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Colm Brannigan's ADR Notes

Welcome to my Summer Newsletter

It contains an overview of a recent condominium arbitration case, and a comment linked to an article on the much mentioned and discussed concept of "Cognitive Bias".

Med-Arbitration Training in Toronto

Med-arbitration is an increasingly popular way to resolve disputes. This med-arbitration workshop 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. This will provide you with another ADR tool for use in appropriate cases including condominium, construction and commercial disputes.

The introductory session of the new med-arbitration workshop, designed with Richard Moore of MDR Associates in Ottawa (<http://mdrassociates.ca/>), will take place in Toronto on November 14 and 15, 2019 and then in Ottawa in early 2020. We already have two participants registered!

Further information on the November course in Toronto course is

at: <https://mediate.ca/wp-content/uploads/2019/07/Med-Arbitration-Course-Description-November-2019.pdf> and

<https://mediate.ca/wp-content/uploads/2019/07/Med-Arbitration-Registration-Form-November-2019.pdf>

Please contact me for further information.

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



ADR Institute of Canada to Launch New Rules, Designation and Templates for "Med-Arb"

I was fortunate to be a part of the working group put together by ADRIC to review the med-arbitration process and coming out of that group's work, ADRIC will launch its new Med-Arb framework, in November 2019 at its Annual National Conference in Victoria, BC.

This is a significant step forward for ADR practitioners and users of ADR services and will provide us with the opportunity to provide further innovative process options to our clients at best practices level.

I will also be delivering a half-day Preconference Workshop on Med-arbitration with Richard Moore on November 20, 2019 in Victoria, BC.

Canadian Lawyer, July 5, 2019. [New framework for Med-Arb](#) to be launched in November.

ADR Institute of Ontario AGM & PD Session - June 6, 2019

As part of my goal of encouraging the use of innovative ADR processes, and especially med-arbitration, I spoke about the opportunities that med-arbitration provides for our clients, at the ADR Institute of Ontario's AGM and Professional Development Program in Toronto on June 6, 2019.



If you were not able to attend the ADRIO event and are interested in med-arbitration as a process, please contact me and I will send you my PowerPoint and a reading list about med-arbitration that I compiled and used in the presentation.

As one example of the use of the mediation arbitration process in an actual case, my very brief article on med-arbitration in condominium

cases is available at:

<https://www.mediate.ca/wp-content/uploads/2019/05/Using-Med-Arb-in-Condo-Disputes.pdf>

To Arbitrate or not to Arbitrate: The Mandatory Nature of Condominium Arbitration

While a condominium dispute, many of the issues in [*Leeds Standard Condominium Corp. No. 43 v. Fuller*](#), apply to other arbitration cases.

The outcome of the case not only confirms that the courts generally support arbitration, but also reinforces the importance of clear drafting when designing ADR provisions for any type of legal agreement.

The case outlines the test to be used by a court when asked to stay an arbitration where an oppression remedy is claimed by court action in the same dispute and is worth reading if you practice arbitration, med-arbitration or law.

This specific case involved a shared facilities type of dispute. The shared facility agreements/reciprocal agreements (SFAs) included specific dispute resolution provisions, as many do, including what was really a condition precedent provision:

Where ADR is required by this Agreement, commencement and completion of such ADR in accordance with this Agreement shall be a condition precedent to the commencement of an action at law or in equity in respect of the question or matter in dispute being arbitrated.

In hindsight it is always easy to criticize drafting of arbitration provisions, and both the article literature and case law is replete with

examples of "pathological" arbitration clauses. The ADR provisions in this case mirror section 132 of the [Condominium Act, 1998](#) and are a good starting place for a multi-tiered ADR clause in a condominium related agreement.

Should the Court Action be Stayed to allow Arbitration?

While there were several important issues before the court in this dispute, the main question to be answered was whether the court case should be stayed to allow arbitration to take place.

The jurisdiction of the Superior Court of Justice to stay a court proceeding is set in section 106 of the [Courts of Justice Act](#) and in section 7 of the [Arbitration Act, 1991](#) which states:

If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

There are exceptions where the court may refuse to stay the proceeding including where the subject matter of the dispute "is not capable of being the subject of arbitration under Ontario law".

Previously, the Court of Appeal, in [Haas v. Gunasekaram](#) set out five very helpful questions to be considered in a motion to stay a court proceeding based on an arbitration clause:

- (i) Is there an arbitration agreement?
- (ii) What is the subject matter of the dispute?
- (iii) What is the scope of the arbitration agreement?
- (iv) Does the dispute arguably fall within the scope of the arbitration agreement?
- (v) Are there grounds on which the court should refuse to stay the action?

In [Ciano Trading & Services C.T. & S.R.L. v. Skylink Aviation Inc.](#) the court confirmed that where it is unclear if the arbitrator has jurisdiction, the arbitrator should decide under the competence-competence principle and section 17(1) of the Act.

This arbitration supportive trend was further reinforced by the Supreme Court of Canada, in [TELUS Communications Inc. v. Wellman](#), with the result that the Arbitration Act, 1991 and the more recent case law places strict limits on court intervention in arbitration, and it has now become an ever more of an uphill battle to convince a court to order a stay of an arbitration.

Did the Dispute Fall Within the ADR Clauses?

It has been more or less clear in Ontario since 2003, with the

[McKinstry v. York Condominium Corp. No. 4726](#) decision that section 132 of the Condominium Act, 1998 requires the parties to use mandatory mediation and arbitration, although you would not necessarily know this from the number of attempts to by-pass section 132 as shown by the quantity and somewhat confusing case law on the topic.

In this case one party saw the dispute as arising from the other party's oppressive conduct, and as a result, maintained that the dispute fell outside the dispute resolution clause as section 135 of the Condominium Act appears to only allow an action for an oppression remedy in the Superior Court, not by arbitration. The other party saw the dispute as primarily contractual about cost sharing under the SFAs. The court had to decide which viewpoint applied.

What is "Oppression"?

The oppression remedy protects against a wide range of unfair conduct. From the case-law, most of which involves business corporations, the conduct has been placed in one or more of the following three categories:

1. Oppression occurs when there is an intentional serious wrong committed;
2. Unfair prejudice occurs when a party mistreats another stakeholder, such as wrongfully squeezing out a minority shareholder, diluting the shares of one party, or changing the corporate structure to alter debt ratios. In this category the offending party has a less culpable state of mind than in oppression.
3. Unfair disregard occurs when another party ignores the claimant's interest without necessarily intending to cause harm, such as failing to prosecute claims, or breaching fiduciary duties owed to the corporation.

Was This Dispute an Oppression Remedy Case?

If this dispute arose under the SFAs, then under the ADR clause in the agreements, it had to be resolved by way of arbitration. If it was an oppression remedy case, then arbitration would not be permitted to continue by the court. But it is never quite that simple.

[Ryan v. York Condominium Corporation No. 340](#), decided that an applicant for an oppression remedy under the Condominium Act was not required to use mediation and arbitration before applying to the Superior Court for an oppression remedy.

Previously the court in [MTCC No. 965 v. MTCC No. 1031 and MTCC No. 1056](#) confirmed that as part of determining whether to grant a stay, the court had to consider whether it is at least arguable that the dispute is arbitrable. Over the last fifteen years plus, the scope of what is arbitrable has expanded greatly. Many disputes where arbitration was previously not permitted for reason of public policy are

now resolved by arbitration.

In this case, the court adopted the analysis in [Tall Ships Landing Developments v. Leeds Standard Condominium Co. No. 419](#), involving the same condominium corporation and similar issues regarding mediation and arbitration:

In determining whether to grant a stay, the question is whether it is at least arguable that the dispute is arbitrable;

Where the essence of the dispute is the oppression remedy, which, under s. 135 of the Condominium Act, falls within the exclusive jurisdiction of this court, a stay in favour of arbitration proceedings would be inappropriate; and

On the other hand, courts should guard against allowing the mere invocation of an oppression remedy under s. 135 to avoid the consequence of an arbitration clause in an agreement.

In order to determine whether the subject matter of the dispute falls within the scope of the arbitration clause, a court must determine the "pith and substance" of the subject matter of the dispute.

In [Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636](#), the court dismissed the defendants' motion to stay an oppression application on the basis that the applicant was challenging the legal effect of the agreement itself, and not just the interpretation of the agreement apportioning the costs of common facilities.

Similarly, in this case, the court found that the "pith and substance" of the dispute was either non-compliance with the SFA or the fairness of the terms of the SFAs rather than "pure" oppression and allowed the arbitration to continue.

From this, for now, there is a clear distinction between "oppression" and "oppression like, but not "really" oppression", in condominium shared facility disputes.

Should We Expand the Scope of Arbitration in SFA Disputes?

As far as arbitration in general is concerned, given the strong trend towards supporting arbitration, it may not be that long before that distinction, which is based on public policy, is watered down especially where the parties agree to considering the oppression remedy in arbitration or where an ADR clause is sufficiently wide to allow this.

powers.

Later the Supreme Court of Canada in [Seidel v. TELUS Communications Inc.](#), confirmed that the legislature had to explicitly exclude the right to arbitrate with respect to a statutory remedy or arbitration could take place if the parties choose it. This is exactly the position under the condominium Act, 1998.

When we look at these earlier cases and combine them with the more recent jurisprudence, our courts now support arbitration and its expansion.

There are many advantages to arbitrating oppression remedy cases in the condominium context. You can design a fair and efficient process and choose an arbitrator who has an understanding and knowledge of the complexities of condominium disputes and the law.

From my experience in having mediated and arbitrated a significant number of SFA disputes, it seems to me that there are two likely scenarios where arbitration of SFA disputes could occur today.

The first is where the parties to an SFA agree to arbitrate their dispute even though an oppression remedy is claimed by one of the parties. This is often not considered by parties or counsel and should be.

Although our courts have held that section 135 of the Condominium Act requires a court-based adjudication, it is very unlikely, in fact almost inconceivable today, that a court would set aside an arbitration award if the dissatisfied (losing) party decided to appeal the outcome (perhaps after changing counsel) on that basis alone. That does not preclude other grounds for challenging the Award but not jurisdiction as the parties would have by agreement granted the necessary power to the arbitrator to decide on the oppression issues in the case.

The other is going forward, as many SFAs are being updated and amended, and it is well accepted that OBCA oppression remedy disputes can be arbitrated, why not consider including specific arbitration provisions including oppression remedy jurisdiction in new and/or amended SFAs?

This also provides an opportunity to set out the procedure and process around dispute resolution which is sorely absent from both section 132 of the Condominium Act, 1998 and many SFAs today.

Either way, whether by Agreement to Arbitrate or a part of an ADR provision in an SFA, careful drafting of the terms are required, but the benefits to clients of a customized dispute resolution process for their SFA disputes can be very significant and counsel should consider expanding the use of arbitration and med-arbitration in condominium disputes.

An Interesting Infographic on Cognitive Bias

A cognitive bias is a systematic error in thinking that affects the decisions and judgments that people make. Some of these biases are related to memory. The way you remember an event may be biased for several reasons and that in turn can lead to biased thinking and decision-making.

This concept is very important in negotiation, mediation and adjudication (whether arbitration or court litigation) and can often derail what seem to be sensible alternatives for dispute resolution.

The infographic and commentary list an enormous number of cognitive biases and tries to answer the question:

What are our most common failures of rational and critical thinking, and how can we avoid them in pursuit of academic and sociocultural progress?

Does the Infographic work? For the most part yes, but perhaps there is a bit too much information overall and it is not easy to read. But despite this, it is worth looking at as it contains useful information.

The Cognitive Bias Codex: [A Visual of 180+ Cognitive Biases](#) by Terry Heick.

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

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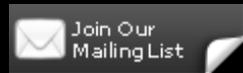


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