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HIGHLIGHTS

News At Home

A California Assemblywomen, who chairs the state Judiciary Committee, has introduced a bill entitled "The Patient's Right to Trial Act" in the California Assembly. The proposed legislation bans mandatory binding arbitration clauses in health care contracts, and allows consumers to sue their HMOs. Critics of the measure see the bill as a trial-lawyer attack upon arbitration clauses. These attorneys view arbitration as a roadblock to securing large jury verdicts. Moreover, according to the critics, the bill represents a "weak link" strategy. If arbitration can be banned in this area, it eventually can be prohibited in all consumer sectors. (Story at page 67.)

The I.R.S. has made a timid move in the direction of ADR. The agency has announced procedures permitting taxpayers to request binding arbitration to resolve disputes between themselves and the agency. The option is available only in limited circumstances and subject areas. A public hearing on the new arbitration procedure will be held in early April. (Story at page 68.)

Judicial Decisions

The U.S. Court of Appeals for the Fifth Circuit has applied the nonstatutory review standard of "manifest disregard of the law" for the first time. According to the appellate court, U.S. Supreme Court precedent clearly allows court review of awards on a nonstatutory basis. Moreover, although statutory rights are arbitrable, they have to be protected as strongly in arbitration as in judicial proceedings. Finally, the payment of arbitral fees by employees does not render the reference to arbitration invalid as long as the payment does not prevent the employees from bringing their claims to arbitration. (Case summary at page 74.)

The California Supreme Court has held—in a potentially pathbreaking opinion—that claims for injunctive relief brought pursuant to a California consumer protection statute are inarbitrable. *Broughton* is one of a series of recent California opinions in which the courts have imposed restrictions on arbitration. In *Vandenberg*, the same court concluded that arbitral awards did not have collateral estoppel effect in relation to third-parties. The Bank of America case (*Badie*) placed restrictions on the enforceability of arbitration agreements in the consumer context. *Volt Information Sciences, Inc.* itself was a triumph of California procedural law over the FAA. Despite the careful and ingenuous wording of the opinion in *Broughton*, it is growing increasingly difficult to avoid the clash of position between the federal law on arbitration and some California court rulings. (Case summary at page 78.)

Perspective

WAMR is privileged to publish an article by The Honorable Louise Otis of the Court of Appeal of Québec on judicial conciliation. The program represents a unique ADR process and is producing outstanding results for Québec's highest court. Over 200 cases have been conciliated in civil, commercial, and family matters and more than 80% have been settled successfully, after a single conciliation session. According to Justice Otis, the conciliation service program is one way for the courts to adapt to the needs of society and better serve the interests of justice. (Article begins on page 80.)

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that to substantially invoke the judicial process a party must make a specific and deliberate act after suit has been filed that is inconsistent with its right to arbitrate and this invocation must cause prejudice to the opposing party. The court found the following factors may constitute waiver: filing an answer; establishing a counterclaim; pursing extensive discovery; moving for a continuance; requesting a jury; and failing to timely request arbitration. The court found prejudice in the time-consuming and expensive bankruptcy proceedings. In addition, Sedillo's bankruptcy petition was found to be filed in bad faith. Further, nearly a year elapsed between the filing of the lawsuit and the request for arbitration. ❑

JP PERSPECTIVE

Perspective

[*Editor's Note:* WAMR is honored to publish this important article by The Honorable Louise Otis, J.C.A. The experience of the Court of Appeal of Québec with judicial conciliation offers an invaluable set of dispute resolution lessons for others who may be interested in this process.]

The Conciliation Service Program of the Court of Appeal of Québec

by

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The Canadian judicial system exists within a federal political structure. The federal parliament (located in Ottawa) and the ten provincial parliaments all enact laws in their respective fields of competence. According to the Canadian Constitution, each province has exclusive responsibility for the administration of justice.

The Court of Appeal of Québec is the highest court in Québec. Its twenty judges have the power to hear appeals from the lower courts. Simply put: the Court of Appeal is a court of last resort. Very few of its judgments in civil matters are ever brought to the Supreme Court of Canada. In 1998, for example, only six appeals from the Québec court were authorized by the Supreme Court of Canada. It would not be an overstatement to say that 99% of the judgments in provincial civil matters rendered by the Court of Appeal of Québec are final.

In 1998, under the auspices of the Chief Justice of the Court of Appeal of Québec, Pierre A. Michaud, the conciliation service was implemented as a pilot program at the appellate court. The author was responsible for the design of the program and has acted as a judge-conciliator in it since its inception. Judicial conciliation was a first in Canada and is still believed to be the only program of its kind anywhere. Judicial conciliation refers to the fact that the process involves the full and active participation of an appeal court judge at each stage of the process. The judge is the conciliator and will never be involved in the hearing, should conciliation fail.

Well into its second year of existence, the results of the program have been very encouraging. In fact, over 200 cases have been conciliated in civil, commercial, and family matters and over 80% have been settled successfully, after one conciliation session.

The Nature of Judicial Conciliation

Participating in the long-standing tradition of the adversarial system, in which a court decides a case because redress is sought by the parties, is and remains the judge's principal function. Judicial conciliation does not seek to have the traditional judicial process replaced by alternative forms of dispute resolution. Judicial conciliation does recognize, however, that the instruments for dispute resolution are readily available to judges when the remedy sought and the interest of the parties are such that a just solution may be reached without the need for a final judgment on the merits.

Judicial conciliation offers parties already engaged in the traditional judicial process an additional route for the resolution of conflicts. Whereas ADR generally advocates bypassing the formal system altogether, judicial conciliation offers another pathway to resolution in the judicial process. Judicial conciliation also permits the parties to remain within the formal system in the event that the attempt at negotiations fails. The Court of Appeal has integrated the two tracks for resolution into a harmonious and functional dispute resolution structure.

By the time litigants lodge an action before the Court of Appeal, they are firmly gripped by the mindset of the adversarial system. Having had a direct experience with the adversarial approach at the trial level, the attitude settles in and does little to encourage the parties to consider resolving their conflict amicably, on their own. Judicial conciliation thus offers litigants an opportunity to withdraw—voluntarily and temporarily—from the formal adversarial process. It allows them to attempt to settle their differences with the active support and assistance of a judge. The recourse to judicial conciliation is a risk-free proposition for the parties. They remain free to return to the formal system should settlement not be achieved.

The process, therefore, is entirely voluntary, flexible, often informal and adaptable, and is invoked only when the parties manifest their readiness to reach an amicable settlement. Judicial conciliation is generally well-regarded by the lawyers who participate in the process because they are not strangers to negotiation or attempts to reach out-of-court settlements. The judge, moreover, does not exercise his or her authority as an adjudicator, but acts instead as a intermediary to help the parties clarify the contentious issues and find a solution to the conflict. As for the litigating parties, it empowers them to play an active and direct role in the proceedings at the appellate level—where ordinarily they are purely observers of the process. It is worth reiterating that the failure to achieve a settlement through conciliation carries no penalties for the parties. They simply re-enter the regular adjudicatory process.

The Need for Judicial Conciliation

Judicial conciliation is warranted for a number of reasons. First, the spiraling costs incurred by litigating parties in the traditional system have become prohibitive. Today's high cost of litigation is no secret. Even large corporations—which can, when necessary, factor the expense of litigation into their prices—are interested in avoiding these fees as much as possible. Imagine then the situation of the ordinary citizen with limited resources facing lawyer and court fees in an uncertain litigation. According to a recent study by the Canadian Bar Association, a three-day hearing at the trial division can have a price tag of more than $30,000. At the Court of Appeal level, further considerable expenses are incurred in the preparation of factums and official transcripts

A second reason which justifies recourse to conciliation is the court delay. The time required to obtain the transcript of the evidence and to file factums, added to the normal delay resulting from a backlog of cases is such that early settlement is an attractive proposition. A third reason for judicial conciliation is to allow the parties to exercise some control over their situation as compared to the uncertainty of result in appeal.

A fourth reason which makes judicial conciliation attractive to the parties is what may be called a certain "collective maturity" or "coming of age" in regard to the formal judicial system. That is to say, citizens today have had greater exposure to the legal process. While they appreciate its benefits, they are also aware of its drawbacks. Better informed, better educated, and perhaps more disposed toward innovations than previous generations, today's citizens are more inclined to commit to alternative conflict resolution. Having some sense of control over their destinies is highly valued. Judicial conciliation thus empowers the litigants and permits them to actively participate in seeking a mutually-acceptable negotiated settlement.

Finally, the fifth reason for having recourse to judicial conciliation was discovered somewhat unexpectedly during the course of actual conciliation sessions. That is, the profound psychological and physical breakdown expressed verbally to the judge-conciliator in private by the parties directly involved in prolonged judicial litigation. This empirical evidence has been accumulated in about two-thirds of the cases that went to conciliation. The professionals involved in litigation—even the most empathetic—often lose sight of this factor. Judges, attorneys, and law professors who are regularly immersed in conflict resolution, however, should be aware of the debilitating effect of the litigation process upon the parties. It is a very real problem.

The Program Features

Conciliation is available to all parties involved in civil, commercial, or family litigation at the appellate level. However, certain types of cases may not be suitable for conciliation (for example, a matter involving jurisdictional issues). Moreover, litigation in constitutional or criminal law is obviously excluded from conciliation.

In all cases, both parties must sign a "Joint Request for Conciliation" form. This is the one and only form that has to be filled out and filed. The form is forwarded to the office of the clerk of court as soon as possible after filing the notice of appeal. At any time before the court hearing, the parties may request a conciliation session. Parties not represented by counsel can also participate in the conciliation program.

It should be stressed that there are no additional costs to the parties. The Court of Appeal of Québec funds the program through its regular staff and the program operates under the general supervision of the Chief Justice. Filing the request for conciliation automatically suspends appeal proceedings. However, either party may at any time decide to abandon the conciliation program and return to the ordinary appellate procedure.

A program manager receives the request for conciliation and opens a file which is kept entirely separate from the Court of Appeal files. The program manager and the judge-conciliator screen the request for conciliation to evaluate the likelihood of settlement and the suit-

ability of the issues for conciliation. When necessary, the judge-conciliator can hold a conference call with the parties. The purpose of the conference call is to discuss the issues on appeal and the status of the negotiations in order to ensure that the parties have a real interest in conciliation. The conference call is also used to ensure that conciliation is not being used merely as a ploy for buying time in the ordinary court proceedings.

The parties must agree on one set of documents which together constitute the conciliation file. Among the supporting documents usually submitted are the following: the notice of appeal, the judgment of the lower court, any relevant proceedings and exhibits, settlement proposals, etc. To avoid unnecessary costs, court transcripts are not required. The supporting documents are usually forwarded to the presiding judge-conciliator approximately one week prior to the date set for conciliation. In practice, the conciliation process, being very flexible, adapts itself to each individual situation.

The Scheduling of Conciliation Sessions

A conciliation session is scheduled within thirty days following receipt of the request in writing. On average, only one three-hour session is required and it is usually held early in the appeal process. The parties can thereby avoid further major legal expenses and delays in obtaining official transcripts and preparing factums and annexes.

It is worth noting that, at this stage, the parties have already had two concrete opportunities to discuss the case: first during the telephone conference and then in the preparation of their supporting documents. Interestingly, this exercise at times triggers a productive dialogue, enabling the parties to communicate further and reconcile their differences even before the actual conciliation session begins. About twenty cases have been settled in this manner.

The Conciliation Session

All conciliation sessions are presided over by an active and regular judge of the Court of Appeal of Québec. The choice of a judge as conciliator rather than a non-judicial person such as a lawyer-mediator was based on various considerations. First, a judge is generally seen as impartial and independent. The judge is not renumerated by either party and exercises an important moral authority. Moreover, by appointing a judge as conciliator, deference and respect are shown toward the trial judge and the legal process which is still active and ongoing. It would seem inappropriate to have a private mediator–appointed by the appellate court–comment on the trial judge's decision.

At a time when there is a serious reluctance to increase the number of judgeships while the caseload at the Court of Appeal is constantly growing, judge-time is a dwindling resource. One may well question, therefore, whether appointing active judges takes up too much of that increasingly scarce judge-time. In Québec, the Court of Appeal in fact implemented the conciliation service without increasing the number of judgeships and without reducing the caseload of the judges. Moreover, experience reveals that conciliating a case soon after a notice of appeal actually saves judge-time–precious time which, otherwise, would be devoted to time-consuming motions and readings, hearing-preparations, listening to lengthy oral arguments and, after due deliberation (which takes more time), drafting a decision. Furthermore, it must be noted that the Court of Appeal panel is always composed of a minimum of three judges.

The Ground Rules and Procedure

At the beginning of a conciliation session, the judge determines ground rules and procedure with the cooperation of the parties and their attorneys. Each conciliation session is unique. The parties will structure it in the way they want. It is important to stress this element because the heart of the conciliation system and the probable reason for its success is its capacity to be supple and adaptable.

The judge discusses a possible settlement jointly with the parties and their attorneys, but may meet with both parties together without their lawyers. The judge explores the possibilities, avoiding as much as possible expressing an opinion with regard to the judgment of the trial court. However, in some circumstances, the judge may feel at ease to express an opinion regarding a lower-court judgment. In those circumstances, the judge-conciliator may readily identify an oversight or weakness in the judgment. This, in an effort to further clarify the legal issues for the parties and to bring about a better understanding of what is at stake. However, as a general principle, the judge must abstain from giving an opinion on the validity of the judgment below and leave the merits of the appeal for the Court. The judge-conciliator must not compromise the position of the Court. As a conciliator, the judge's role is to bring the parties to focus upon resolving their differences, and not to second-guess what a bench of three judges might eventually decide on the merits of the case. The judge can recommend specific solutions for settlement, but must never compel the parties to accept a settlement.

Discussions are not limited to the specific issues raised in the notice of appeal and some time is allowed for the parties to settle any related issues arising between them in other cases. Again, the flexibility encouraged and provided by conciliation permits the parties to find a global settlement of their differences.

The Confidential Nature of Proceedings

The confidential nature of conciliation proceedings is crucial to productive negotiations. As a matter of ethics, the parties voluntarily agree, on the request for conciliation form, to keep all matters strictly confidential and to refrain from disclosing the substance of any discussions that take place in conciliation. There are

no transcripts or summaries of the conciliation session and any notes taken by the judge conciliator are eventually shredded. Should the parties be unsuccessful in reaching a settlement, the judge-conciliator obviously cannot be a member of the Court of Appeal panel that is eventually designated to hear and decide the merits of the appeal.

The Conciliation Techniques

The existence of conflict is a manifestation of life itself. Conflict exists in a variety of forms and can be found in every sphere of human activity. Judicial conflict is a formal dispute between individuals over their legal rights. This clash of rights, interests, and attitudes can, however—under the right conditions—generate creative conflict-resolution, change, and even growth. Those "right conditions" can be provided by the process of judicial conciliation.

At the beginning of a conciliation session, the parties must acknowledge that conflict is a normal state of being. Only when it becomes deeply-rooted and engrained does conflict become unhealthy, even pathological, and lead to endless judicial fighting. The task of the judge-conciliator is to break the deadlock and to foster a meeting of minds. Where is the point of no return in a conflict? There is in every human conflict one crystallizing event that eludes the natural forces of settlement. This is what is commonly known as an irritant. And the judge-conciliator must rapidly identify that irritant. How? Through active listening and questioning. Not surprisingly, experience often shows one conflict is hidden within another. The trick is to identify the one fundamental conflict. There are many ways to do this—such as by reinforcement techniques, knowing when to keep silent, negotiating tactics, focussing on interests, etc.... To use any of these techniques effectively, the judge-conciliator must put him or herself genuinely within the process and must avoid formulaic responses.

A naval analogy might illustrate the point. In days of old, on the tall mast ships of the British merchant marine, the rigging was bound so tightly that no sailor was able to untie it. However, one single red cord was wound all along the rigging; if pulled, it would instantly release the rigging as if by magic. Similarly, it is the crystallizing event in a conflict that must be found in order to fully succeed in breaking the deadlock in negotiations. As long as this crystallizing event eludes the conciliator, a solution may still be reached but it will, at best, be partial. The settlement will be no less valid: however, the vital element which would have allowed the conflict to be completely defused and to reach a complete resolution resides in the one red cord still woven throughout the conflict.

The Settlement Agreement

If the parties are successful in resolving their differences through conciliation, a settlement agreement is drafted by the attorneys and signed by the parties. The settlement agreement is then ratified by an independent panel of three judges of the Court of Appeal at no extra cost and without the need for a written motion. Once ratified, the settlement becomes a judgment and is enforceable like any other judgment of the Court.

In the few cases in which settlement is not achieved in a first session, the parties may be granted a short delay to consider further their positions and return for a follow-up session. The latter often prove to be successful. Even in failure, the conciliation exercise will have permitted the parties to better understand the issues and this will prove to be useful in the preparation of the factums and in reducing the time of a hearing. Consequently, if the conciliating session does not end up in a settlement, the exercise will prove to be beneficial in providing efficient case management.

Conclusion

At each stage of the implementation of the pilot program, the parties involved were invited to provide feedback. The high degree of satisfaction of the participants and the positive results in the settlement of cases prompted the Court of Appeal to officially adopt the Conciliation Service Program in October 1999.

The reluctance felt at the beginning of the pilot program by the skeptics is progressively dissipating. The media too has taken much interest in the court's pioneering initiative and has encouraged recourse to the program by making it known to the public.

As a whole, the conciliation service program is one way for the courts to adapt to the needs of society and better serve the interests of justice. ❑