JUDICIAL DISPUTE RESOLUTION IN CANADA AT THE CROSSROADS: TOWARDS ACCESSIBLE DISPUTE RESOLUTION

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Proposal: A Summary Judicial Dispute Resolution Procedure

Two steps:
1. Early judicial intervention comprising analysis, planning, evaluation and negotiation
2. Judicial dispute resolution comprising evidence, submissions, provisional decision, negotiation and determination
Why “Summary”? 

• Traditional common law litigation is protracted by interlocutory steps and exhaustive disclosure which makes it very costly and thus inaccessible to the great majority of potential litigants.

• The Supreme Court of Canada has recently endorsed the use of summary hearing procedures to improve access to justice: *Hryniak v Mauldin, 2014 SCC 7.*
Why “Judicial”? 

• Judges are the “face of justice” as courts are the “place of justice”; many studies have concluded that interacting with a judge provides litigants with the satisfying experience of “having their day in court”

• Judges are best placed to ensure fairness in negotiation and results which are consistent with law and justice
Why “Dispute”?  

• The “disputing paradigm” has encouraged courts to be more responsive to litigants’ interests which are often not completely addressed through the frame of legal rights and obligations.  

• Judges should follow the example of some of their European counterparts who ask the parties at the start: “If I decide this case in favor of one or the other of you, will that resolve all of the issues between you?”
Why “Resolution”?  

- The great majority of litigants do not commence legal action in order to have a trial; they do it to bring the other party to the negotiating table; in other words, to begin a process of “litigotiation” as coined by Galanter  
- Resolution by agreement if possible, but if not, by judicial decision to bring finality to the proceedings  
- See the popularity of “med-arb” in the private ADR sector
Why “Procedure”?

• Existing judicial dispute resolution practice in Canada is not well defined or governed by rules which leads to wide *variation in judicial behavior* and *uncertainty* for litigants.

• The Supreme Court of Canada has recently supported *innovations in procedure* as being within the powers of courts and consistent with the achievement of justice: *Endean v. British Columbia, 2016 SCC 42.*
Why Canada?

- Canada has no constitutional right to a *jury trial* in civil matters as in the United States and is like many other countries in this respect.
- Canada’s Charter of Rights and Freedoms protects people’s right to be treated in accordance with the “*principles of fundamental justice*”.
- The proposed procedure is consistent with natural and fundamental justice.
Step 1: Early Judicial Intervention

Judicial role and functions:

• **scrutinizing and analyzing** pleadings; seeking clarification or approving amendment

• **providing guidance** concerning required evidence and seeking agreed facts

• **evaluating** strength of legal positions and possibilities of proving contested facts

• **inviting** parties to express needs and concerns driving the litigation both confidentially and to opposing parties

• **providing assistance**, if requested, in negotiating possible settlement
Step 2: Judicial Dispute Resolution

Judicial role and functions:

- **receiving and weighing** documentary evidence and sworn evidence of the parties with active judicial participation ("facilitative judging")
- **giving provisional judgment** or decision
- **inviting negotiations** with or without judicial assistance
- **rendering final judgment** or decision incorporating any alterations agreed by the parties and approved by the judge
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Thanks!