Arbitration and ADR Law

Judge-led Mediation: an Update by Albert Monichino

Introduction

Some legal systems recognise the appointment of a serving judge as a mediator. In the UK, the Settlement Process of the Technology & Construction Court authorises judges to provide a "*service, akin to mediation, at the request of the parties*".[1] If a judge acts as a mediator, and if the matter does not settle, that judge must not have anything further to do with the case.

Judge-led mediation is employed in the Québec Court of Appeal as well as the Québec Superior Court.[2] Judicial "*facilitation*" also forms part of the criminal jurisdiction of these Courts. Justice Louise Otis, a former member of the Québec Court of Appeal, designed the first system of judge-led mediation in Québec. Recently, the Victorian Bar had the pleasure of Her Honour addressing members on the Québec judicial mediation experience.

In the Québec Superior Court, litigants may consent to the judges of that Court acting as mediators. This practice has judges facilitating agreement between the parties in purpose-built "*courtrooms*" with what appears to be a large settlement rate. The judge/mediator is excluded from taking any further part in the case if it fails to settle. Other Canadian jurisdictions have also adopted this system.[3]

The concept of "*judge-led mediation*" has caught the attention of the Victorian Attorney-General, whom has spoken enthusiastically about its possible adoption in Victoria. On 11 May 2009, the Attorney General issued a press release announcing *inter alia* the appointment of a Supreme Court judge as part of an ADR pilot programme, the stated purpose of which was to place ADR "*firmly within the court system*".[4] According to that press release, the Victorian Government had invited Justice Otis "*to provide a master class for Victorian judges*" conducting mediations as part of this pilot programme. Plainly, the Victorian Attorney-General regards the Québec system as worthy of emulation or adaption in this State.

Against this background, this update examines briefly the Québec system of "*judicial mediation*". It also looks briefly at a recent extra-judicial speech of the Chief Justice of the Supreme Court of Victoria, in which Her Honour commented on the risks and

---

[1] His Honour Judge Peter Coulson QC, *The Technology & Construction Court* (2006) Sweet & Maxwell, pp. 72 – 73.

[2] N. Alexander (ed.), *Global Trends in Mediation* (2006) Kluwer Law International, p. 107

[3] N. Alexander (ed.), *ibid.*, p. 90

[4] See http://www.premier.vic.gov.au/attorney-general/hulls-welcomes-pioneer-of-judge-led-mediation.html

benefits of judge-led mediation and described the judicial mediation model that is likely to be adopted in Victoria.

The Quebec Judicial Mediation Model

The Québec judicial mediation model has the following features –

- It has not replaced private mediations; litigants remain free to engage in mediations over which private mediators preside.
- Almost all matters may be submitted to a conference between the parties (and their legal advisers) over which a mediator-judge presides.
- A conference may not be held without the consent of the parties.
- A conference does not stay the proceedings.
- Everything said or written in connection with the conference is confidential; such material cannot be disclosed in judicial proceedings, unless the parties consent to that disclosure.
- If the matter does not settle, the mediator-judge is prohibited from having anything further to do with that case.[5].
- The mediator-judge facilitates negotiations. It would appear that the style adopted by judge-mediators is facilitative as opposed to evaluative in style (see below).
- The mediator-judge may meet the parties in private sessions.

Unsurprisingly, Justice Otis is an enthusiastic advocate of judge-led mediation. She has written numerous papers and articles in which she explains and promotes this system of ADR.[6] One article identifies numerous theoretical and practical advantages of this system.[7] Some of these advantages are described as follows –

- Judges brings their "*moral authority*" to the mediation process. This authority arises from the widespread "*perception of the judicial office as one of impartiality and independence*".
- Judges assist in creating a "*secure*" negotiating environment, from which "*economic coercion*" is eliminated.[8]
- The "*empowerment*" of the parties; and the ability of the judge-mediator "*to show the parties how to become agents of peace, working at the micro level to transform society*".

---

5 In her address to the Victorian Bar, Justice Otis mentioned that in Québec legislation had been enacted which was designed to prevent dissemination from the judge-mediator to other judges of the Court involved in the determination of the proceeding

6 See the numerous articles available on the website of the Canadian Conference of Judicial Mediation: www.judicialmediation.ca/Page.aspx?idPage=24

7 Otis & Reiter, "*Mediation by Judges: A New Phenomenon in the Transformation of Justice*", 6 Pepp. Disp. Resol. LJ 351

8 C.f. *ACCC v Berbatis* (2003) 214 CLR 51 at [16] per Gleeson CJ

In her address to the Victorian Bar, Justice Otis was asked this question: "*What makes a judge-mediator any more effective than a private practitioner as a mediator?*" Her Honour replied "*Moral authority*". That answer raises a number of questions. Does a sitting judge have greater moral authority than a retired judge? Is a retired judge any less effective as a mediator when he or she has retired from the Bench? Is it integral to the mediation process that the mediator not only be perceived as independent and impartial but also have a high degree of moral authority? Is the moral authority of a senior legal practitioner inadequate for mediation purposes? How does moral authority assist the mediation process anyway?

In one article, Justice Otis emphasises that the judge-mediator should refrain from expressing any opinion on the legal merits of the dispute (or, in appeal proceedings, the efficacy of the judgment from which one party has appealed). On this issue, the article states as follows –

> "*Such commentary could potentially compromise the court's position and impair the effectiveness of the traditional system should the case return to the adjudicative stream. It would certainly undermine the relationship between the two systems. Though a judge-mediator does not speak "judicially" during a mediation session, the judge's position in society is such that it would be difficult for the parties to make this distinction, and consequently they could easily – and understandably – misinterpret what the judge says during mediation as the definitive position of the court on an issue. This is clearly an area requiring a high degree of caution and restraint*…"

The Hon Marilyn Warren, "*AR and a different approach to litigation*" (Speech to members of the Law Society of Victoria, 18 March 2009) - published at www.supremecourt.vic.gov.au.

In her address to the Victorian Bar, Justic Otis mentioned that in Québec legislation had been enacted which was designed to prevent dissemination from the judge-mediator to other judges of the Court involved in the determination of the proceeding.

Herein lies one dilemma in respect of judge-led mediations. Judges may well bring to the process their "*moral authority*" (or, more accurately, the authority of the court which he or she embodies) but there is a substantial risk that this very participation undermines or harms that authority. Thus there is a real question whether a system of open justice is able to accommodate judicial officers brokering deals in private.

The Victorian Interpretation

Recently, the Chief Justice of the Supreme Court of Victoria gave a speech on ADR.[9] Her Honour expressed the view that, subject to some resourcing from government and goodwill from the profession, there could be experimentation with settlement conferences involving judges of the Supreme Court.

In that speech, the Chief Justice explained her conception of judge-led mediation as follows (emphasis added) –

---

9 The Hon Marilyn Warren, "*ADR and a different approach to litigation*" (Speech to members of the Law Institute of Victoria, 18 March 2009) – published at www.supremecourt.vic.gov.au

> "*It does not involve judges behaving in exactly the same was as a private mediator from the profession or the Bar.* ***Judges cannot caucus or confer with individual parties on a separate or private basis*** *- mediators ordinarily do that. For a judge it would jeopardise the independence and dignity of the judicial office. We know of litigation and threats of litigation against private mediators for allegations of negligence, bias, dishonesty and the like. It is essential that in an effort to alleviate pressures on court workloads we do not see the confidence of the community in the courts undermined.*" (emphasis added)

In the same speech, Her Honour identified five or six risks arising from judicial involvement in mediations and suggested that the judge-mediator would be expected to adopt a facilitative approach rather than an evaluative one.

Whilst Justice Otis has promoted judicial involvement in mediation as a means of destroying "*economic coercion*" in negotiations, Chief Justice Warren has acknowledged that litigants may feel pressured into settlement by virtue of the judicial presence.

Also, there is a risk of private communications between the judge-mediator and the other officers of the court, or at least the perception that such communications might take place. This raises the following question: what steps must the court take to ensure that there is no communication between the judge-mediator and the judge hearing the proceeding?

In the Victorian Bar's response to NADRAC's Issues Paper entitled "*Alternative Dispute Resolution in the Civil Justice System*", the Chairman of the Victorian Bar Council referred to the Chief Justice's description of judge-led mediation and said that Her Honour's preferred model of judge-led mediation is not "*mediation*" within the meaning of the NADRAC Glossary, but rather falls within the definition of a "*conciliation*" process. In other words, private mediation sessions, in which the mediator consults one party in the absence of the other, are fundamental to the mediation process.

Conclusion

Judge-led mediation (or in Victoria, more properly styled, judge-led settlement conferencing) continues to excite interest. The Victorian Attorney-General appears to place great reliance upon it as a panacea for the resolution of commercial disputes before the Victorian courts. The Chief Justice of the Supreme Court of Victoria has explained how it should operate in Victoria – namely, without private caucusing of the parties and without the judge-mediator adopting an evaluative style. No doubt the topic will engender further discussion and debate in the months ahead.