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Acknowledgments

Please contact us to share your thoughts on any of the issues raised in our newsletter or to suggest topics you would like us to include in future issues. We also welcome contributions of articles for future issues. Submissions may be in French or English; however we ask that all contributions be written in plain language. We reserve the right to edit. For more detailed information, please contact the editors: Diana Lowe and June Ross.

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This newsletter will be published in the spring and fall by the Canadian Forum on Civil Justice. It is intended to serve as an informative source of news for lawyers, judges, legal educators, court administrators and members of the public on civil justice reform initiatives. The contents of this newsletter are intended as general legal information only and should not be relied upon as legal advice. The opinions and views expressed in this newsletter are those of the individual writers and do not necessarily reflect the opinion of the Canadian Forum on Civil Justice.

The Canadian Forum on Civil Justice is a non-profit corporation established by The Canadian Bar Association and the University of Alberta, Faculty of Law. The Forum is a national organization established pursuant to Recommendation 52 of the CBA *Systems of Civil Justice Task Force Report*. Services are provided in French and English.

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Next Issue

In our next issue, watch for a report on our panel discussion on developments in Alternate Dispute Resolution in our Courts and for an update on civil justice reforms and CBA *Systems of Civil Justice Task Force Report* recommendations.

Publications

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Civil Justice Reform Update

As was recommended in the Canadian Bar Association *Systems of Civil Justice Task Force Report*, mediation and alternative dispute resolution are at the heart of a significant portion of the civil justice initiatives being pursued in Canada (see Recommendations 1, 2, 3, 5, 13, 26(a), 27, 36, 38, 39 and 49). The *Task Force Report* discussed the need for a review of legal education as part of the system-wide change needed to ensure that the vision of a multi-option civil justice system for the 21st century be realized. Recommendation 49 proposes that:

- The CBA and the Canadian Council of Law Deans form a joint multi-disciplinary committee to consider and propose a comprehensive legal education plan to assist in civil justice reform for the twenty-first century, and
- the plan address the whole spectrum of service providers and the full range of educational opportunities.

This joint multi-sectoral Committee was formed in the winter of 1998. The Committee comprises the following people: Professor Kathleen Delaney-Beausoleil (Laval University), Justice Thomas Cromwell (NS Court of Appeal), Dean Lewis Klar (University of Alberta), Mr. Thomas Macdonald (Blois, Nickerson & Bryson - Chair, Special Committee on Systems of Civil Justice), Professor Moira McConnell (Committee Chair, Dalhousie Law School), Professor Sylvia McMechan (Royal Roads University), Alan Treleaven (President, Association for Continuing Legal Education). The Project Officer is Heather Nowlan of The CBA.

The Committee has focused its attention on dispute resolution education, which it sees as a key feature of the *Task Force Report*. In the fall of 1998, the Committee sent out a survey to legal and dispute resolution educators across Canada (pre-law, law school, Bar admission, CLE for lawyers, judicial CLE and dispute resolution programs) to learn whether dispute settlement skills and conflict analysis are taught in the continuum of legal education and, if so, at what point. The Committee also reviewed similar studies from other jurisdictions. An extensive Discussion Paper containing the Committee's proposed recommendations is being finalized and will be available in both French and English either at the CBA annual meeting in Edmonton this August, or shortly thereafter. The Discussion Paper will be also be posted on the the CBA internet site (http://www.cba.org/) and the Forum's internet site (http://www.cfcj-fcjc.org). The Committee will prepare its Final Report in light of the comments it receives on this Paper. It is expected that a Final Report will be available by early January 2000.

Publications

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In the Shadow of the Rule of Law: Alternative Dispute Resolution and Provincial Superior Courts

By Dr. Graeme A. Barry, Assistant Professor, Faculty of Law, University of Alberta, whose doctoral dissertation is entitled *Provincial Superior Courts and the Canadian Constitution: Changing Times and Unchanging Principles*. Professor Barry thanks Chief Justice W. K. Moore for information regarding the Alberta Court of Queen's Bench practice relating to mediation. The ideas expressed are those of the author.

I. Introduction

In 1994, the Right Honourable Brian Dickson delivered an address in which he praised the wide variety of methods by which disputes are resolved in Alternative Dispute Resolution (ADR) without resorting to courtroom litigation [1]. During the course of his address, however, the former Chief Justice also expressed two concerns with ADR. First, some cases may be pushed out of the courts and the parties forced to settle because of an over-burdened system [2]. Secondly, ADR must be developed in a manner consistent with "the principles of fundamental justice that underlie our judicial system" [3]. Some of these principles include equal access, established procedures, reasoned decisions, public scrutiny, and qualified neutrals [4]. Former Chief Justice Dickson was especially concerned with the impact that judicial involvement in ADR may have upon the public's perception of judicial impartiality [5].

Some of these principles are not merely institutional practices, but constitutional values which emanate from the rule of law. The impartiality, independence, separation of powers, and core jurisdiction of the provincial superior courts must be considered in relation to the interaction of ADR methods with the judicial system. In this article, I shall examine the constitutional principles associated with the provincial superior courts, and the effect which these principles will have upon various ADR methods of mediation and arbitration. If designed carefully, the improvements to the civil justice system which ADR promises may be secured without diminishing judicial constitutional values.

II. Provincial Superior Courts: Constitutional Principles and Core Jurisdiction

The rule of law is a fundamental postulate of the Canadian Constitution [6]. The meaning to be accorded to the rule of law is inexact, since the concept is both an ideal and an ideology. The Supreme Court of Canada has declared that the law is supreme over the acts of both government and private persons. Secondly, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". Finally, the relationship between the state and the individual must be regulated by law [7].

As the "defender of the Constitution" [8] in which the rule of law is a basic principle, the provincial

superior courts are separate from the executive and legislative branches of government when performing the adjudicative function in matters within their jurisdiction. However, the Constitution does not contain a strict separation of powers. Parliament and the provincial legislatures may confer on the courts other legal functions which are performed outside the framework of adversarial litigation [9].

Independence and impartiality are normative requirements of judicial adjudication. Independence and its corollary, the separation of powers, deal with the relationship of the judiciary both individually and institutionally with others, whereas impartiality refers to an unbiased state of mind. Although judicial independence is a distinct value from judicial impartiality, it is intended to be a cornerstone in promoting a reasonable public perception of impartiality [10]. Judicial independence and impartiality are not absolute concepts, but principles that can be measured by degrees along a spectrum of possibilities [11]. The question is whether an informed and reasonable person would perceive a tribunal as independent or impartial [12]. The perfect ideal of judicial impartiality is unlikely to be attained in the human condition. Despite the difficulties inherent in striving for unattainable ideals, it is imperative that the judiciary possess a high level of independence and impartiality because adjudication is a form of third party conflict resolution, and a judge must be a genuine third party. Justice could not be done and public confidence in the process could not survive if the judges were allied with certain parties involved in disputes. Ultimately, the dominant purpose of judicial impartiality, independence, and separation of powers is to enhance the citizen's confidence that a judge will hear and decide a case free of governmental or private pressures in accordance with the law [13].

Judicial independence of the provincial superior courts is an unwritten constitutional principle which is elaborated upon in the written text by section 11(d) of the *Canadian Charter of Rights and Freedoms*, and sections 96 to 100 of the *Constitution Act, 1867* (judicature provisions) [14]. Section 99 guarantees the security of tenure, section 100 ensures financial security, and the judicial interpretation of section 96 prevents legislative encroachment upon the court's core jurisdiction. The powerfully persuasive logic underlying the core jurisdiction theory is that the interrelated constitutional guarantees of judicial independence "are only meaningful so long as judges carry out meaningful tasks" [15]. Crucial elements of the core jurisdiction cannot be taken away so that the provincial superior courts would become "empty institutional shells" [16].

The constitutional validity of jurisdictional grants to both inferior courts and administrative tribunals is now determined by the modified *Residential Tenancies* tripartite test supplemented by the guarantee of a provincial superior court core jurisdiction [17]. Even if an exclusive grant of jurisdiction to the inferior court or tribunal satisfies the modified *Residential Tenancies* test, it is still necessary to determine if the grant derogates from the provincial superior court core jurisdiction.

In *MacMillan Bloedel v. Simpson* [18], the slender five-member majority of the Supreme Court of Canada provided an incomplete definition of the core jurisdiction concept. In addition to the provincial superior court power to control its process and enforce its orders, Lamer C.J.C. alluded to the power of judicial review for jurisdictional error over provincial administrative tribunals, and the power of constitutional review of federal statutes. The majority preferred to develop the content of the core on a case-by-case basis. This jurisprudential approach is problematic for inferior courts, administrative tribunals, and alternative dispute resolution processes.

By relying upon case law and legal scholarship [19], I suggest that the core jurisdiction of a provincial superior court should include the general categories of constitutional judicial review, administrative judicial review for jurisdictional error by provincial administrative tribunals, a core of the administration of criminal law consisting of such serious offences as murder or treason, a core of the administration of civil justice, such as civil lawsuits involving large pecuniary claims and the determination of the title to land, and the inherent power of the provincial superior court to control its process and enforce its orders. The specific elements of each part of the core jurisdiction are open to further elaboration by judicial interpretation, which must always respect the dynamic balance between the special constitutional position of the provincial superior courts and the flexibility required by the other courts, administrative tribunals, and ADR processes in the performance of their functions. Any

proposed juridical test will not provide mechanical exactitude because it is a provisional hypothesis "expressing the adjustment which commended itself at the moment between competing possibilities" [20].

It is essential to understand the constitutional principles of impartiality, independence, separation of powers, and the core jurisdiction associated with the provincial superior courts. By means of this background knowledge, one can discern how these courts may supervise ADR methods under the rule of law, and how court-annexed ADR may infringe upon judicial constitutional values.

III. Alternative Dispute Resolution

Alternative Dispute Resolution refers to three major methods of settling disputes: negotiation, mediation, and adjudication [21]. There are numerous variations of these methods. ADR can be annexed to a court process, tied loosely to a court process, or completely separate from the judicial process [22].

The legal philosophy which animates ADR is the settlement of a dispute through informal, inexpensive, and expedited means. Thus ADR possesses the potential to play an important role in improving the effectiveness of the civil justice system. Although ADR offers many advantages to society and to the individual citizen, it is not a panacea for all legal disputes. Some of ADR's possible shortcomings include coerced consent, an improperly authorized agreement, and the difficulty of subsequent judicial participation without a previous trial and judgment. Dockets are reduced, but civil justice may not be done [23].

Recent developments in both court-annexed mediations and private arbitrations raise questions concerning the role of the provincial superior courts in these processes.

(a) Mediation

Mediation is the facilitation of negotiations among parties by a non-party neutral [24]. In Ontario, it is a mandatory step for litigants in a case managed action to attempt to mediate the dispute before proceeding to the trial of the action [25]. Pursuant to section 92(14) of the *Constitution Act, 1867*, each province possesses power to prescribe the procedure in civil matters in the provincial superior courts. The court in Ontario explicitly retains supervisory power over the process, including the power to exempt the litigants from the rule of mandatory mediation. Although this additional step in the process delays access to the court, it does not prevent it. Therefore, the requirement of mandatory mediation does not appear to infringe the constitutional values associated with the provincial superior courts.

A different situation arises when mediation is not only court-annexed, but the provincial superior court judges are serving as the mediators. In Alberta, the court-annexed mediation process spans a spectrum. In the pre-trial conference the judge urges the parties to consider settlement negotiations or to expedite the litigation [26]. Judicial Dispute Resolution (JDR), which was introduced in 1994, attempts to build on the pre-trial conference. In JDR, a judge conducts a settlement conference which assists the parties in reaching an agreement. The Alberta Court of Queen's Bench incorporates dispute resolution weeks into its regular sitting schedules [27].

Finally, another type of mediation is the mini-trial, which was implemented in Alberta in 1991. The mini-trial is a structured proceeding designed to encourage voluntary settlement negotiations. The presentation of evidence and arguments on behalf of the parties before a judge enables the parties to settle the dispute on the basis of a non-binding opinion rendered by the judge at the conclusion of the process [28]. If there is no settlement, it is an established practice in Alberta that the judge who conducted the mini-trial does not preside at the trial [29]. There is no specific authority for the mini-trial in the Alberta Rules of Court. There are three possible sources of legal authority. These sources include the broad wording of Rule 219 relating to pre-trial conferences, the inherent statutory jurisdiction of the court under the *Judicature Act*, and the inherent common law jurisdiction of the

court [30].

In the *Secession Reference* [31], the Supreme Court of Canada stated that the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may confer on the courts legal functions other than strictly judicial functions. Thus provincial superior court judges may act as mediators. A more explicit conferral of authority in relation to court-annexed mediation would be preferable. In a process governed by the rule of law, personal confidence in the abilities of those who presently administer the system is not a sufficient substitute for explicit rules which inform the participants [32]. It is true that discretion is an integral part of any rule, but if designed carefully based upon past experience, such a rule will better guide and direct "choice within the limits where choice ranges" [33].

An individual judge may believe that involvement as a mediator in a specific case could infringe upon his or her actual or apprehended impartiality if there is a possibility that the same judge may preside at the trial of the action. This judge would be justified constitutionally to decline to preside at the trial even if assigned by a senior judge with administrative powers [34]. Moreover, I believe that a judge should not preside over the trial after delivering a non-binding opinion at the conclusion of a mini-trial when settlement does not occur. The judge has already prejudged the case. Because the constitutional value of judicial impartiality is impugned, I do not believe that the consent of the parties cures the defect. The importance of the constitutional principle of judicial impartiality transcends the confines of one case [35].

(b) Arbitration

Arbitration is the ADR process in which a third party neutral, after hearing the evidence and the arguments from the parties in a relatively informal hearing, renders a binding decision resolving the dispute [36]. A private, consensual domestic arbitration is similar to litigation because it includes adjudication, but the parties select the arbitrator, and the manner in which the arbitration will proceed is governed by statute as well as by the parties' agreement [37].

The rule of law mandates that the law is supreme over the acts of government and private persons. Therefore, the provincial superior court's supervisory power over private, consensual domestic arbitrations cannot be ousted completely. Several current Canadian arbitration statutes are based on the *Uniform Arbitration Act* [38]. This Act provides that arbitral awards may be set aside for specified procedural or jurisdictional defects. Appeals to the court are heard with the consent of the parties. Where the parties do not consent, appeals on questions of law are permitted with the leave of the court applying specific criteria [39]. Therefore, the statute includes the provincial superior court's power to intervene in the arbitration process either on an appeal of the award or through review on specified grounds.

Having recognized the provincial superior court's power to intervene, the related issue is the extent to which the court should intervene in reviewing the arbitral award. The parties have voluntarily chosen this ADR method so as to reduce delay, save costs, and preserve privacy. Balanced against these considerations, the court must also enforce adherence to the statute governing the process and the contractual terms to which the parties have agreed. Power that is not the subject of regular review is most often the object of arbitrary abuse.

In cases in which the parties have consented to the availability of an appeal, the courts have tended to discuss the standard of review in the context of the jurisprudence in administrative law [40]. By employing this method, the courts have blurred the line between an appeal and judicial review, and between legislatively established specialized tribunals and specialized private arbitrators [41]. According to this administrative law jurisprudence, the three standards of review are correctness, reasonableness *simpliciter*, and patent unreasonableness. In order to decide upon the level of deference, the court considers the presence and strength of a privative clause, the expertise of the arbitrator, the purpose of the Act as a whole and the provision in particular, and whether the nature of the problem is a question of law or fact [42].

IV. Conclusion

In the *Systems of Civil Justice Task Force Report*, the authors state that the multi-option civil justice system of the twenty-first century will require an expanded judicial role in the management and resolution of cases [43]. Former Chief Justice Dickson has observed that a sophisticated approach will be needed in order to reconcile various ADR methods with present legal principles which include judicial impartiality, independence, separation of powers, and the core jurisdiction.

Recent developments in mediation and arbitration emphasize this challenge. Mandatory mediation conducted by non-judicial personnel does not infringe constitutional principles. Court-annexed mediation conducted by judges, such as pre-trial conferences and JDR, is constitutionally permissible since judges may perform legal functions outside of a strictly adversarial process. It is advisable, however, that judges who conduct these mediations not preside at the trial, and respect rigorously the confidentiality of the process. Moreover, judges who render a non-binding opinion at a mini-trial should never preside at the trial if settlement has not been reached. These safeguards preserve both the appearance and the reality of judicial impartiality.

The provincial superior courts possess supervisory power over private, consensual domestic arbitrations under the rule of law. In exercising this power over ADR, the courts must be careful not to destroy the efficacy of the processes which reduce delay, save costs, and preserve privacy, while also enforcing adherence to legal requirements.

The task of the law has been a deep concern "with balancing the values of continuity against those of improvement, certainty against adaptability, liberty against authority" [44]. The challenge which ADR poses is to discern how it will affect judicial constitutional values, and how judicial supervision of ADR will influence ADR's processes. If this issue of interaction is carefully considered, ADR can contribute significantly to the effectiveness of the civil justice system as it operates from its position in the shadow of the rule of law.

Endnotes

1. Right Honourable Brian Dickson, "ADR, The Courts and the Judicial System: The Canadian Context" (1994) 28 Law Society of Upper Canada Gazette 231. Return to Article

2. Ibid., 235. Return to Article

3. Ibid., 241-242. Return to Article

4. Ibid., 235. Return to Article

5. Ibid., 241. Return to Article

6. There are three foundations for the rule of law concept in the Canadian Constitution. It is referred to explicitly in the preamble to the *Constitution Act, 1982*, implicitly included in the preamble to the *Constitution Act, 1867*, and inherent in the nature of a constitution. See *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750-751. Return to Article

7. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at 257-258 [hereinafter Secession Reference]. Return to Article

8. The Queen v. Beauregard, [1986] 2 S.C.R. 56 at 73. See also MacKeigan v. Hickman, [1989] 2 S.C.R. 796 at 827, McLachlin J. Return to Article

9. Secession Reference, supra note 7 at 233. Return to Article

10. R. v. Lippé, [1991] 2 S.C.R. 114 at 139 and 140, Lamer C.J.C. [hereinafter Lippé]. Impartiality may have both an individual and an institutional aspect. Return to Article

11. Peter H. Russell, "Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Considerations" (1984) 17 Canadian Journal of Political Science 227 at 245. Return to Article

12. R. v. Généreuxx, [1992] 1 S.C.R. 259 at 286-287. Regarding impartiality see also Canadian Judicial Council, Ethical Principles for Judges (Ottawa: Canadian Judicial Council, 1998) paragraphs A.3 and A.4, 31. Return to Article

13. Garry D. Watson, "The Judge and Court Administration" in Allen Linden, ed., The Canadian Judiciary (Toronto: Osgoode Hall Law School, York University,1976) 163 at 183. Return to Article

14. Re Provincial Court Judges, [1997] 3 S.C.R. 3 at 63-64, Lamer C.J.C. See also Judge Gerald T. G. Seniuk, "Judicial Independence and the Supreme Court of Canada" (1998) 77 Canadian Bar Review 381at 384. Another rationale of the judicature provisions has been to provide a predominantly unitary court system with integrated federal and provincial participation. See Re Residential Tenancies Act, [1981] 1 S.C.R. 714 at 728, Dickson J. [hereinafter Re Residential Tenancies Act]. Return to Article

15. Peter H. Russell, "Constitutional Reform of the Canadian Judiciary" (1967) 7 Alberta Law Review 103 at 108. Return to Article

16. W. R. Lederman, "The Independence of the Judiciary" in W. R. Lederman, ed., Continuing Canadian Constitutional Dilemmas (Toronto: Butterworths, 1981) 167. This is a republication of Professor Lederman's seminal article in (1956) 34 Canadian Bar Review 769-809, 1139-1179. Return to Article

17. Peter W. Hogg, Constitutional Law of Canada, Fourth Edition, looseleaf (Toronto: Carswell, 1997) 7-29. The tripartite test is derived from Re Residential Tenancies Act, supra note 14, and has been refined by subsequent jurisprudence. The impugned power must be characterized by the court. The first stage is an historical inquiry as to whether the power conforms broadly to an exclusive power exercised by a section 96 court in 1867 in the four confederating provinces. If there is a tie, it is necessary to examine the position in the United Kingdom in 1867. Sometimes the power may be described as "novel" because it did not exist in 1867, or was transformed subsequently into something entirely different. The second step is undertaken if the historical test of broad conformity is satisfied. The second step determines if the power is "judicial" in nature. If the power is judicial, the court then proceeds to the third step and examines whether the power in its institutional setting still broadly conforms to a section 96 power. The issue is whether the adjudicative function is the sole or central function, or ancillary to general administrative functions or necessarily incidental to a broader legislative policy goal. Return to Article

18. MacMillan Bloedel v. Simpson, [1995] 4 S.C.R. 725 especially at 743, Lamer C.J.C. Return to Article

19. Ibid., 751-753. For discussions of the general categories of the provincial superior court core jurisdiction see also The Canadian Bar Association, Towards a New Canada (Ottawa: The Canadian Bar Association, 1978) 50; Noel Lyon, "Is Amendment of Section 96 Really Necessary?" (1987) 36 U.N.B.L.J. 79 at 84; T. A. Cromwell,"Aspects of Constitutional Judicial Review in Canada" (1995) 46 South Carolina Law Review 1027 at 1028 and 1030-1031; and Robin Elliot, "Rethinking Section 96: From a Question of Power to a Question of Rights" 17 at 27-28 in Denis N. Magnuson and Daniel A. Soberman, eds., Canadian Constitutional Dilemmas Revisited (Kingston: Institute of Intergovernmental Relations, 1997). Return to Article

20. Benjamin N. Cardozo, The Growth of the Law (New Haven: Yale University Press, 1924, eleventh

reprint, 1961) 70. Return to Article

21. Thomas A. Cromwell, "Dispute Resolution in the Twenty-First Century" in Research Papers: Background Studies to the Systems of Civil Justice Task Force Report (Ottawa: The Canadian Bar Association, 1996) 29. Return to Article

22. Julie Macfarlane, General Editor, Dispute Resolution: Readings and Case Studies (Toronto: Emond Montgomery Publications Limited, 1999) 477. Return to Article

23. Owen M. Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073 at 1075. Return to Article

24. Mr. Justice George W. Adams and Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995) 17 Advocates' Quarterly 133 at 137. Return to Article

25. Honourable Patrick T. Galligan, "The Intersection and Confluence of the Existing System of Litigation and Alternative Dispute Resolution" (Justice to Order, Canadian Institute for the Administration of Justice, Saskatoon, 14-17 October, 1998) [unpublished] 3 and Appendix. Return to Article

26. Chief Justice W. K. Moore, "Annual Report of the Court of Queen's Bench" [Alberta] (February 1999) [unpublished] 7. Return to Article

27. Ibid., 7-8. Return to Article

28. Ibid., 8. See also Hon. W. K. Moore, "Mini-Trials in Alberta" (1995) 34 Alberta Law Review 194. Return to Article

29. Alberta Law Reform Institute, Civil Litigation: The Judicial Mini-Trial (Edmonton: Alberta Law Reform Institute, August, 1993) 33 [hereinafter Civil Litigation]. Return to Article

30. Ibid., Footnote 33, 10. Return to Article

31. Secession Reference, supra note 7 at 233. Return to Article

32. Bernard Schwartz, "Fashioning an Administrative Law System" (1988) 37 U.N.B.L.J. 59 at 66-67. Return to Article

33. Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven: Yale University Press, 1921, reprinted 1946) 94. Return to Article

34. Judges are to be independent from other judges in performing the adjudicative function. See Beauregard, supra note 8 at 69 and Lippé, supra note 10 at 152-153, Gonthier J. quoting Beauregard. See also Mr. Justice T. David Marshall, Judicial Conduct and Accountability (Scarborough: Carswell, 1995) 89 and 29-30, and Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada (Ottawa: Canadian Judicial Council, May, 1995) 12. Return to Article

35. Rule 35(8) of the British Columbia Rules of Court permits a judge who has heard a mini-trial or attended at a settlement conference to preside at the trial if all parties of record consent. See Civil Litigation, supra note 29, Appendix A at 42, and Hon. Madame Justice Beverley M. McLachlin and James P. Taylor, QC, British Columbia Practice (2nd edition) Volume 2, looseleaf (Markham, Ontario: Butterworths, 1979) 35-22. Return to Article

36. Adams and Bussin, supra note 24 at 140. Return to Article

37. Joanne Goss, "An Introduction to Alternative Dispute Resolution" (1995) 24 Alberta Law Review 1

at 12. Return to Article

38. Macfarlane, supra note 22 at 538. Return to Article

39. Ibid., 561-563. See Also Barry Michael Fisher, "Judicial Review of Errors of Law: A Proposal for Interpretation of Canadian Arbitration Statutes from US Decisions" in Macfarlane, supra note 22 at 565. Return to Article

40. John J. Chapman, "Judicial Scrutiny of Domestic Commercial Arbitral Awards" (1995) 74 Canadian Bar Review 401 at 422-423. Return to Article

41. For a discussion of the general difficulty in distinguishing judicial review from an appeal see Hon. R. P. Kerans, Standards of Review Employed by Appellate Courts (Edmonton: Juriliber Limited, 1994) 58. Return to Article

42. Pezim v. B.C. (Superintendent of Brokers), [1994] 2 S.C.R. 557. The factors for determining the standard of review of specialized tribunals were more recently summarized by Bastarache J. in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 at 1005-1012. In Willick v. Willick (1995), 158 A.R. 52 (Alta. Q.B.), Deyell J. considered Pezim in determining the standard of review applicable to an appeal of an award under the Arbitration Act, S.A. 1991, c. A - 43.1. Pezim was also applied by MacPherson J., as he then was, in 887574 Ontario Inc. v. Pizza Pizza Ltd. (1995), 23 B.L.R. (2d) 259 (Ont. Ct., Gen. Div.), in which the parties provided for the appeal from the arbitrator's decision. MacPherson J. observed that although Pezim was a case dealing with a legislatively created specialized tribunal, it was "equally applicable to a specialized private arbitrator agreed upon by the parties and confirmed by court order" (see Footnote 3 at 265 of the decision). In Petro-lon Canada v. Petrolon Distribution (1995), 19 B.L.R. (2d) 123 (Ont. Ct., Gen. Div.), the parties in an arbitration had also agreed to a right of appeal. E. MacDonald J. cited Pezim with approval in determining the standard of review. Return to Article

43. The Canadian Bar Association, Systems of Civil Justice Task Force Report (Ottawa: The Canadian Bar Association, August, 1996) 55. Return to Article

44. Eugene C. Gerhart, America's Advocate: Robert H. Jackson (New York: The Bobbs-Merrill Company, Inc., 1958) 466, quoting from United States Supreme Court Justice Robert Jackson's "Lawyer's Creed". Return to Article

Publications

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What's New in Alternative Dispute Resolution in the Courts?

To find out, join our panel of experts from across Canada, who will discuss developments in dispute resolution in our civil courts. Our panel members are:

- **The Honourable Mr. Justice James B. Chadwick**, Regional Senior Justice of the Superior Court in the East Region of Ontario
- **Ron Hewitt, QC**, Assistant Deputy Minister, Saskatchewan Justice
- **Gwen Harris**, a Coordinator of the Provincial Court Civil Claims Mediation Pilot Project in Edmonton, Alberta
- **Jerry McHale**, Director of the Dispute Resolution Office, Ministry of the Attorney General in British Columbia

The discussion will be of interest to the public, legal educators, lawyers, judiciary, court administrators, mediators and ADR experts. This event is being held in conjunction with the CBA National Meeting and will be held in Edmonton, Alberta on August 25, 1999 from 9:00 am to 12:00 noon. For details and to register, please contact the Canadian Forum on Civil Justice at (780) 492-2513 or by e-mail: cjforum@law.ualberta.ca

Publications

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Ontario Mandatory Mediation Program

By Ann Merritt, Provincial Mediation Coordinator, Mandatory Mediation Program, Ontario Ministry of the Attorney General

What is the Ontario Mandatory Mediation Program?

On January 4, 1999, Rule 24.1 of the Rules of Civil Procedure came into effect, establishing the Ontario Mandatory Mediation Program.

The Ontario Mandatory Mediation Program was designed to help parties settle their cases early in the litigation process, thereby saving both time and money. The Program is a key component of the government's Civil Justice Reform strategy, recommended by the Ontario Civil Justice Review, which has the objective of creating a modern, faster, more affordable and accessible civil justice system. The Mandatory Mediation Program was developed in consultation with over 200 stakeholders, including representatives from the mediation, legal and business communities and the judiciary.

The Program builds on the experience of two prior mediation pilot projects in the province, established by Practice Direction. In July 1995, the Alternative Dispute Resolution Centre was established in Toronto as a voluntary program and, in January 1997, a mandatory mediation project was implemented in Ottawa. The results of these pilots were impressive, with approximately two out of three cases either fully or partially settling within 60 days of the mediation session.

Under Rule 24.1, civil, non-family, actions that are subject to case management are referred to mandatory mediation. In addition, effective September 1, 1999, contested estates matters will be referred to mandatory mediation under a complementary Rule of Civil Procedure (Rule 75.1).

The Mandatory Mediation Program was introduced as a pilot program in the City of Toronto and the Regional Municipality of Ottawa-Carleton and is expected to expand throughout Ontario over the next several years. The Program is being evaluated to determine its impact on the civil justice system.

How does the Mandatory Mediation Program work?

- Defended civil, case-managed (non-family) actions and contested estates matters are referred on a mandatory basis to a three-hour mediation session. Litigants may opt out of the mediation process only by order of a Case Management Master or Judge.

- The mediation session must take place within 90 days after the first defence is filed, unless the parties obtain a court order either exempting them from mediation or abridging or extending the time. For standard track cases, parties may consent to a postponement of up to 60 days. (In estates matters, the time frame for the mediation is set by the court in an order providing directions relating to the mediation).

- The mediation is conducted by a private-sector mediator. Parties may agree to select a mediator from an approved roster of mediators, or they may agree to choose a mediator who is not on the roster. This decision must be made within 30 days after the first defence is filed. (In estates matters, a mediator must be chosen within 30 days of the court order for directions).
- If the parties cannot agree on a mediator, one will be appointed for them by a court official known as the Local Mediation Coordinator, who is responsible for administering the Program.

- At least 7 days before the mediation, parties must provide the mediator and the other parties to the lawsuit with a Statement of Issues, which identifies the issues in dispute and the parties' positions and interests. The pleadings and any documents of central importance to the case must be included.
- If any party fails to submit a Statement of Issues or to attend within the first 30 minutes of the mediation session, the mediator may cancel the mediation session and file a Certificate of Non-Compliance with the Local Mediation Coordinator. The party responsible for the cancellation will be required to pay any cancellation fees charged by the mediator and may be subject to sanctions imposed by the court.

- Agreements reached during mediation must be signed by the parties or their lawyers and are legally binding. Cases that do not settle during mediation continue down the traditional litigation path.

- All parties share the cost of the mediation session. Mediation fees are prescribed by a Regulation under the Administration of Justice Act. For example, in a two party case, a maximum fee of $300 per party is charged. Should the parties wish to continue beyond the three-hour session, fees must be agreed to by the parties and the mediator prior to the commencement of the initial mediation. (In estates matters, the court has authority to apportion fees among the parties.)

- Mediation services are provided to all litigants. An access plan is available for parties who cannot afford mediation services.

- After the session, the mediator must complete and file a report on the outcome of the mediation.

How is the Mandatory Mediation Program administered?

The Office of the Provincial Mediation Coordinator is responsible for implementing and administering the Program for the province. Local Mediation Coordinators are responsible for the day-to-day operation of the Program in each county covered by the Mandatory Mediation Rule.

Local Mediation Committees, comprised of representatives from the judiciary, bar, mediation community, public and Ministry staff, are responsible for selecting mediators for the roster based on approved guidelines. The Committees are also responsible for monitoring mediator performance and responding to complaints.

More information about the Program is available on the Ministry of the Attorney General web site at: http://www.attorneygeneral.jus.gov.on.ca

Publications

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Did You Know. . .

. . . that there is a national network of law schools, lawyers and community organizations that matches law students who want to do *pro bono* work with lawyers who supervise the work and with public interest and non-government organizations, government agencies, tribunals, legal clinics and other providers of legal, health and community services?

Pro Bono Students Canada began at the University of Toronto in 1996, expanded in 1998 to include every Ontario law school, and expanded again in 1999 to include the University of New Brunswick, University of Manitoba, University of Alberta, University of Calgary and University of British Columbia law schools. Student project assignments can include: preparation of legal memoranda, assistance to counsel in legal proceedings, development of proposals for legislative reform and government policy, and the provision of information and services to the organization and its clients.

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The Civil Justice System and the Public

The Canadian Forum on Civil Justice is coordinating a research proposal designed to involve the public in the process of court reform. We have been joined by partners from across Canada from academia, the judiciary, the legal profession, court administration and the public to conduct research and develop mechanisms for better communication between the courts and the public, with a view to improving both the operation of the civil justice system and the public perception of the system.

Studies of the civil justice system have accepted the need for reform of the system and concluded that the public, as a primary participant in the system, should play a key role in reform efforts. A number of the many recommendations of the Canadian Bar Association Systems of Civil Justice Task Force Report are aimed at increasing the responsiveness of the system to the needs and expectations of the public. These recommendations seek to both increase access to the civil justice system and to develop effective two-way communication between the courts and the public. Our study will advance these important recommendations of the Task Force.

We begin with the widely accepted belief that there are significant barriers which prevent access to our justice system. While discussion has now started about how to improve the system, the public is generally unaware of the discussion, which means that they are not involved in the reform efforts, and their needs and expectations are not being voiced. Our work will begin by studying the relationship between the courts and the public, including identifying and investigating barriers to the public's involvement. We will be looking for ways to involve all parts of society in the study. Our focus in the second stage of the research will be on developing methods of communication between the courts and the public. The third stage will involve pilot projects to begin testing some of these communication models, from which we hope to make concrete recommendations which will improve communication and, ultimately, improve access by increasing the ability of the civil justice system to speak to, hear and respond to the public.

Our current partners include:

- University of Alberta
  - Faculty of Law
  - Faculty of Extension, Legal Studies Program
  - Faculty of Arts, Department of Sociology, Population Research Lab
  - Faculty of Arts, Department of Political Science
  - Faculty of Business
- Public Legal Education Association of Canada and member agencies
- Association of Canadian Court Administrators
- Canadian Institute for the Administration of Justice
- The Canadian Bar Association
- Alberta Law Reform Institute

- The Legal Aid Society of Alberta
- Justice Canada
- Canadian Centre for Justice Statistics

We are continuing to add partners and are interested in including groups which face particular barriers to accessing our civil justice system as well as the traditional players in our civil justice system.

We submitted an initial proposal to the Social Sciences and Humanities Research Council in the spring and have been invited to proceed to the second stage in a two-stage application process. Our full proposal will be submitted by October 1, 1999; between now and then we will be refining our research design and determining the role and contribution of each of our partners.

We would be greatly assisted in the development of our research proposal if those of you who are involved in or aware of initiatives relating to communication between the courts and the public would provide us with details. Please contact the Canadian Forum on Civil Justice with information about your program or if you are interested in learning about this exciting research proposal.

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Membership

Membership applications have been arriving daily since we sent out our first newsletter and we are pleased that so many of you have expressed your interest in civil justice reform by joining the Forum. Thank you especially to our sustaining members for your generous support.

The annual General Membership fee to join the Forum and receive our semi-annual newsletter is $50. To encourage you to consider membership, we are willing to waive the fee during our first year of operation; we hope we will have convinced you to continue your membership after the waiver expires. Sustaining members are those who have donated in excess of our $50 membership fee.

Please be sure to let us know if your address changes so that we can keep in touch with you.

Diana J. Lowe, Executive Director

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At the Forum

Every day at the Forum is filled with exciting challenges, not simply because we are often doing things for the first time as an organization, but because we are part of the growing movement which is taking place across this country to improve the civil justice system. As you will see on the pages which follow, the Forum is undertaking both research and projects which will add to the growing body of reform efforts underway throughout Canada. We are also developing ways to collect information about the numerous and varied reform initiatives that are taking place, so that we can, in turn, share these resources and enable everyone to benefit and learn from experiences in other jurisdictions.

We have the vehicles to deliver this information to you. Our newsletter will be published twice yearly and will highlight some of the current research and initiatives that you share with us, as well as provide a forum for scholarly reviews. Our website (http://www.cfcj-fcjc.org) is home to our "civil justice clearinghouse": an electronic collection designed to allow you access to the growing body of work on civil justice reform. The site includes links to other relevant websites, a searchable bibliographic database of published civil justice materials and, with your help, will soon house a collection of unpublished materials on our full-text database.

The Forum has begun a "Civil Justice Clearinghouse Project" designed to develop this collection. We will begin by establishing contacts with those organizations and individuals responsible for writing or collecting the unpublished materials: the bar (through The Canadian Bar Association, Law Societies and civil trial lawyers associations), the judiciary, rules committees, court administrators, legislators, academics, public legal educators, law reform institutes, legal aid societies, arbitrators, mediators and librarians. Once these contacts have been established, we will identify and begin collecting the unpublished materials on civil justice issues in each Canadian jurisdiction and will then catalogue these materials so that they can be included in the full-text database on our website.

We are very grateful for funding we have received from the Law Foundation of British Columbia and the Alberta Law Foundation for clearinghouse projects in their respective provinces, as well as from the Canadian Bar Law for the Future Fund to enable us to proceed in the federal jurisdiction. We are pursuing parallel funding from each provincial and territorial Law Foundation so that we can ensure that the work being undertaken in each Canadian jurisdiction will be included in the clearinghouse.

The unpublished materials that we are seeking include draft rules and legislation, reports, commentary, articles, minutes, surveys and research papers on civil justice initiatives. If you are storing unpublished materials in your filing cabinet or on the shelf in your office, don't feel that you need to wait for a direct request from the Forum . . . we would welcome your phone call or e-mail message.

Please visit our website for more information about the "Civil Justice Clearinghouse Project", including a list of the subject headings which we have developed for our bibliographic database and which will be used to classify both the published and unpublished materials in our civil justice clearinghouse

collection.