JUDGES AS DISPUTE RESOLVERS – LESSONS FROM CANADA

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Roots of the “Judicial” in Judicial Dispute Resolution (JDR)

- “Arm twister” or “head knocker”
- Wise advice giver
- Empathetic listener
- Settlement facilitator
- Experienced (trained?) mediator
JDR in the Common Law World

• United States – Federal judges and magistrates and State judges
• Singapore – designated judge mediators
• Canada – Federal and Provincial judges
JDR in Canada Today

• **Quebec** – facilitative judicial mediation based on the principle of “participatory justice” at trial and appeal levels

See: Roberge, *The Sense of Access to Justice Following a Settlement Conference* (research report)
JDR in Canada Today

• **Ontario** – *ad hoc* judicial settlement interventions; judicial settlement conferencing as part of pre-trial procedures

See: Ontario Bar Assoc., *A Different ‘Day in Court’: The Role of the Judiciary in Facilitating Settlements* (task force report)
JDR in Canada Today

- Alberta, Nova Scotia – facilitative and directive approaches as chosen by individual judges and optional “binding JDR”

See: Rooke ACJ, *Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen’s Bench of Alberta* (thesis)
Canadian JDR – Lessons Learned

• Expect high demand

• Institutionalize for quality and consistency

• Provide administration and education
Demand for JDR

- JDR must be seen as integral to judicial duties
- Rostering of sufficient judges necessary to accommodate both trials and JDR
- Careful consideration of “rationing” and selection criteria (unrepresented? family law?)
Institutionalisation

• Judicial support and participation at the highest levels is required
• Provide a well defined procedure with flexibility
• Accommodate represented and unrepresented disputants
Training and Administration

- Education and training of judges
- Training of support and administrative staff
- Provision of tailored facilities and services (e.g., meeting rooms, secure storage of JDR information)
- Outreach to litigants
Value Added by JDR

• Substantive justice – recourse for the disempowered
  – preventing unfair, unconscionable or anti-social resolutions
• Procedural justice – *Injury* becomes *injustice* when a claimant is ignored or treated with disdain or contempt
  – reaffirming the dignity and worth of disputants
• Transparency – public reliance on outcomes - see Welsh 2019
Value Subtracted by JDR

• Privacy
• Confidentiality
• Creativity
Future of JDR?

• JDR plus determination if necessary: see Zariski, “Judicial Mediation in Canada: Towards Accessible Dispute Resolution” Windsor Yearbook of Access to Justice, 2018
JDR – Back to the Future?

• Why?
  – Ensure the Rule of Law not only from the “top down” but also from the “bottom up”
  – Counter decreasing access to justice through the courts
  – Meet the challenge of “crowdsourcing” justice – from charity to “digilantism”
  – Avoid the weakness of fully consensual processes in dealing with power imbalances
JDR – Back to the Future?

• How?
  – Make dispute processing more accessible through the courts
  – Provide hybrid processes combining judicial facilitation plus summary determination if necessary (similar to “med-arb”)
  – Encourage judges to bring “justice to the dispute resolution table”
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Thanks!

Questions?