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Early Neutral Evaluation Programs in Family Law Disputes

by John-Paul Boyd

The Canadian Research Institute for Law and the Family has just released a new research report, *An International Review of Early Neutral Evaluation Programs and Their Use in Family Law Disputes in Alberta*, which includes a literature review of early neutral evaluation programs in Manitoba, Australia, New Zealand, Malaysia, Singapore, the United Kingdom and the United States, and makes recommendations about the implementation of such a program in Alberta. The findings from the literature review are very positive and are likely applicable throughout Canada.

Generally speaking, early neutral evaluation programs are court-based programs that require the parties to a dispute to attend a neutral third party evaluator early on in the life of a lawsuit. At these hearings, the parties present their positions in the case and receive the feedback of the evaluator on the merits of those positions and the likely result of the lawsuit if it went to trial. The evaluator may assist the parties in settling all or some of the issues in dispute. However even when a full settlement is not reached, the hearing provides a useful reality check for litigants and their lawyers, helps to clarify the issues in dispute and prepares the parties for future judicial and extrajudicial dispute resolution processes.

According to one of the studies reviewed in the report, 80% of lawyers and 81% of parties surveyed agreed that early neutral evaluators made useful contributions to their cases, and provided:

- new insights about the case (lawyers 54.9%; parties 61.9%);
- a fresh perspective on the case (lawyers 52.6%; parties 47.6%);
- a more complete understanding of the case (lawyers 46.5%; parties 52.4%);
- improved communications between the parties (lawyers 60.2%; parties 52.4%);
- identification of key issues (lawyers 75.4%; parties 47.5%); and,
- improved prospects for settlement (lawyers 54.9%; parties 58.5%).

According to another study, the early neutral evaluation program reviewed:

- made counsel and parties address themselves to their cases in a more systematic manner;
- enabled counsel and parties to exchange information and identified areas where additional information was needed;
- contributed to the parties' understanding of the issues in their case;
- provided an efficient vehicle for communication;
- gave parties a fresh perspective on their case and a frank assessment of the relative strengths of the competing positions; and,
- created opportunities for settlement negotiations.

Reported rates of full settlement resulting from early neutral evaluation programs range from 31% to almost 100%, and rates of partial settlement range from 12% to 51%. Lawyers and litigants surveyed in the literature also reported very high rates of satisfaction with early neutral evaluation programs, as did the evaluators

surveyed.

The research report reaches these conclusions, based on the literature reviewed:

(1) Early neutral evaluation programs facilitate settlement, and save litigants time, money and emotional stress as a result.

(2) Early neutral evaluation programs provide a useful reality check for litigants, and their lawyers, early in the process through an objective, independent and unbiased evaluation of the merits of the case by an experienced and respected evaluator who is usually a lawyer.

(3) Early neutral evaluation processes enhance direct communication between litigants and improve their understanding of the case.

(4) Even if settlement is not reached, early neutral evaluation programs help to identify the issues in dispute and help prepare litigants for further dispute resolution processes both in and out of court, also saving litigants time and money.

(5) The discussions held in early neutral evaluation programs are confidential, and offers and admissions made during the process are communicated on a without prejudice basis.

(6) Early neutral evaluation programs yield high satisfaction rates for participants, including litigants, their lawyers, and the evaluators.

(7) Although data have not been collected on the impact of early neutral evaluation processes on the overall efficiency the court system, research suggests that high early settlement rates help the court close more cases in a timely manner, thus saving money for the courts.

(8) There is some evidence that when parents participate in shaping the post-separation parenting arrangements for their children, they are more satisfied with the outcomes achieved and are better equipped to resolve future parenting disputes without resorting to litigation.

(9) Early neutral evaluation processes are common in non-family civil disputes, but have been successfully used in family law disputes to deal with custody and parenting time issues, as well as financial and family property issues.

(10) Early neutral evaluation processes have been used with self-represented litigants successfully.

(11) Special considerations must be taken into account when early neutral evaluation processes are used in cases involving domestic violence.

Although the Dispute Resolution Officer program presently offered in Calgary and the Child Support Resolution Officer program in force in Edmonton share many similarities with an early neutral evaluation program, both are limited in the scope of issues they address and in the time available to address them. The research report suggests that a working group be established, with representation from family law practitioners, mediators and arbitrators, judges, and representatives from Alberta Justice and court administration, to develop a pilot early neutral evaluation program for use in family law disputes.

The Institute makes a variety of recommendations on the optimum characteristics of such a pilot project,

drawn from its research, and on the issues the working group must address in its deliberations. The research report notes that the proposed pilot project aligns well with the objectives and guiding principles of the Reforming the Family Justice System initiative presently exploring means of improving the family justice system in Alberta, and may be ideally suited for adoption and evaluation as a prototype by the initiative. The highlights of the Institute's recommendations are these:

> 2. Discussions held during ENE processes should be confidential and the evaluation results should be non-binding unless settlement is reached. Although there are differing opinions as to whether the process should be mandatory or voluntary, it is suggested that participation in the pilot program only should be voluntary and that the court may recommend participation.
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> 4. Similar to ENE programs in Minnesota, we recommend that a pilot ENE program in Alberta be open to self-represented litigants, although we recognize that self-represented litigants may require additional supports, including additional information about the nature of the program, its relationship to the court system and the consequences of settlement.
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> 5. We recommend that evaluators screen cases for domestic violence, and determine the suitability of a family law dispute for the ENE pilot program based on the extent to which the domestic violence may affect the safety of a litigant, as well as the litigant's ability to negotiate a fair settlement and their willingness to participate, and whether the litigant is self-represented.
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> 8. To maximize the benefits of an ENE program, ENE sessions should be held as early in the process as possible. Best practices range from 45 to 60 days of a Case Management Conference order in Minnesota. We suggest that the ENE process begin within 45 to 60 days of the filing of a defence or counterclaim to ensure that the process is only provided when a claim is contested.
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> 11. According to the literature, an average ENE session lasts for three hours, allowing time for the following steps:
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> > a) the evaluator will make opening remarks explaining the purpose of the ENE program, the confidential nature of the proceedings, and the procedures that will be followed;
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> > b) each party will make a 15- to 30-minute presentation of their case;
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> > c) the parties may ask questions of each other to clarify their positions and their evidence;
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> > d) the evaluator may ask questions to clarify issues;
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> > e) the evaluator will provide feedback on the merits of each party's case, the likely outcome if it goes to trial, and recommendations for the resolution of the dispute;
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> > f) the parties may attempt to reach settlement of some or all of the issues in the dispute with the assistance of the evaluator, if desired;
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> > g) where a complete settlement is not reached, agreements are made regarding the disclosure of additional documents, the scheduling of discovery, and next steps in the proceeding; and
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> > h) a record will be signed by the parties summarizing any agreements reached and identifying the matters remaining in dispute, if any.

12. It is critical that any settlements reached should be recorded immediately following the conclusion of the ENE session, and be signed by the litigants and their lawyers, if represented by legal counsel, to discourage buyer's remorse and the subsequent unravelling of the parties' settlement. The working group will need to consider whether such settlements should be recorded as memoranda of understanding, written agreements or consent orders, and who should be responsible for preparing the record, particularly when one or more litigants are self-represented.

14. The working group must explore funding options to pilot an ENE program. Best practices indicate that a cost-recovery model may be necessary for sustainability, with accommodations made for low-income litigants.

The research report pairs nicely with the conclusions reached in the Institute's 2014 report, *Self-Represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen's Bench*. This earlier report concludes that self-represented litigants tend to take unreasonable positions in family law disputes which ultimately reduce the likelihood that these disputes will resolve without a trial. When cases involving self-represented litigants do reach trial, they tend to require more adjournments and take longer to resolve as a result of self-represented litigants' unfamiliarity with the rules of court, the rules of evidence and the law that applies to their cases, and the results self-represented litigants achieve tend to be worse than the results they would have achieved had they had counsel. An early neutral evaluation program which includes an objective appraisal of the strengths and weaknesses of the parties' positions would likely be of great assistance to these litigants.

John-Paul Boyd is the executive director of the Canadian Research Institute for Law and the Family. The Institute is a federally-incorporated charity established in 1987 and is affiliated with the University of Calgary.

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