

TIME TO CALL IN THE REFEREES

It is said that judges, and to that I would add arbitrators, are the only people who attend sporting matches and cheer for the referee. And here is a plea for greater use of the referee.

INSPIRATION

Inspiration for the plea comes from many sources, but I will cite two. The first is an interview conducted and reported by the Canadian Broadcasting Corporation of the Chief Justice of the Federal Court of Canada, my former Court, on June 27, 2017. The Chief Justice was making a plea for greater funding for the Court – twenty-five million dollars. He said, in part:

We don't have enough staff in the courtroom. We don't have enough staff in the registry. And this is going to give rise to delays. It comes right back to access to justice.

He noted in particular an anticipated rise in intellectual property disputes in light of the agreement between Canada and the European Union.

The second inspiration is a Special Report in The Economist magazine of July 8th, 2007 titled "The Economies of Longevity". This report noted that, in the rich world people were leading longer, healthier lives with much energy, experience and knowledge within them, yet forced by various systems to retire at an age far too early, letting these resources go to waste. Having given the expected examples of the Rolling Stones", the report says, at page 4:

...The key to unlocking this longevity dividend is to turn the over-65s into more active economic participants.

Thus, on the one hand, overly-busy,

underfunded Courts, and on the other, unused talent.

FOCUS OF THIS PAPER – REFEREES

The focus of this paper is the provisions in the Rules of many Canadian Courts for the appointment of a referee.

It goes without saying, particularly to the participants of this Conference, that parties engaged in a dispute have ample opportunity to settle that dispute between themselves or to seek the assistance of a third party, such as an arbitrator or mediator, to do so. Sometimes the parties are obliged to do so by contract, sometimes particular legislation requires them to do so, or to do so before going to Court.

The situation which I wish to discuss is one where the parties find themselves engaged in the Court process. One has commenced a lawsuit against the other. The judicial process is involved. Is there a way to achieve a prompt, least expensive and just resolution of the dispute while placing less burden on the Court itself? Bring on the reference.

WHAT IS A REFERENCE?

The rules of most of the Courts in Canada provide that a referee may be appointed to hear evidence in respect of certain matters and to provide a report to the Court. The Court may adopt, modify or reject the report; if it does nothing within a stipulated period, the report is



HON. ROGER T. HUGHES (RET.)

The Honourable Justice Roger T. Hughes (Ret.) is a Mediator and Arbitrator at JAMS. Judge Hughes has over a decade of experience as a judge on the Federal Court (Canada). A recognized expert in intellectual property matters, Justice Hughes brings the perspective of a longtime federal practitioner — as advocate, judge and neutral — to each of his matters.

deemed to be adopted.

The referee has pretty much all the procedural powers of a judge, including compelling the appearance of witnesses and the production of documents. Disputes as to procedure and pleadings may be resolved. The powers to compel compliance are the same as those of a Judge.

The costs of a reference can be allocated or awarded by the Court.

WHO CAN BE A REFEREE?

The Rules of the various Courts vary as to who can be a referee. Manitoba Rule 54.03 is quite restrictive: a referee must be a Master of the Court. Ontario Rule 54.03, on the other hand, is quite open: it is a person agreed upon by the parties. Nova Scotia Rule 11 is the most specific: it is any person with the neces-

sary skills in respect of the matter to be determined. That Rule lists a number of persons, including chartered accountants, engineers and lawyers, but the list is not limited to such persons. The point is, with the exception of Manitoba, a referee does not need to be a Court official, or even a lawyer. As a practical matter, one would expect a referee to be a person with skills appropriate to determine the matter at hand.

WHO APPOINTS THE REFEREE?

The Federal Court Rules, Rule 153, requires the Chief Justice to appoint the referee. Other Court Rules – Ontario, Nova Scotia, and Newfoundland, for instance – simply require that the Court, or a Judge, appoint the referee.

Again, as a practical matter, a motion would be made to the Court for an appointment. The Judge seized of the case, or, if no such Judge, the Motions Judge, would order the appointment if appropriate or refer the matter to the Chief Justice.

SCOPE OF THE REFERENCE

The scope of the reference may be constrained by the Order granting the reference or by the Rules of the Court. Federal Court Rule 153(1) limits the scope to “any question of fact”. Ontario Rule 54.02 permits a reference to be directed to “the whole proceeding or to determine an issue”. Nova Scotia Rule 11 requires the scope to be “a question within the expertise of the referee”.

The Nova Scotia Rule expresses it best; the matter must not only be constrained by what is at issue in the Court proceeding, but must also be within the scope of expertise of the referee. The Federal Court Rule is the most confining: the reference must be as to “fact”, thus, presumably, not “law”. The overlap between fact and law has been debated for a long time. Where does “opinion” fit in, for instance, where experts disagree as to what should or should not have been done, or what was, or was not, obvious? Presumably a referee, in the report, could set out the findings, including opinions, and

leave it to the Judge reviewing the report to consider the matter, including whether the Judge wants to conduct a hearing as to the point or opinion given.

COSTS

The costs of the reference could be set out in the Order directing the reference or by the Judge who reviews the report, or a combination. It may not be unreasonable for the parties to bear the

costs associated with the reference in some proportionate way.

Some Examples of where a Reference Could be Directed

- **Matters of accounting** are an obvious example. Books and records could be examined and best principles of accounting applied. Was the formula in the contract properly applied to the calculation of royalties?

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- **And the list goes on...**

WHY ONE OF US AS A REFEREE?

Most members of this organization will consider themselves an appropriate candidate for appointment as a referee. We have skills in conducting a hearing, writing a report, and in making procedural determinations. No doubt some of us are better at it than others.

A more important question is how to match the particular skills of a candidate to those required of a referee addressing the particular problem – skills in accounting, science, navigation, intellectual property.

Special consideration should be given to matters concerning Indigenous peoples, where a depth of knowledge and empathy is required. In one case which I handled as a Judge, I asked another Judge, himself an Indigenous person, to join in resolving the dispute. He went and lived with the parties on the reserve, meeting and eating with each of the disputing factions. Eventually, they

all met and ate together. A dispute that had festered for about three score years was resolved.

HOW TO DO IT

I believe that greater use of references can bring about quicker, cheaper and more satisfactory resolution of many disputes. Underused, competent people will have been utilized appropriately.

We need to make the Courts more aware that they have this resource available to them. The Chief Justices

should be lobbied to make them particularly aware of this resource.

We need to make our particular skills in the fields of accounting, engineering, navigation, intellectual property, Indigenous peoples' issues known and publicized so that litigating parties have access to, and knowledge of, the great resources available to them.

This is our chance to make a difference, to make a change for the better, to put our resources to full and proper use. 🌐

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