Colm Brannigan

Chartered Mediator and Arbitrator

Colm Brannigan's ADR Notes

Welcome to Spring.

While this newsletter is "much ado" about "my stuff" it does have a short article on an important arbitration case and a short comment on litigation risk analysis and settlement.

In my Winter Newsletter, I mentioned my association with the new Canadian Centre for Conflict Management in Kingston, Ontario. CCCM's web site www.cc4cm.ca is now online with Program and Course information and professional profiles of CCCM's associates.

The CCCM Summer Institute

This is part of our plan to offer exceptional training and skills building opportunities and will take place this year at Queen's University from July 29th - August 2nd, 2019. The courses that will be offered are:

Foundational Conflict Management & Mediation (5 Days) - July 29 - August 2, 2019

Med-Arbitration (2 Days): July 30 & 31, 2019

Stakeholder & Community Engagement (2 Days): August 1 & 2, 2019

Further information is available at https://cc4cm.ca/our_services/workshops/the-cccm-summer-institute/

Med-Arbitration Workshop

I am particularly excited to offer this course, designed with Richard Moore of MDR Associates in Ottawa (http://mdrassociates.ca/) and is the only one of its type in Canada other than one in BC.

Med-arbitration is becoming an increasingly popular way to resolve disputes. It can be designed to efficiently, effectively and fairly resolve disputes including disputes involving both lower and higher monetary amounts and disputes where relationships are of lesser or greater importance. It is used in family disputes, commercial disputes, partnership disputes, landlord and tenant disputes, condominium disputes, and many others.

If designed and conducted appropriately, med-arbitration can be highly client-centric, fair, effective and satisfying. On the other hand, if it is inappropriately designed or conducted, it can lead to confusion, frustration and on-going dissatisfaction.

This med-arbitration workshop, delivered by two highly experienced dispute resolution professionals, is an intensive two-day practical immersion in the knowledge and competencies required to run a fair, effective and efficient med-arbitration process in any type of dispute.

In addition to the Summer Institute, I also plan to offer the course in Ottawa and Toronto over the next year so if you have are interested and would like further information please contact me.

Managing Conflict - One Size Does Not Fit All

On Saturday May 11, 2019, I spoke at the Canadian Condominium Institute - Eastern Ontario's Conference along with Christy Allen of Davidson Houle Allen LLP (https://davidsoncondolaw.ca/lawyers/christy-j-allen/) The program included a demonstration of a mediation and I would like to thank Andrea Daly, Cheryll Wood and Jessica Weick also of Davidson Houle Allen LLP for participating in the role-play along with my son, Conor Brannigan who is a mediator with the Canadian Transportation Agency in Ottawa.

As always, I welcome your feedback and please feel free to forward my newsletter to any of your colleagues.

"Keep Calm and Prepare to Mediate"

This short article was written together with my son Conor Brannigan and is published in the Spring edition of the Condo News. Although focused on condominium mediation it is applicable to mediation in any area. The article is online and available at: https://cci-ghc.ca/sites/default/uploads/files/condo-news/CondoNews-Spring2019-article15.pdf

Expanding the Pie: Appropriate Dispute Resolution In The New Millennium

As part of my goal of expanding the use of innovative ADR processes, I will be speaking at the ADR Institute of Ontario's AGM and Professional Development Program in Toronto on June 6, 2019.

My topic will be med-arbitration and how it holds out potential to revitalize the use of ADR. The brochure for this wide-ranging program can be found here (http://adr-ontario.ca/wp-content/uploads/2019/02/ADRIO-2019-Flyer-_Final.pdf).

If you will not be attending the ADRIO event and are interested in the topic, please contact me and I will send you my PowerPoint presentation and a suggested reading list about med-arbitration.

The Power of the Arbitrator to Manage the Process

In many ways the major benefits of arbitration are the opportunity to

custom design the process and, compared to court proceedings, the ability to have the process happen reasonable quickly.

On the assumption that the parties want to have the process to be efficient and speedy, and sometimes they don't for various tactical and other reasons, designing the process requires collaboration and effort by counsel far beyond that required in litigation.

However, even many experienced litigation counsel are not that familiar with arbitration and sometimes do not see the opportunities available in process design. They default to their familiarity with the Rules of Civil Procedure. But the Rules do not apply to arbitration in Ontario. So, what happens if counsel or the parties cannot agree on the procedure to be followed?

If the parties cannot agree, the arbitrator has both the authority and the responsibility, to set the procedure for the conduct of the process under the Arbitration Act, 1991 which provides little guidance other than:

> Conduct of Arbitration
>
> Equality and fairness
>
> 19 (1) In an arbitration, the parties shall be treated equally and fairly.
>
> Idem
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases. 1991, c. 17, s. 19 (2).
>
> Procedure
>
> 20 (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act. 1991, c. 17, s. 20 (1).

In a very recent Ontario Superior Court of Justice decision, Lobanova v. Grynyshyn, 2019 ONSC 3064 (CanLII), http://canlii.ca/t/j0cd2, Mr. Justice Frederick L. Myers reviewed and confirmed the authority of an arbitrator to determine the course of the arbitration including scheduling.

In what is probably the most important part of the decision, Mr. Justice Myers, who clearly understands the arbitration process, commented (bold added):

> [50] It is often useful and important to **take a step back to consider the issues in a proceeding on a holistic basis to ensure that one does not lose the justice of the forest in the details of the trees.**
>
> [51] **In this dispute, the parties agreed to have their court proceedings resolved by arbitration. That was their right. They were heard by the**

> **arbitrator very quickly as they wished. One corollary of the parties' decision to proceed by alternative dispute resolution is that the parties have very limited access to the courts when things do not go as they hope**. In my view, a court is not justified in intervening where a new counsel for a party prefers an alternative theory of the case over one that was advanced by the party at the arbitration hearing. A party does not raise an error of law on appeal where it seeks to reverse its position and ignore the evidence it presented at the arbitration. **An arbitration is not a test run in which evidence and positions can be tried on for size and then discarded in subsequent court proceedings. The parties opted-out of their court proceedings. Resort to the court after an arbitration is not a do-over. The arbitration is the main event. The court can intervene only on the prescribed grounds set out the Arbitration Act, 1991 none of which is raised on arguments made on this motion.**
>
> [56] **Moreover, the justice of the case requires the timely completion of the arbitration and deference to interim scheduling decisions of the arbitrator**. The merits of this application for leave to appeal remain to be heard in August.

Counsel can and should represent their clients as strong advocates in arbitration while at the same collaborating in the process design. Leaving the procedure to the arbitrator instead of working out reasonable timetable and other matters with the opposing counsel is losing an opportunity which you may come to regret.

Allowing the process to default to the Arbitration Act, 1991 and the arbitrator, misses the point of arbitration. Work to design the process to meet the needs of the parties with opposing counsel and the arbitrator, or do not be surprised if the process is imposed on you. and if that, it is not likely to be the Rules of Civil Procedure that are followed.

This is a must-read decision for both arbitrators and counsel and should encourage cooperation in arbitration design which will result in a much more customized process based on the needs of the parties and the type of dispute.

Litigation Risk Assessment and Settlement

Although there is some writing on this topic going back to at least 2009, lately there has been a fair amount of interest by both practitioners and academic writers around litigation risk analysis and taking a more rigorous, scientific approach to what is a very important subject.

Recent examples include an article by Michaela Keet, Heather Heavin and Shawna Sparrow," Anticipating and Managing The Psychological Cost of Civil Litigation" in the 2017 Windsor Yearbook of Access to Justice. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3148000.

The brochure for the Ontario Bar Association ADR Section's February 2019 program, "Litigation Risk Assessment: Using Quantitative Probability Analysis to Assess Settlement Offers" asked:

How can you more accurately predict the value of your client's claim, and critically assess the reasonableness of BATNAs and settlement offers? Whether you are a litigator or a mediator, join us to gather the essential knowledge and skills you need to move away from vague and unhelpful qualitative assessments (e.g., "a good chance of success") towards a more thorough quantitative probability analysis.

And a recent blog post, with links to a PowerPoint presentation, "Litigation Interest and Risk Assessment" (http://indisputably.org/2019/05/litigation-interest-and-risk-assessment/) all show us some of the work in progress.

We all know that dispute resolution procedures such as litigation and arbitration involve significant financial and time investment even though most disputes are resolved by some form of settlement rather than by court decision from a court or other tribunal. Yet settlement discussions often seem hit or miss and disconnected from any overall theory or assessment of the strengths and weaknesses of a case.

Mediators are very familiar with many of the "non-quantifiable" and psychological costs of litigation. There are quite simply what we call interests.

We are now seeing serious attempts being made to integrate interests into a formula or algorithm of settlement and assign numeric values to them in a mostly mathematical analysis of risk assessment. This research presents an opportunity for both ADR and legal professionals to rethink some of the key considerations involved in reaching settlements and perhaps bring interests from their present position as not quite as important as the real, usually financial, issues in the spotlight of what makes up a successful, sustainable settlement.

If I can be of help in providing information about mediation, arbitration, med-arbitration or ADR training, please contact me.

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