

ALTERNATIVE DISPUTE RESOLUTION

COMMENTARY: mediation under simplified procedure makes sense

Even if the mediation does not lead to settlement, it has served a purpose.
Opportunities for settlement could be pursued simply and inexpensively.



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photo by Dougal Bichan

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Simplified Procedure (Rule 76) may have once been viewed as a stopgap measure to reduce court backlog, but now it's here to stay. As the "country cousin" of ordinary procedure, simplified procedure has a personality all its own, and has recently inherited Mandatory Mediation. It has the personality of a sprinter: fast off the mark and straight to the finish line in the blink of an eye. That is, there are no discoveries and you go straight to trial in 5 months or you are out of the running.

Rule 76 applies to plaintiffs who have a claim for \$50,000 or less for money, real property or personal property. The \$50,000 maximum is *per party*. If there are multiple parties or third party claimants, the dollars at stake could approach \$200,000 or more.

Approximately 13,000 claims were filed under Simplified Procedure in Ontario in 2004, according to Justice Gordon P. Killeen of the Superior Court of Justice, London. Because there are no discoveries, a higher percentage of these cases do go to trial or summary trial. That is where the issue of costs gets very tricky.

One member of the Bar described the costs under Rule 76 as "brutal". A simple scenario proves his

point. Suppose the claim is for \$30,000. The average cost per party per trial day is about \$10,000 in Toronto. A reasonable and proportionate legal fee should not exceed 30 per cent of the claim, generally speaking. Therefore, "If there is a 6-day trial on a \$30,000 claim, either somebody is working for nothing, or their bills aren't going to be paid" said Justice Warren Winkler of the Superior Court of Justice.

Justice Winkler's solution is to make mediation *mandatory* for Simplified Procedure cases. In his Practice Direction of December 31, 2004, Justice Winkler states: "In wrongful dismissal cases and in actions commenced under Rule 76 (Simplified Procedure), the mediation shall occur within 150 days after the close of pleadings."

Considering the cost of trial and the risk of an adverse cost award, it makes sense to go to mediation very early in the process. Mediation can help parties to move through a case simply, rather quickly, inexpensively and with far less risk of adverse cost consequences. For example, at an early mediation counsel can:

- *Assess the credibility of the opposing party:* We all appreciate how much a

case turns on the character of the plaintiff and the defendant. This is especially so in cases where there is a lot of "he said, she said" and relatively little documentary production on key issues. It might be helpful to meet the other side before pre-trial.

- *Informally question the opposing party:* At mediation, I always ask the parties to speak, to describe what happened from their perspective. Plaintiffs and defendants develop positions when they file their statements. In order to find out what is behind their positions, what they believe about the situation, how they feel, what they need to bring it to closure, I need to hear *their* story. I need to ask questions to make sure I understand their story. Once you have heard my conversations with the plaintiff and the defendant, you are in a much better position to assess what your clients can hope to achieve. Counsels can conduct an informal version of discovery at mediation.

- *Agree to production and a timetable:* As the mediation unfolds, the evidentiary issues and documents that are central are quickly identified. Mediation provides an opportunity for counsel to shape procedural agreement and timelines

regarding further production. All present can also select a date for resuming mediation.

- *Develop a working rapport with opposing counsel:* When I begin mediation, I always ask the lawyers whether they have worked together before. I find this makes a difference to the tone of the mediation at the outset. If they have worked together, the atmosphere is less formal, more co-operative, and we might even enjoy some humour. When the lawyers are strangers, they are more likely to be formal, engage in initial sparring, and increase the stress in the room for everybody. This is not conducive to settlement. Mediation provides the opportunity for counsel to get to know each other. Usually, after mediation, the relationship is more co-operative: phone calls are returned, discussions are productive, and counsel follow through.

- *Counsel caucus:* I sometimes ask counsel to caucus with me to develop a better understanding of barriers to settlement.

- *Conduct the settlement discussion and documentary disclosure (R. 76.08):* This step is required within 60 days after the first defence is filed. Although it is often a five-minute telephone conversation, the

settlement discussion could be the initial mandatory mediation meeting. Rule 76 cases move very quickly. Plaintiff's counsel need to start building their case the moment their client walks in the door.

You can mitigate many of the risks and cost disadvantages of Simplified Procedure by initiating mandatory mediation at the 60-day mark, the settlement discussion. If a procedural agreement is achieved, and documents are exchanged, a second mediation could be scheduled near the 90-day mark, just before the plaintiff files Notice of Readiness for Pretrial and Affidavits of Documents.

Mediations at the 60-day and 90-day marks should enjoy a very high settlement rate.

Your clients have not spent too much time and money. You know most of what you are going to know before trial. It is a perfect time to do a litigation forecast and help your client make an informed decision. Finally, you have not invested their equity in the risk and uncertainty of a trial.

Even if the mediation does not lead to settlement, it has served a purpose. Opportunities for settlement could be pursued simply and inexpensively.

Joyce Young is a mediator specializing in wrongful dismissal, contract and family mediation.