];

5) clients who as a result of education, socialization and personality view compromise as weakness;

6) parties who are not thinking of the stress caused by protracted litigation;

7) parties and their counsel who approach mediation with a closed mind and attend only because the rules require them to do so;

8) counsel who may be conflicted if they have already spent disproportionate time which cannot possibly be allowed by way of costs even if that party succeeds at trial;

We are all vulnerable when we find ourselves in personal conflict. The tendency to strike back and deflect blame is natural, especially in western rights-based societies.

Our culture praises winners. It disparages losers. As US President John F. Kennedy once wrote, “Victory has a thousand fathers. Defeat is an orphan”.

Changing culture is a tall order. Transforming a binary, “win-lose” rights-based culture to one of “shared interests” is much easier said than done. What we as judges can and should do is be aware that ADR provides an alternative that has the capacity to bring conflict to an earlier end at much less financial and psychological cost. The key lies in leading parties and counsel in the right direction and in not being shy about it

Jack Zwicker

Covid-19 and Private Arbitration

By Deputy Judge Jack Zwicker

For those of us who practice law and act as Deputy Judges, Covid 19 has accelerated the pace of virtual conferences and document sharing applications. The former were not widely known to lawyers when Zoom first started up ten years ago much less electronic data sharing which dates back to the 1980's.

While these technologies have answered the question of safety by allowing us to work from home, the two most troubling consequences of these technological changes are their complexity and effect upon us as lawyers and Deputy Judges in getting up to speed with the learning curve that change has imposed on all of us.

We are all aware that before Covid 19 struck in March, 2020 the average time span for civil actions of any complexity, from issuance of a Statement of Claim to trial, was at least 5 years in all of our major cities. It hasn't helped that Rule 48 of our Rules of Civil Procedure encourages delay by empowering registrars to administratively dismiss actions that have not been set down within 5 years of the date that Claims are issued.

One year post Covid we have no idea of the extent to which that five year delay has increased. We also have no idea of the physical number of previously scheduled civil motions, assessments and pre-trial conferences that have been postponed. It remains to be seen when trials will resume in earnest in all our courts.

In the meantime, many of us are struggling with unfamiliar computer programs that are not intuitive. For those of us who are older and who cut their teeth on electric typewriters, the new technologies can be a challenge. For others who are more tech savvy, this may not be a problem. My sense, however, is that many of our colleagues are struggling with these changes.

We as lawyers and as Deputy Judges are the wheels that make the gears run in the small claims courts. If the speed and complexity of these changes becomes too great a challenge the court system risks being overwhelmed. And that would impede judicial catch-up let alone allow us to help the courts get ahead of the curve. So, the central question is, what we can do to lighten the burden of change.

Apart from our individual efforts in learning and getting comfortable with these technological changes, there is an ADR alternative that can relieve part of the burden.

That alternative is private arbitration. While mandatory mediation is required in Ottawa-Carleton, Toronto and Windsor Essex and in family and estate matters, arbitration is not referred to in the Rules of Civil Procedure. Though our rules, are silent provincial arbitration acts like the Ontario Arbitration Act protect arbitral processes whenever parties to a dispute agree, whether or formally or informally, to arbitrate. In such cases a party who initiates litigation in the face of an arbitration agreement can be prevented by the Superior Court of Justice from continuing on application under Rule 14.05.

Particularly striking is section 26.1 of the Act that effectively reverses the normal process we take for granted when we litigate. Whereas moving from issuing an action to trial is the norm, in arbitration the presumption is that *no hearing* will take place *unless* at least one party requests it. Section 26.1 of the Ontario Arbitration Act expressly provides for this. Many counsel assume that a formal hearing is necessary and take this for granted, analogizing arbitral processes to civil litigation processes. This assumption is incorrect.

Indeed, two of the principal advantages of private arbitration are the 'no hearings' arbitrations that section 26.1 encourages and the adaptability of arbitration to process design regardless of the Rules of Civil Procedure.

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Covid-19 and Private Arbitration continued

By Deputy Judge Jack Zwicker

Unfortunately, litigation counsel all too often demonstrate unfamiliarity with the workings of our Arbitration Act by mapping out an agenda and timeline that is a pale imitation of the steps followed in civil actions. It doesn't need to be that way. And it is the ethical obligation of arbitrators to point out these critical differences.

The appropriate time to do so is at the so-called 'preliminary first meeting of the parties' which usually excludes the parties and provides litigation counsel and the arbitrator(s) an opportunity to examine both process and timelines. The arbitrator has the statutory duty to make an order that details each step of the process and timetabling from start to finish. And nothing precludes a second look at and revision of these orders should counsel change their minds. Section 20 of the Act confers unrestricted authority upon the arbitrator to determine procedure. Of course, it is always safer to attempt to obtain counsels' consent.

It's worth noting that a number of disputes are customarily arbitrated and adjudicated without any hearings such as:

i) Real estate valuation disputes;

ii) Share valuation disputes;

iii) Business valuation disputes;

iv) Insurance policy-holder disputes;

v) Any contractual or commercial dispute that does not require credibility findings.

Where adjudication on consent of the parties does not depend upon or require any determination of credibility, the typical process involves each party exchanging a valuation brief.

These briefs are delivered to the arbitrator who reads them in the privacy of his or her own office, considers the evidence, researches any case law that may apply and makes a written award similar to reasons for judgment in civil litigation.

The parties proportionally bear all of the costs of arbitration including court reporters, translators, and facilities costs where arbitrations are done in person, and the arbitrator has statutory authority to award legal costs together with pre and post-judgment interest to the successful party. Section 50.1 of the Act makes such awards enforceable as though they were court judgments.

The very fact that arbitral processes can be designed to accommodate the particular facts of each claim, including elimination of hearings, helps to speed up the process, reduce legal expense and provide early awards. All in all, arbitration can be an effective means of reaching binding, enforceable decisions without putting the parties through their paces while Covid 19 continues to impact the courts. It's worth considering!