Court of Appeal for Ontario experiments with mediation in a civil case

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This being The Lawyers Weekly "ADR focus," here's a yarn about my unexpected recent experience with alternative dispute resolution in the Ontario Court of Appeal.

I was involved in an appeal last spring that turned into a successful mediation, presided over by Mr. Justice Stephen Goudge of the Court. So far as I have been able to determine, such a mediation has never happened before in a non-family appeal.

Does it mean going to see the Ontario Court of Appeal mediating more appeals? Is the Court getting touchy-feely all of a sudden? I won't speculate.

Here's what happened. The case was a letters rogatory application. My client wanted the Ontario Court to order a search of certain documents, requested by a US judge in complex anti-trust litigation in the US Courts. There were complications. It wasn't clear if the documents existed, or if they did exist, whether they could ever be found among the massive volume of other documents in storage.

Mr. Justice Lamek, in Weekly Court, dismissed the application, on the grounds the search would be too expensive and difficult. My client appealed.

The panel hearing the appeal was comprised of Justices McMurtry, Abella and, as already mentioned, Goudge. At the hearing, I got the expected questions from the panel asking where was the palpable error by the trial judge, and why should they overturn his discretionary decision. One of the practical problems was: even if the Court was inclined to overturn, surely it was unlikely to want to spend time developing a procedural order sorting out how the search would be conducted. I suggested sending it back to the trial judge to work out the details.

After the appeal was argued, the Panel left the courtroom and deliberated. When they came back, Justice Goudge announced he had a proposal: if all three lawyers on the case agreed to it, he would meet with us in his chambers in the next few days and try to mediate a solution.

If we did not all agree to participate the mediation, or if the mediation failed, the Panel would simply release its decision. He implied that the Panel had already reached a decision, but did not tell us what it was. We all agreed.

We then met with Justice Goudge three times over the next few weeks. The process was informal. Each meeting took perhaps half an hour. We worked out ground rules for a somewhat limited search of the documents, including such details as who would do it, what would be searched, and who would pay. The search was then done (nothing was found), and we reported back to Justice Goudge on the outcome, and thanked him for his efforts.

The outcome was a reasonable and practical one, in my view. My client satisfied itself that the document did not exist, and it was able to report back to the US court to that effect. Inconvenience and expense to the party holding the documents was minimized under the terms of the mediated settlement.

To say the least, this was an unexpected outcome to the appeal; I have had trial judges suggest mediation from the bench, but not an appellate court.

At the final mediation meeting, we asked Justice Goudge whether this case meant there was a new interest at the Court of Appeal in mediation.

His Lordship replied that there were differing views among members of the court as to whether mediation was an appropriate thing for an appeal court to be doing. It seems there are members of the court who believe that the Court should be experimenting with mediation in civil cases.

The Court has recently set up a designated panel of judges who will attempt mediation in family cases, prior to the hearing of appeals, particularly where the facts have changed since the lower court decision.

But so far as Mr. Justice Goudge, or any of the counsel involved, seemed to be aware, our case was the first time mediation had been attempted in a civil appeal. He explained that the panel had decided to try it in this case because there had been some change in the status of the related US litigation since the trial level decision.

No doubt mediation would not be appropriate in many, and perhaps most, civil appeals, but in this case at least, it worked very well.