Dispute Resolution – Mediation

The Fusion of Reason and Abstraction

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I. INTRODUCTION

Over the past 15 years, Alternate Dispute Resolution ("ADR") and specifically mediation, both private and judicial, have become a major component to our litigation process and the means by which an increasing number of cases get resolved. Concurrently, the more efficient processing of claims and disputes toward resolution prior to trial has been encouraged by both the Bench and profession as witnessed by our *Code of Professional Conduct* (for ex. Rule 2.02) and our relatively new *Rules of Court* (for ex. Rule 1.2). While the mandatory mediation provision of our *Rules* is currently suspended, its existence further confirms mediation as an entrenched component in our litigation process.

The field of mediation has struggled over the years with a major disconnect between theory and practice. This disconnect has stymied efforts to better understand and develop more effective practice. But with time and more experienced mediators and counsel alike, a more mature and sophisticated approach is emerging. So, for example, whereas in the past there was a pre-occupation by those studying and practicing mediation with one "correct" approach to the practice of mediation – interest-based, facilitative, transformative, evaluative etc. – increasingly one sees an acceptance and recognition that a fusion of all these techniques for possible deployment in any given mediation is the progressive and most helpful approach. Hopefully, with the passage of more time and experience with mediation, we have outgrown past debates over whether, for example, lawyers, by definition and training, are even capable of effectively discharging the role of mediator, whether Judges are better than lawyers in private practice at discharging the role of mediator and, as alluded to above, the past relentless search for the one correct process and approach to the conduct of a mediation.

This paper will start with a review of some fundamental concepts of mediation and thereafter offer ideas, observations and analysis aimed at advancing the mediation cause in a positive direction. This objective involves a fusion of theory and practice and necessitates an appreciation for the complexity of the human condition, particularly in the dispute context. Through quotes and associated footnotes, an effort is also made to introduce the more useful and progressive articles and books on the subject of mediation. The ideas, analysis and opinions to follow are provided largely from the mediator's perspective and for the potential benefit of mediators but hopefully is found to be somewhat relevant and helpful to counsel engaged in the mediation process as well. In the course of the paper, questions and issues will also be raised largely with a view to promoting further thought and dialogue.

II. BASIC PRINCIPLES

i. Definition of ADR

"ADR can mean different things to different people. Some suggest ADR is not an enormous concept but is simple common sense. If there is a disagreement on what is common sense, others portray ADR as mostly about saving time and money in dispute resolution – the achievement of economic efficiencies. Still others say that ADR stands for a range of formal and informal processes that exist as alternatives to litigation…" [1]

Three of the more common ADR mechanisms are mediation, med/arb and arbitration. This paper will be focused on mediation. Flexible and progressive definitions of mediation flow quite naturally from those applied to ADR. It is generally considered "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction". Even more simply, it has been described as "assisted negotiations". [2]

ii. Autonomy/Self-Determination

Fundamental to the theory and practice of mediation is the concept of party autonomy and self-determination. The standard definition of autonomy is that it reflects a circumstance where an individual has the capacity to make a choice amongst real alternatives and can make that choice using reasons with which he or she is comfortable. Fusing these two related concepts clearly establishes what distinguishes mediation from dispute adjudication – the parties themselves are responsible for making decisions affecting them, assisted by a neutral third party, and, concurrently, a process to that end.[3]

The concept of party autonomy will surface, from time to time in this paper, as a fundamental concept in the practice of mediation. In fact, in a broad sense, it has potential relevance to the provisions of our *Code of Conduct* and the *Rules of Court* which encourage and mandate attention if not a focus on the resolution of claims prior to trial. Query whether the civil justice pendulum has swung too far in the direction of resolution when considering circumstances where parties wish and have good reason and cause to pursue traditional litigation through trial and possible appeal? The concept is also of importance in the context of the solicitor-client relationship.

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[1] Pirie, A.J., *Alternate Dispute Resolution, Skills, Science and the Law* (Irwin Law: 2000) p. 18

[2] Morris, C. and Pirie, A*., Qualifications for Dispute Resolution – Perspectives on the Debate,* Uvic Institute for Dispute Resolutions, p. 167

[3] Matz, D.E., *Mediator Pressure and Party Autonomy*, Negotiation Journal (October 1994), p. 360