GLOBAL JUDGES FORUM

COMMERCIAL ENFORCEMENT AND INSOLVENCY SYSTEMS

World Bank at Pepperdine University
Malibu, California
May 19-23, 2003

Efficient Court Administration:

Value Added Techniques for Real Time Litigation, Court Administration and Case Management

The Need for Effective, Efficient and Timely Delivery of Justice

The Superior Court of Justice Experience in Toronto, Ontario, Canada

By: The Honourable Mr. Justice James M. Farley

INDEX

Introduction

"Justice delayed is justice denied". This old saying is as important today as it was a century ago. The court system must be ever vigilant to ensure that perceived short term gain for some litigants using new twists and turns does not result in a diminution of justice in the long run for those who are prepared to abide by the letter and the spirit of the law. The integrity of the justice system is paramount.

What I am describing to you in this paper is the experience we have had in Toronto since we set up the Commercial List in 1991. A copy of our most recent Practice Direction, *Practice Directions - Commercial List - 2002*, 57 O.R. (3d) 97 (Sup. Ct.) may be located at our court website; please link on to: http://www.ontariocourts.on.ca/superior_court_justice/notices/toronto_region/commercial.htm. The Commercial List has as its foundation insolvency and bankruptcy matters plus creditors remedies; in addition the List will deal with corporate, tax, pension, securities and other complex commercial litigation. What has worked (and not worked) for us in Toronto may be of assistance to other jurisdictions. But I wish to stress that each jurisdiction will have to establish its own practice to suit its own individual needs.

Absent unusual circumstances which would have to be justified to the court, there is no reason why general commercial litigation cannot be completed within 3 years of its initiation. Indeed I would think that the ideal average should be in the 1 and ½ year range. I make that observation fully acknowledging that there are commercial cases in our court system where counsel on both sides have engaged in deep pocketed litigation with the result that the cases are still ongoing after 10 years. This would be "autopsy" litigation where it is not truly important that the case be tried with any immediacy. However where one is dealing with "real time" litigation where a decision is urgently required so that the parties can make ongoing plans and decisions, then the time horizon has to be foreshortened to meet the requirements of the particular circumstances. I give you the example of the Schneider public company takeover case where the multiple claims were made in late January 1998, pleadings were completed, production of documents took place and oral discovery made with the trial taking place in April and my 80-

page decision being released on May 10, 1998. Insolvency matters, inherently chaotic, are ultra real time litigation as value is eroding as the days, sometimes hours, pass. Frequently insolvency matters are therefore dealt with in total, start to finish in a matter of days or a few months.

Trials and the Trial Requirements Memorandum

Attached to this paper is a copy of the Trial Requirements Hearing Memo. If required by the supervising judge, the particulars of this memo or specified parts thereof must be completed and approved by the supervising judge (or designate) a week or more before the appointment to schedule the trial, although in complex and lengthy cases we will "pencil in" target dates so that counsel may have some assurance that they will have their trial date for forward planning purposes - not only for that particular case but the rest of one's caseload. The memo provides a general outline of what remains to be dealt with in the case (we assume that counsel will be able to resolve some of the issues and that others may become "non-issues"). If the matter is not all that complex, it may be determined that a full-blown memo is not required, but rather a streamlined one. While counsel have been living with the case intensively and extensively over a period of time, it is important to recognize that the trial judge's first contact with it will be the Trial Requirements Memo. Thus it is helpful to set out who the various "cast of characters" are and how they fit into the case. Similarly there should also be a bare bones non-contentious chronology. Compendiums of the agreed exhibits are to be prepared for delivery to the court a week or so before the trial commences. It is best practice to do this on a joint basis, together with a compendium of the expected law. If at all possible, this should be on an expurgated basis of only the relevant passages of documents, statutes and cases. Key to scheduling is the witness milestones: what witnesses will be called and how long is it anticipated that each will be in direct and cross-examination. This process will also allow for determining whether the evidence of any particular witness is necessary or whether that evidence can be agreed upon in whole or in part. As a rule of thumb, we have found that a focussed trial using these methods is likely to last no more than the time of a "regular" trial. Similarly we can determine on a preliminary basis whether proposed expert witnesses will be helpful. Reports of experts in any event have to be circulated well in advance so that no one is caught by surprise.

Case Conferences

Case conferences may be booked for any time during the litigation process. I distinguish a case conference from a formal motion; the latter deals with a matter on a formal basis with a decision being made by the judge while the former deals with matters rather informally, usually in chambers, so that all ongoing aspects of the litigation may be canvassed with directions being given by the judge with a view towards streamlining and expediting matters, but all the while ensuring that no one is being denied justice. Our formal court commences at 10 a.m. and continues on to 5 p.m. with a 75-minute break for lunch. Case conferences of longer than "10 minutes" are to be booked in this period, although when a judge is tied up in trial on another matter but is the "continuing" judge in the subject matter (we attempt to have all matters dealt with in a continuing case by one judge), then these case conferences may be held before or after regular court or during the lunch break. "10 minute" matters are dealt with between 9:30 a.m. and 10 a.m. in chambers by as many of the then sitting judges as are required. They are designed to deal with mechanical matters on a quick and timely basis. However these 9:30 a.m. appointments are quite important for two additional reasons – firstly, they allow for early contact with a judge who may independently or on request explore the possibility of settlement and how that might be facilitated and secondly, in real time litigation, counsel are able to have "immediate" access to a judge to determine what sort of a schedule should be imposed to meet the practical deadline imposed by the circumstances.

It may be that the plaintiff unrealistically wishes the trial to be the day after the claim is made; similarly the defendant may wish it to be the "week after never". If the counsel on all sides are not able to come to an agreement on scheduling of all events, then the judge will be able to direct what is reasonable at the case conference. Frequently the judge will caution counsel that they are being too aggressive with their schedule and that they should allow more slippage time; this is especially so when faced with either ultra busy or relatively inexperienced counsel. I would emphasize that we are a "scheduled court", not a "hurry up court". It should be noted that aside from matters involving bankruptcy and insolvency, going on the Commercial List is a voluntary decision of counsel. Even if the matter does not commence in the Commercial List, a subsequent application for transfer may be made by all sides or just one side; this frequently

happens (even on a joint basis) when the litigation gets bogged down in the regular list. While there are some senior commercial litigators who seem to wish to avoid the Commercial List, I think it fair to observe that the regular attendees on the List are the recognized leaders of the commercial bar. Further it seems to be regarded as an obligation of honour by counsel whether they represent the plaintiff or the defendant to have the matter dealt with in the Commercial List where there is a reasonable assurance that the case will be dealt with in a timely fashion by an experienced judge who has an interest in the field but in the usual fair and evenhanded basis that all matters are to be dealt with in any area of the court. Less experienced counsel come to the Commercial List for a variety of additional reasons: from gaining the experience of litigating on the List, to stumbling on it and thinking that the judge will wave a magic wand that will resolve the case so that counsel need not do much work. I would think that approximately 85% of our work involves "recidivists"; 15% involves "accidental tourists". I should note that the insolvency bar in Toronto (this bar is basically an Ontario insolvency bar because of the specialized nature of the work; and indeed members of this Toronto bar are frequently retained to do work in the rest of Canada and in a fair number of instances internationally) is a tight-knit group. They were conscious of the necessity to reach timely resolutions and were innovative and resourceful well prior to the establishment of the Commercial List. Indeed they epitomized the 3 Cs of the List – communication, cooperation (at least in procedural matters) and common sense.

Scheduling

Being a scheduled court, we guarantee that when a matter is booked, it will be dealt with on the scheduled date(s). However implicit in that is that the start date for one trial is the day after the finish of the previous one. Hence you will appreciate the practicality of the witness milestones in the Trial Requirements Memo. We will build in as much flexibility to that as circumstances and practicality allows. To date we have had the relatively few matters which go into overtime and are interrupted and continued at the next available free time. Sometimes with counsel who have a justified reputation for inaccurate time estimates, we have to build in even more (unannounced) slippage room.

There is constant juggling going on between the dynamics of erupting real time litigation which must be "immediately" squeezed in and the relief of settlements plus the unfortunate situations where because of truly unforeseen circumstances, a matter has to be adjourned. Where there is no Commercial List case available to fill the void created by a settlement or adjournment, then that freed up Commercial List judge will be released to the regular list provided that that judge does not have an outstanding reserve decision which needs to be released on an urgent basis. If there is more work than available judges because of an emergency matter or an urgent carryover, then the judge's day becomes a little longer (but recognizing that this approach can only govern for a short time, otherwise the judge will lose effectiveness). Sometimes one of the judges who have Commercial List experience but not so assigned for that 6 month period may be freed up by the Regional Senior Judge to deal with an overload situation. So far in the 12 years of operation of the Commercial List we have had nimble footwork making good luck.

Steps Leading to Trial

What is required is a tested-by-experience standard as to how long it is reasonable to allow the litigants, as assisted by their counsel, to take the required steps leading to a trial, or with necessary adjustments, a paper application, or merely a motion. Everyone works to a deadline - but not to a deadline which is a movable one without appropriate justification to the court. The deadline has to be objectively reasonable to be workable. Subject to any limitation period the plaintiff is under no time constraint as to investigation for any preparation of its complaint. The defendant must have a reasonable time to deal similarly with its defence. In the case of multiple parties, longer still will be required, especially if there are claims over against others. Included in the defence time must be adequate provision for the defendant to locate and retain counsel, if such counsel is not already on retainer. Where the defendant is a foreign entity, a greater allowance must be made for retention of counsel (from a competent established and available bar) and the preparation of the defence. The pleadings should be in sufficient detail for the parties to readily recognize what is at issue and the general thrust of the evidence that will be relied on. Pleadings which slavishly recite standard form precedents with the plaintiff alleging a long list of irrelevant claims or the defendant providing unresponsive blanket details are to be

strictly sanctioned. If the pleadings are not sufficiently detailed in part, then either side should be entitled to request "particulars". When this is completed, there should be a mechanism to identify and provide access to originals (with the additional provision of copies) of truly relevant material documents. Thereafter there should be provision for an examination by the party in opposition of at least one (perhaps more with the permission of the court unless the other side consents) representative of each side. This will allow the examining party to determine the specifics of the opposite case, particularly in reference to the documentation. Consideration could be given to requiring each side to provide "will say" statements for each of the witnesses it would propose to call at trial; such "will say" statement should give the general thrust of the testimony but refrain from giving exact details (otherwise too much time and effort will be wasted in attempting to fine tune this into the equivalent of extensive evidence at trial). Either side should be allowed to request the other side to admit or confirm various facts which reasonably should not be in issue; if this request is refused and it is thereafter demonstrated in trial that the admission/confirmation ought reasonably to have been given, then such conduct may be sanctioned by a costs award. The court may wish to consider providing the parties with access to a judge or master with a view to that judicial officer checking to see if the parties can agree on various issues and/or facts so that the agreement may be relied on at trial. Needless to say that throughout the litigation process, the court would expect and be entitled to demand that there be a continuous canvassing of the possibility of settlement of some parts or all of the lawsuit.

Finally, after a pretrial conference where the parties have access to a settlement judge (who would not be the trial judge and who would not discuss the merits of the case or the positions of the parties with the trial judge), there should be a trial management meeting of counsel with a judge who should be the trial judge if that is logistically possible. That judge should review with the counsel what the mechanics of the trial will be, how evidence will be presented (e.g. it may be that the witness will provide his evidence by way of an affidavit (or other written statement to be confirmed at trial in advance of the trial for review by the other side which should allow for focussed cross examination by either the opposite counsel in an adversarial trial or by the judge with the assistance of opposite counsel in an inquisitorial trial), and how long it is expected that the trial will take (including time for opening and closing statements and the individual times for each witness). Document briefs of the material to be

referred to and relied on at trial should be provided to the judge in advance, preferably in compendium (i.e. extract) form with the relevant portions highlighted and page references marked on the cover page of each document. Frequently it will be desirable to have the statute, case law and legal writings in advance, similarly in such compendium and highlighted form. Indeed it may be preferable for counsel to provide their opening statement in writing to the judge in advance of the trial.

After the evidence has been completed, it may be appropriate to allow a short time (e.g. a week or so) for the purpose of allowing counsel to prepare their closing submissions, perhaps in writing. Not only will this allow greater focus of the evidence and the applicable law, but it may also provide the parties with the opportunity to settle once they see how the evidence has gone in during the trial.

Much of our work in the Commercial List in Toronto is dealt with on a "paper" application basis so that when the matter comes into court, the judge will have the benefit of a record (the material filed by both sides together with a factum (or skeleton) of the facts relied on and the law plus a case book (with page references and highlighted)). Where an issue will be affected by credibility, we will have appropriately brief *viva voce* examination of the witness; in this way court time can be minimized.

It is also important to ensure that counsel are recognized as officers of the court and in that capacity they are obligated to be responsible to the court as well as their clients.

Case Management

Case management can take the form of the court adopting a "hands on" approach to selected cases with periodic joint reports to ensure that they keep on a reasonable track - usually a timetable agreed between the parties which is accepted by the court (in case of failure to agree, the court will direct what is reasonable in the circumstances). Alternatively it can take the general form of statutorily mandated time lines by which certain functions must be accomplished. In either case, a party in default risks having its side of the case dismissed or otherwise disregarded unless that party can convince the court that an extension is reasonably

warranted in the circumstances. To facilitate monitoring of cases in the system, with or without either type of case management, the court will require computerized recording of its case load. This will assist with respect to ensuring that deadlines are met, filings are appropriately made and when filed they can be tracked so that they may be retrieved and to providing overall statistics of various nature so that the court may monitor the court's own performance to ensure that standards are met. The court system will also require adequate resources to ensure that it can perform its tasks as to court filings, storage and retrieval, security, administrative, secretarial, record keeping for purposes of appeal, research, continuing education, maintenance of an appropriate record of the trial and other proceedings for the purpose of appeal, etc.

Scheduling of trials and other court attendances is always a difficult task. Litigation of any nature, but particularly commercial litigation and insolvency proceedings, does not lend itself to a production assembly line approach. Each case will have its differences and unforeseen aspects. Then too there is the question of cases settling, often, perhaps far too often, on the eve of trial. Experienced counsel and competent court administrators/schedulers will be able to closely predict how long cases are likely to take and whether they are likely to settle and when. Ideally the court scheduler should be a person of acknowledged integrity so that counsel are confident to advise on a confidential basis their own view of whether a case will settle (note, this is the experience of the English Commercial Court).

The insolvency bar which practices in the Commercial List and elsewhere in Canada are masters of negotiating resolutions which maximize and preserve value. Even if they are unable to reach a final settlement, invariably they will find a solution which assists – e.g. if an asset or a business enterprise is to be sold, but there is a dispute as to who has priority over the proceeds, the contestants will agree to the sale and thereafter litigate on an autopsy basis entitlement to the funds realized.

There must be a delicate balance of overbooking so that the court will have a continuous flow of cases to deal with at trial, notwithstanding any settlements. There must be sufficient slippage allowed for so that trials which go into overtime can be accommodated. If there is a gap with no available trial work, then one would assume that the judge would be able to attend to

other judicial duties including the writing of judgments which are reserved so that these judgments may be released in a timely fashion. If there is a problem where settlements do not completely relieve the overbooking, then there should be flexibility in the system to accommodate those further trials which must go on as previously scheduled (especially if witnesses are coming from long distances or are reasonably unavailable otherwise for an extended period). Scheduling should aim at meeting committed targets.

A most important factor in achieving settlement in cases on an institutional basis is the availability of a judge and a courtroom. If the momentum of the court system is that court dates are met, then the system will work smoothly including a high level of settlements. If the momentum is negative, then the system will start to break down because of overload and backlog accumulation; cases will not settle; the public and litigants/counsel generally will lose confidence in the court system.

Ways to Resolve Disputes

In the course of human (and business) events there is always the chance that parties will disagree. How are those disagreements resolved? Must every dispute have to be adjudicated by a judge? Clearly not! If a court had to rule upon every point of contention between litigants, then not only would the court system break down and fail, but also business and commerce would suffer because of cost, delay and uncertainty. Certainty of prevailing conditions has always been a foundation for any business decision. If business decisions are impeded, then trade and investment will diminish. If so, then the economy of the nation will suffer and its people will have to make do with a lower standard of living than would otherwise be achievable.

In any developed jurisdiction there will be disputes. In the Toronto region (with a population of approximately 3 million, but the centre of commerce for the Province of Ontario), in any given year there will be between 30,000 to 70,000 disputes (or an average of 50,000 cases a year) filed in the court system (excluding claims under $10,000 Cdn), the numbers depending on the stage of the business cycle. Perhaps half are not disputed (perhaps because there is no merit to a defence or perhaps because the defendant has no money to fight the case or assets to

protect) and thus default judgment is granted. That leaves 25,000 cases a year to be dealt with. The general civil Toronto court only has the capacity to conduct 1,000 trials a year. What of the other 24,000 cases? If these are merely added to the backlog of cases to be tried, then you will readily appreciate that within a decade cases will be added to the trial list which could not be heard during anyone's lifetime. From experience I can advise that this is one of the two biggest problems for the court process in Nigeria.

The answer is that the other cases in Toronto settle. The question remains as to why they settle and when they settle. A settlement when the parties have a high degree of comfort as to the circumstances of the case (including the facts related to the other side and its positions) and the law which is applicable to such a case is the best type of settlement. However a settlement when there are substantial material unknowns is not likely to be satisfactory. When that settlement is combined with any one or more of the following elements: a party or a material witness dying or becoming mentally incapacitated; a party becoming bankrupt; or a party becoming so frustrated at the expense, delay and uncertainty of a lawsuit that the litigation is eventually abandoned, then it is the worst type of settlement. A successful law and court system will promote the best type of settlement and attempt with all reasonable effort to minimize the worst type.

Part of that effort will be direct court involvement and part will be indirect. You may have heard of ADR (or alternative dispute resolution) which has been employed to describe a non-judge-imposed resolution of a dispute. As that term has been used in North America, it usually refers to mediation and arbitration. I am of the view that is too narrow. Allow me to discuss what I believe to be a more complete spectrum of dispute resolution, and a spectrum which needs to be in place and working for a successful system.

One analysis of the spectrum is that it ranges from:

(a) **Negotiation:** which involves the parties to a dispute sitting down, with or without advisors, to discuss the dispute and to see if they can come to a mutually agreeable solution.

(b) **Mediation:** which involves the parties, with the assistance of a trained neutral, again seeing if the parties can come to a mutually agreeable solution. The neutral (mediator) will take an objective view of the submissions of the parties and with some "brain storming" and some "reality checking" see if some or all of the issues in contention can be eliminated.

(c) **Neutral Evaluation**: which involves the parties presenting (usually as early on in the case as possible) their case and positions to an experienced neutral who would be regarded as an expert and having that expert give the parties a non-binding opinion as to the legal merits of the case and the "percentage" values to be given to possible/probable outcomes so that the parties may factor that into their settlement decisions.

(d) **Arbitration:** which involves the parties presenting their case, as if it were in essence a trial before a judge but instead, to an arbitrator who would be a neutral selected by a process agreed between the parties. Evidence would be given and credibility assessed. Depending on the rules previously selected (e.g. as contained within the provisions of a contract which may be in dispute) or selected as a result of adopting the arbitration route to resolve the dispute, the parties may adopt a streamlined approach to the litigation (e.g. limited or no examination of the parties prior to the arbitration or limited production of documentation). The arbitrator's decision would be binding on the parties. There may or may not be an appeal from that decision, either to a panel of other arbitrators or to a court. The basis for appeal may be completely open in the sense of an arbitration *de novo*, or limited to errors in principle.

There are various refinements and modifications to the foregoing. For example, in a mediation it may be agreed that the mediator may separately caucus with one side to hear information which that side may not then wish to communicate to the other side at least directly.

However that information, especially when it is combined with that gained from a caucus with the other side, may demonstrate that there is a narrow gap to be overcome and provide an insight as to how to do so employing neutral questioning and observations by the mediator. Caucusing may also provide the mediator with appropriate privacy to advise that side that, in the mediator's opinion (and experience), that side is being unrealistic in its presentation and expectations. For caucusing to work effectively, the parties have to have the utmost confidence in the neutrality, objectivity and discretion of the mediator. Sometimes the parties will agree, either at the outset or during the mediation, to have the mediator transform into an arbitrator (this is referred to as Med-Arb). Usually this will be where the parties have agreed in the mediation as to how to resolve most of the issues, leaving only a few (usually minor) issues in dispute. The mediator will use the knowledge gained of the case during the mediation to give a decision (conceivably non-binding but likely binding). If there has been caucusing and there remains undisclosed information which either side wishes to remain confidential, then it is almost impossible to have the mediator become an arbitrator.

None of these traditional forms of ADR is to be regarded as an inferior means of dispute resolution. The parties and their advisers must be fully prepared and organized to the requisite degree before embarking on any procedure. When one comes to the arbitration option, then the degree of preparation and organization would be equivalent to that of a court trial. There are great similarities between an arbitration and a court trial. What are the differences? They include the following:

(a) A trial (and all documentation used therein) would, absent exceptional circumstances, be open to the public including the media and competitors. Arbitration is usually conducted privately and it may therefore be helpful to maintain confidentiality of, for example, business trade secrets.

(b) The parties may agree that the case needs special expertise by the trier. Unless the judge assigned to the case possesses those qualities, then that expertise would have to be filtered through to the judge either by the appointment of a court expert or by the testimony of experts retained by the parties. The arbitration clause of a

contract may specify a particular arbitrator with that expertise or require the appointment of someone possessing those qualities, or the parties may at the time of the dispute agree on such a person.

(c) While there may be court filing fees, these would likely not be as significant as the costs which the parties would bear (subject to reallocation at the end of the arbitration) in paying for the arbitrator(s) plus physical costs together with a possible arbitration association assessment.

It should be recognized that whether the trier be a judge or an arbitrator, the trier must be a neutral independent objective person properly trained and possessing adjudication skills. A judge may likely have more adjudicative experience than an arbitrator unless the arbitrator is a professional arbitrator with no other duties. It is possible that a judge, if authorized by the law of the jurisdiction, can take on the role of an arbitrator; in this respect I note that the U.K. government has so authorized judges and masters (a term used for lower level, "junior" judges or quasi judges) of its Commercial Court to act as arbitrators.

Real Time and Autopsy Litigation, Resolution Encouragement and the Commercial List

Any successful court system must be able to respond in a timely fashion to the litigation demands upon it. This is especially so of what we term "real time" litigation, as opposed to "autopsy" litigation. Real time litigation is where the outcome of the litigation will have a material impact upon how the parties conduct themselves during and after the litigation and it is important that a decision be rendered as soon as practicably possible. A good example of this would be litigation involving an insolvent business. In an insolvency, value of the enterprise will quickly evaporate over time (e.g. the organizational, distributorship and/or business reputation with customers' goodwill). If a business is to be reorganized thereby preserving to the maximum that value, then litigation affecting that reorganization must be dealt with forthwith and not be put in a chronological lineup with autopsy litigation. Autopsy litigation is where it is not that important that a case be tried in court "today", 3 months or 3 years from now (even in autopsy litigation, I see no reason why those cases should not be tried at the outside within 3 years of

instituting the action). The functioning court system will balance the needs of both types of litigation on a general or overall basis. If absolute speed is essential and a real time case cannot be accommodated on that schedule, then it is conceivable that that might be achieved by resorting to arbitration.

In Toronto we established 12 years ago a Commercial List, being a subdivision of our Superior Court of Justice. It has a roster of five judges who have corporate/commercial experience. They deal with both real time and autopsy cases including insolvency matters, shareholder and other corporate litigation, intellectual property disputes and other commercial litigation of a more complex nature. The Commercial List has enjoyed a good reputation amongst lawyers and clients.

How does the Commercial List operate? Perhaps half of our work is conducted by utilizing a paper application or a paper motion with affidavits, cross-examined on if necessary outside court with a transcript being available (including the hybrid using some limited *viva voce* examination in court where credibility is key to an issue). In this way a matter can be dealt with in anywhere from (usually) one or two hours to one or two days depending on the complexity of the case, the number of issues and the number of sides involved. There is a focus on relevance – the first and necessary hurdle in the question of admissibility of evidence. If it's not relevant, it is not admissible (and not a question of as some would have it the weight to be given to the evidence). This is true for both the paper application and any trial work.

We have emphasized the importance of continuously canvassing settlement. In this respect we have noted that resort to the oldest form of ADR – namely negotiation – early on is extremely productive. As a result of the views of some like-minded judges and some fortuitous elements, the Commercial List was the "midwife" for the province-wide mandatory early mediation requirement in Ontario. A pilot project supervised by the judges of the Commercial List achieved sufficient voluntary (but encouraged) participation success that the government mandated that in all civil litigation (outside the Commercial List and a few other exceptions) the parties were to retain a trained mediator for a 3 hour session to see if a mediated settlement could be achieved within 3 months of the action being started. It remains to be seen if this mandatory

initiative is as successful in the long run as the voluntary participation pilot project was since if litigants voluntarily subscribe to a mediation session, they are already half way to an overall resolution.

I think it fair to observe that dispute resolution should not be thought of as being restricted to the categories above. Perhaps if one were to go further out on the scale from negotiation, there would be an appreciation of other elements. For example, negotiation after the fact is not as desirable as negotiation at the time of entering into the contract or relationship when the parties are on "friendly" terms. It is far better to consider all the foreseeable realistic possibilities which may disrupt the parties in the future and negotiate then a satisfactory way of dealing with same. In that way a dispute may be headed off within the contract or at least a mechanism be established to more easily resolve the problem when it occurs. No contract will stand unchanged and be good for all time; external conditions will change, new technology will take over and the parties will know each other better. Perhaps it would be a good idea to have incorporated in any contract that the parties will periodically review their relationship and contract. For example, I have observed litigation which has escalated in heat and demands for money when all that the plaintiff really wanted was better quality control on its purchases from the defendant or new arrangements to ensure that there were no delays in shipment of components, which delay impacted upon the plaintiff's commitments to its customers. A trial or arbitration is not the solution for a continuing relationship or where the parties care about their reputation in the market which may impact on their suppliers, customers and others who deal with them.

Litigation Culture

Then too, there is the question of litigation culture. If the lawyers have restricted their skills to being courtroom lawyers, then there likely will be a lack of any meaningful communication which may lead to an early, less costly and more effective resolution. In some communities this may be seen as an inefficient and ineffective way for a lawyer to serve his client; in others the atmosphere may have degenerated down to a battle of egotistical gladiators. I think much is to be said for proper training in dispute resolution at the legal institutions and

schools and for the encouragement by the judiciary and bar associations in this regard. Focus on the real issues in dispute is always important. Examination of the other side prior to trial along with production of that side's documentation should be sufficient to avoid trial by ambush but not so extensive as to result in litigation by avalanche (with the crucial documentation buried in irrelevant material). Where both parties are well financed, is there any problem with allowing them to engage in "endless" deep pocketed litigation? Perhaps not, but at trial it means that they will inappropriately use up time which other cases could more appropriately utilize, and aside from the immediate trial considerations it will send out a wrong signal and encourage others to engage in such tactics. Where one of the parties is not as strong as the other financially, there may be a tactical attempt to win a battle of attrition. The court system should be set up in such a way to control and avoid this. Wars are won by strategy, not tactics.

The formal court system may also assist resolution of matters before reaching the trial stage. Institutional encouragement to explore one of the ADR options is helpful. So are case conferences with a judge to review the status and anticipated progress. Case management milestones provide a calendar by which certain events must be concluded unless the court allows an extension for sufficient reason. It may be that a case may turn on a particular issue which can be determined by the judge on a summary judgment motion earlier on: see *Ashmore v. Corp. of Lloyd's* [1992] 2 All ER 486 (H.L.). This case also emphasizes that counsel owe a duty to the court not to advance ten bad points in the hope that the judge will determine one good point out of them. In common law jurisdictions the judiciary are able to rely on inherent jurisdiction to ensure that a case proceeds not only as "justice dictates" but, as well, as "practicality requires". In non-common law jurisdictions it is helpful for the governing legislation or code to provide some equivalence to inherent jurisdiction so that a judge has the requisite discretion to deal with matters not directly covered by the legislation or code, but in a judicial way to ensure that justice is done. As well there is the concept of the pretrial conference (close to the trial date) where a judge will receive the written submissions supplemented by oral comment of the parties and review the applicable law with a view towards suggesting and brokering a settlement. The parties will be invited to make offers to each other and the judge may well advise as to a likelihood of outcomes depending on various scenarios including credibility of the parties (or acceptability of expert testimony) and a possible range of award at trial. In the Canadian system as opposed to

the American, there is the element of the award of costs by the court after a decision. These costs awards are usually not a full indemnity for the legal expenses attributable to the litigation, but they are generally a significant contribution. As a result each side is thereby encouraged by a graduated scale of costs, to make a realistic offer(s) of settlement to the others as early on in the process as possible.

In the end result no matter which option has been chosen to resolve the dispute, no objective person having been informed of the essential particulars of the case should be surprised by the result. If that result is achieved then one would have to conclude that the objective of rendering justice had been achieved. Then there is the question of timeliness.

How does one get the message out? Firstly there is the experience that counsel get as over time they return to the Commercial List and so become familiar with its emphasis on thinking ahead and self-discipline. The Practice Direction (which as you will see reiterates a common sense and fair to all sides approach with an emphasis on communication) is published as part of our official court reports; it is also included in all the annual books on Rules of Practice. In addition, Commercial List judges are frequently asked to speak at bar education programs. When the List was started, we offered to have a judge attend lawyers meetings held within a law firm (or group of firms) at the lunch hour or after court closed. Finally we have an active Commercial List Users' Committee (bar, bench and administration) which meets every two months; it also hosts an annual get together of List counsel and insolvency practitioners.

Analytical Skills and Experts

How does a judge deal with complex evidence and issues? Aside from the aspect of the commercial side of the court being manned by specialized judges who have experience directly in this area or who have continued to gain such by individual or group training, there are a number of ways of dealing with this. Firstly, one should always expect that the parties through their counsel will agree on or admit certain facts.

Then there is the question that the court may take judicial notice of certain facts without formal proof. The facts may be uncontrovertible. They are able to be accessed in a standard textbook accepted on a widespread basis by educational institutions without controversy (e.g. the laws of physics).

Additionally there is the aspect of business or government records which are maintained in the ordinary course and where there is no reason to challenge their authenticity or accuracy. The *Evidence Act*, on notice to the other side, allows these to be produced into evidence at trial without further proof.

Available, though infrequently used in Canada, is the ability of the judge to appoint the court's own expert, usually on the basis that that expert be paid for by the parties in some fashion.

Then there is the aspect of the parties retaining an expert to provide the court with an explanation of and opinion of the evidence as presented. In Canada, the Supreme Court of Canada has established the guiding principles for the admission of such expert testimony: *see R. v. Mohan*, [1994] 2 S.C.R. 9. The four point test is that the evidence:

(a) must be relevant;
(b) necessary in assisting the trier of fact;
(c) not be excluded under any other exclusionary rule (e.g. hearsay); and
(d) be presented by an expert who is properly qualified.

The proper qualification of the expert comes first; the expert is allowed only to testify as to the area in which he is so qualified (in any other area, he is <u>not</u> an expert). The subject area must be one in which there is accepted scientific validity including peer review and confirmation; "real science" is acceptable whereas "junk science" is not). Increasingly in Canadian courts, we are experiencing experts who are being attempted to be qualified when they are nothing more than

hired mercenary advocates (in one case that expert opines "x" and in the next, otherwise identical case, the expert opines "not x"). We require the experts to be neutral and objective not “jukeboxes” who will play any tune the retaining person with the money requests. Counsel are reminded to caution their proposed experts in this regard.

I am of the view that Justice Cresswell in *The "Ikarian Reefer"* [1993] 2 Lloyd's Rep. 68 correctly stated what the court is entitled to expect. His points were as follows:

1. Expert evidence should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

2. Expert witnesses should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise.

3. Expert witnesses should state the facts or assumptions upon which their opinion is based. Witnesses should not fail to consider material facts which could detract from their concluded opinion.

4. Expert witnesses should make it clear when a particular question or issue falls outside their expertise.

5. If an expert's opinion is not properly researched because the expert considers that insufficient data is available then this must be stated with the indication that the opinion is no more than provisional.

6. If experts change their view on a material matter after reports are exchanged, then that should be communicated to the other side without delay.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or similar documents, these must be provided to the other party at the time of the exchange of reports.

The English have gone even further with their Practice Direction on Part 35 introduced in 2000. I have no doubt that it will greatly assist the English judges. It reads as follows:

Part 35 is intended to limit the use of oral expert evidence to that which is reasonably required. In addition, where possible, matters requiring expert evidence should be dealt with by a single expert. Permission of the court is always required either to call an expert or to put an expert's report in evidence.

FORM AND CONTENT OF EXPERT'S REPORTS

1.1 An expert's report should be addressed to the court and not to the party from whom the expert has received his instructions.

1.2 An expert's report must:

1. give details of the expert's qualifications,

2. give details of any literature or other material which the expert has relied on in making the report,

3. say who carried out any test or experiment which the expert has used for the report and whether or not the test or experiment has been carried out under the expert's supervision.

4. give the qualifications of the person who carried out any such test or experiment, and

5. where there is a range of opinion on the matters dealt with in the report -

i. summarise the range of opinion, and

ii. give reasons for his own opinion,

6. contain a summary of the conclusions reached,

7. contain a statement that the expert understands his duty to the court and has complied with the duty (rule 35.10(2)), and

8. contain a statement setting out the substance of all material instructions (whether written or oral). The statement should summarise the facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based (rule 35.10(3)).

1.3 An expert's report must be verified by a statement of truth as well as continuing the statements required in paragraph 1.2(7) and (8) above.

1.4 The form of the statement of truth is as follows:

'I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct.'

1.5 Attention is drawn to rule 32.14 which sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.

(For information about statements of truth see Part 22 and the practice direction which supplements it.)

1.6 In addition, an expert's report should comply with the requirements of any approved expert's protocol.

Unless the expert adheres to those standards, his opinion will be rejected.

A trial management conference will assist in determining whether any expert evidence will be needed or presented. Experts' reports should be exchanged on a timely basis so that they may be analyzed and, if necessary, disputed. Frequently one finds that it is only certain elements in the opinion which are contested. Therefore it is helpful to require that the opposing experts meet before trial and discuss their points of difference. If they are not able to resolve these points, then they are required to jointly present them in chart/table form. This will assist the trial judge as he will be able to determine what the judge's view is as to these contested points by forming his own opinion with the assistance of the experts and thus resolve the "missing" elements in the formula.

Does It Work?

The reaction of the business community to the Commercial List has been almost uniformly positive and laudatory. Commercial cases - whether real time or autopsy - are decided on a timely basis by experienced interested judges. These judges appreciate the need for business certainty and forward planning and implementation. We are aware of numerous instances where the clients have insisted that counsel (who may not in certain instances be looking forward to the discipline of the Commercial List) put the case on the Commercial List - and this applies to both plaintiff and defendant. As discussed previously, the bar are generally enthusiastic about the

operation and availability of the Commercial List. We attempt to be as responsive to the needs and changes as possible. In this regard we have the advice of a Users' Committee; in addition any counsel may make their views known to that Committee and to the bench on an ongoing basis.

In every bed of roses, there are thorns. What problems have we encountered in the Commercial List otherwise not alluded to? Let me dispose of an obvious possible difficulty. If the matter is dealt with effectively, efficiently and expeditiously by the trial court in the Commercial List, might this be frustrated if the matter is appealed? Fortunately our appeal courts have recognized the desirability of making certain that game playing is kept to a minimum. Even in past years where the regular backlog in the Court of Appeal was approaching 4 years, that court would deal with appeals from the Commercial List on a "forthwith" basis. For example, in the *Schneider* case I have referred to, the appeal was perfected and then heard in August with the decision being rendered in October 1998. Counsel and parties appreciate that they cannot derail the process by going to a tactical appeal. I would also suspect that appropriate deference is shown to the experience and expertise of the Commercial List judges when they are operating in their "family" area.

Can counsel still derail a Commercial List case? The answer is only rarely. One and almost singular example of this was a case which was scheduled to take 14 weeks in trial - an inordinately long Commercial List case to begin with. Unfortunately the 3 sides / counsel only seemed to cooperate in being uncooperative. The trial took 14 months not 14 weeks. It appears that old style litigation habits - at least in this case - were difficult to shed. Rather than relying on the trial judge to keep the ship on track, the opposing counsel in this case on a round robin basis took turns in lighting probably unnecessary fires. The upshot is that 2 weeks had to be set aside before the taxing officer to determine what the allowable costs will be. These costs will rival the multi-millions claimed in this suit which was dismissed. Thus it may be observed that where all counsel are of the view that there should be no adherence to the 3 Cs of the Commercial List, a Commercial List case can be as slow and expensive as a regular case. However when at least one side will play by the 3 Cs, then the job of the trial judge in controlling the process is made infinitely easier.

We are best at a mix of paper applications and short trials (of no longer than 2-3 weeks). Where the trials take mega weeks, we tend to get as bogged down as the regular list - except that the cases will likely only take half the time to try. One practical problem which plagues all parts of the court is where there is a multi party case so that there is likely a large number of experienced counsel participating. In the *Schneider* case we had 7 sets of parties with 23 gowned counsel (and who knows how many present in mufti). Scheduling those trials, even on a spaced out basis is a delicate task. Of course, during the preparation of those cases, experienced (and expensive) counsel are able to lay off that "mundane" (but ultra important task) on juniors. The problem with that is that the juniors are not in a position to resolve the case and often have difficulty in conceding on various points and issues.

In our court system we have the benefit of Masters who are authorized to deal with routine and generally simple matters including procedural matters (for example, whether questions of a party on a cross-examination were properly refused or must be answered). They relieve the judges of a good deal of mundane work. However we have found it salutary for the judges to take on this type of work periodically so that they may appreciate what is involved. Similarly we have Bankruptcy Registrars (one in Toronto) who are the equivalent to a Master, and frequently a Master may be a part-time Bankruptcy Registrar in some locations.

Important for a Commercial List operation is a skilled and dedicated court office. This office must ensure that the judge has all the material on a timely basis and that matters are properly scheduled. That office should be able to assess counsel and cases as one would handicap a horse race.

Does the Toronto Commercial List work? I believe that I can safely confirm that it does. It does not produce miracles. It needs a lot of care and attention. It requires the assistance of counsel, counsel who recognize that it is in their clients' and their interests to cooperate to ensure that the list runs smoothly. But it has a good - and I believe rightly deserved - reputation. Other areas of the court - both geographically and subject matter - have made varying attempts to initiate a similar process, many of which have had positive results.

Importance of a Functioning Court System

I have frequently mentioned that the law applicable to the case has to be assessed. In our jurisdiction that includes not only statute law but previous case precedent and legal writings. It is helpful for the legal community to have ready access in hard copy and electronically to these resources so that they may appropriately advise their client as to the potential legal outcomes under various fact scenarios.

Lastly, it is important that the court system in any country be set up in such a way that the public and litigants have the utmost confidence in it. This is particularly important where there may be a high degree of foreign participation in the lawsuits. Needless to say the court system must be blind as to the nationality or domicile of a litigant (except as to security for costs concerns). Otherwise needed foreign investment will tend to dry up or become considerably more expensive, thereby depriving the domestic economy of the opportunity to fully develop its growth potential and deprive the society of the economic engine working to efficiency to fund social needs. In any event the courts should, in fact, must be independent of the rest of government, accountable according to publicly available criteria only in the same way that courts are in other parts of the world. Judges must be neutral and objective. Their remuneration and tenure of office must be sufficient to attract competent appointees. They must be and perceived to be beyond reproach. I know that all of you here take a particular and justifiable pride in this regard.

I appreciate the opportunity to participate in this seminar. I expect that I will learn a great deal from all participants. I have never been to another legal jurisdiction where I did not pick up an idea for improving our system. I will be pleased to discuss my topics (and any other areas in which I may assist) both formally and informally during my time with you.