



RESOLUTION HOUSE 2009 Annual Report

Where Are Those RH Calendars?

After a thorough review and noting that last year many two-year (2009-10) Resolution House calendars were distributed far and wide, it was decided that the next distribution will be for 2010-11, at the end of 2010. If you are one of those individuals whose calendar was the 2008-09 or an earlier edition, and you would like a new one, the best way to ensure delivery of a new calendar is to attend a RH mediation or other intervention in 2010! Don't forget to bring your professional card to your mediation or other intervention, and give me one, so that I log you in on the 2010 list. New 2009 clients will not be forgotten. If you have never been the recipient of a Resolution House calendar, and are not aware of them, well, you do not want to miss out on this easy-to-assemble, handy-dandy marvel of plastic engineering.

Changes and Non-Changes

The 2008 Annual Report itemized a number of significant client-friendly changes. Perhaps most significantly for client support staff, in early 2009 Resolution House adopted an **on-line calendar**, allowing for quick availability checks. Just recently, the on-line calendar has been further enhanced to make booking even easier. Check it out! Another change put into effect earlier in 2009 was the **reduction in cancellation fees**, which can be done in several ways. These changes are being maintained for 2010. What is more, the mandatory mediation base rate, which has been in place since early 2008, is **frozen** for 2010. The mandatory mediation fee schedule is on the Resolution House website, setting out in plain English all terms and conditions. Cumulatively, these changes, as well as the very modest increase in fees over the past 14 years, means that Resolution House mediations continue to be a powerful value-added service for parties and counsel alike.

Just the Stats, Ma'am

The statistical time frame for this newsletter is December 1, 2008 through to November 30, 2009. The long term pattern of settlements of mandatory mediations of 50-55 percent continued, which is not particularly surprising, considering the fact that mandatory mediations in 2009 usually were held relatively early in the litigation process. This year, I found that the settlement rate for private mediations was lower than usual, in the same range as mandatory mediation, but I believe that this may be attributable to the "sample size" being far smaller, and thus sensitive to distortion.

The Rules of the Game Are Changing

I expect that the changes in the Rules of Civil Procedure coming into force in January 2010, most of which do not pertain to mandatory mediation, will have an upward effect on mediation settlement rates. In a nutshell, there is a longer period of time from the filing of the first statement of defence/notice of intent to defend/motion responding to an action (180 days versus the current 90 days) to hold the mediation, and extensions of time will be easier to get, on consent (although extensions in Ottawa have never been that difficult to obtain, as far as I could tell). However, regardless of whether there has been consent to extend time for mediation, mandatory means mandatory still, and setting down an action for trial triggers the requirement to mediate. Counsel will be required to certify that the mediation rule (24.1) has been complied with when filing a trial record. One may presume that with the benefit of prior discovery, which has been occurring in many cases already, the parties will be better equipped to resolve issues at mediation, although this will come with a cost-considerably higher transaction/litigation costs. Those cases which usually do not require

discovery, as with many employment cases, will still benefit from early mediation, and in fact a strong case can be made for mediating before pleadings are served. Sophisticated clients who are involved in decision-making related to legal strategy undoubtedly will be doing their own cost-benefit analysis on the merits or lack thereof of proceeding with mediation earlier or later. It is hoped that the Rule changes will promote the setting of firm, "real" fixed dates, as opposed to "dummy dates" prompted by time-limit requirements, which have led to multiple cancellations, in turn wasting client, lawyer and mediator time and resources.

An Offer for Law Firms and Organizations with Mediation Representatives

As I attend various Bar functions from time to time, such as mentoring dinners and the CCLA Civil Litigation Conference at Montebello, one of the main attractions is to mix socially with colleagues and friends. I have noticed, as I get a wee bit older, that I am encountering more and more new faces, they belonging to newer members of the Ontario Bar and new representatives of parties at mediation.

I would like to meet more of the "new crop" and to encourage these folks, I am offering law firms with two or more new civil litigators a **free Ottawa seminar on mediation of litigious matters**. If a single lawyer is interested, I have no problem with a joint session, where single practitioners or members of more than one firm get together. The same invitation is extended to representatives of organizations which are engaged in mediation on a relatively frequent basis, which of course includes insurers. It matters not to me whether the individuals are aligned with the plaintiff side of litigation or the defendant side. The seminar is between one and two hours long and I leave time for your questions. Location usually will be the law firm or corporate boardroom of the attendees' choice (I do not provide the venue). Topics covered include preparation of mediation briefs, approaches to negotiation, tactics that work at mediation (and tactics that do not) and more. My approach is not to suggest that there is only one way to do things, emphasizing more who one is dealing with and what is likely to motivate

them, the factual and legal problems presented by the case and, using a representative/client-focused approach, constructing a forward-looking strategy that anticipates the steps required to get to settlement, including impasse-breaking techniques. If you are interested, call me to make arrangements; please note that several weeks of lead time and a mutually convenient date and time are required.

The Downside of "Social Media"

The legal press recently reported a criminal case where two women charged with a house robbery assisted in their own convictions as a result of their dubious decision to post self-incriminating photographs on Facebook. The desire of many to post accounts of personal events, to "be seen", and maybe even be "famous", is facilitated by services like Facebook, Twitter, blogs and photo-sharing on-line. We appear to live in an age of celebrity, where privacy is waived with little thought and where many seem to crave more than Andy Warhol's oft-referred-to 15 minutes of fame. I have mediated several civil cases where the plaintiff's propensity to distribute information to the world has been the subject of interest to the defendant(s), who may find inconsistencies in what the plaintiff is saying about his/her physical condition, for example, when compared to photographs of activity, etc. on-line. This phenomenon is likely to increase in frequency, as we see technology evolving, perhaps prompting a new adage to add to "buyer beware"- "poster beware". I cannot help but note how this activity seems to fly in the face of institutional privacy concerns, which have never been more tightly scrutinized and enforced by government and many businesses, to the point that it is increasingly difficult to get one's own information! There seems to be a disconnect here between what many want and what may be in their best interests. I would hasten to add that cyber-related litigation is not new- in the ancient 1990's, about a decade ago, I mediated a case where the issue was whether distribution of allegedly misleading and defamatory information through international e-mail was compensable.

Reader's Corner

After a hiatus of a year, I return with some reading observations/suggestions. Perhaps because I did not read as many "classics" of literature when I was younger that I would have liked to, I now find myself reading books that have been in print since the 1800's, the works of Nobel laureates in literature, older Booker Prize winners, and so on. While by no means do all of these works deserve their reputations, the fact that many have been repeatedly reprinted usually says something. I had heard that **Moby Dick** by Herman Melville was worth a read, which it most certainly was. Perhaps one of the most interesting aspects of the book was not just the famous character sketch of Captain Ahab, but the voluminous knowledge of Melville on American whaling as it was in his time, from the tools of the trade through sailing techniques to the behaviour of whales of different types. Absolutely fascinating! Not the easiest read, but one I can highly recommend for its brilliance, all the more evident when I next read a modern crime novel, supposedly a best-seller, which paled in comparison. Another author who I am exploring at present is the late and prodigious John Updike- I just finished an early short novel of his, **Of the Farm**, and greatly enjoyed it. Updike is a master of description in many respects, from the sound of broken crockery sliding into a wastebasket to the complexities of marital and familial relationships. I will be pursuing more Updike, of which there is no shortage.

Travel Notes

This past summer, I had occasion to **walk across a country**- England! Last winter I got bitten with the idea of a healthier holiday than sitting around at a cottage, but my wife and I were not terribly keen on visiting a place where too much disease and misadventure lurked. Armed with an excellent Lonely Planet guide, I planned all the stops of our private seven-day hike on the web. Our route followed that of Hadrian's Wall (a World Heritage site), in northern England, and I can report that it was a wonderful and fulfilling experience, although I will admit that not all the English "cuisine" we ate was inspiring. I intend to write about our walk in greater detail and may post it on the

Resolution House website in 2010, for those who would like to know more.

Our Pandemic Position

The last thing I would want to give (or receive, for that matter) to anyone attending a Resolution House mediation or other intervention is the flu, whether it be **H1N1** or another variety. I have received my H1N1 immunization and hope that you are getting yours too. The more people who are protected, the greater the likelihood that the shots will effectively limit the spread of the disease. My arm was sore for a few days, but there were no other side effects of significance. Why take the chance?

From the Annals of Litigation...

I have come across a case of great importance to **golfers**, of which I count myself as one. A jury in Maine awarded a woman golfer \$40,000.00 (no deductible even though she was driving) for injuries to her face, which she sustained when her *own* ball careened off some railroad tracks which traversed the first fairway. I for one would have thought that the skill required to accomplish such a feat, with the attendant loss of face, so to speak, would be enough to prompt the golfer in question to perhaps take a free drop and quietly move on the next hole, hoping that not too many people observed the incident. As it was (in America), she successfully sued the golf club. The last I know is that the case was under appeal (yaaahhh!), where the outcome, let's face it, could hinge on who golfs where. Interestingly, the railroad was not sued. I have no information on whether the railroad line or the fairway came first, although I know that the line was not laid between the time she lined up the fateful shot and the time she executed it. Perhaps she should have yelled "fore" and gotten out of the way! As for the big story in golf this year, that pertaining to a Mr. Woods, all I can say is that even the best of us can be duffers from time to time. We await the full tally of penalty strokes and the final score in his case.

All the best to all of you- have a healthy and prosperous 2010. Your comments are welcome!

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