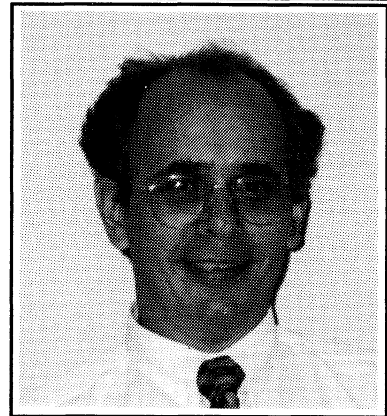
President's Column

Rule 48 – Some Concerns



Steve Southwood, President

In recent years both the Courts and the profession have been considering ways to refine the litigation processes and promote ADR initiatives in an endeavour to render those processes more economic and efficient. In this regard there are two interesting developments in the proposed amendments to the Supreme Court Rules. The first is compulsory mediation. The second is the right to obtain an order for the oral examination of an opposing party to legislation.

Rules 48.15(1) and (2) of the proposed amended rules provide:

"(1) If at any time a Judge or Master is of the opinion that a proceeding is capable of settlement or ought to be settled, the Judge or Master may direct that it be set down for mediation for the purpose of exploring the possibility of settlement.

(2) Where a proceeding is ordered to be mediated it shall be held before a mediator appointed by the Judge or the Master from the list of mediators kept in accordance with subrule (8)."

Subrule (8) provides:

"The Master shall keep a list of all persons who in the opinion of the Judge or the Master are suitably qualified and willing to act as mediators."

I have some concerns about these rules. They appear to be based on the United States concept of the "multidoor" courthouse. That is, on the notion that courts are the proper institutions to provide all the various mechanisms required to address the resolution of disputes between members of society.

My concerns are:

(1) Courts fill a highly specific role, namely, the adjudication of disputes through due process and by the application of the principles and rules of law. Judges are selected because of their perceived qualities and ability to exercise the power of adjudication. This contrasts with the mediation process – at the heart of which is a private discussion between the mediator and each of the parties. Private access by one party to a compulsorily court appointed mediator may be perceived as a rejection of the basic principles of impartiality and due process.

(2) For a mediation to be successful there usually needs to be the consent of both parties.

(3) How is the Court to determine that a proceeding is capable of settlement – that is, what information or criteria will be applied? The Court usually knows very little about the substance of a matter until trial. No doubt an appointment of a mediator will usually be made when one party sees a tactical advantage in it and makes an application for it while the other party may be insisting upon its right to have the matter judicially determined on the basis that it has a strong case.

(4) It is likely to increase the cost of litigation and possible reduce access by the parties to a trial on the merits of a matter. The right of parties to come to a superior court and have their dispute adjudicated according to law should be vigilantly protected.

(5) What remedy will be available if a mediator misconducts a mediation and who will be responsible for the costs of the litigation in such circumstances?

(6) What criteria will be applied in determining who will be on the list of mediators? It will be important that only legal practitioners of the greatest experience and standing are appointed if respect for the Court is to be maintained.

On the other hand, discovery by oral examination should lead to a greater understanding by the parties of the strengths and weaknesses of each other's cases and either a narrowing of the issues for trial or earlier settlement of the proceeding. It may be, however, that the order should contain a similar rule to rule 30.11 so that answers obtained may be used in evidence.