Photograph by Siobhan Brannigan

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Colm Brannigan's ADR Notes

Welcome to My New Year Newsletter

Welcome to 2020. I hope everyone enjoyed the holidays and that this coming year will be happy and productive for all.

This edition of my newsletter is focused on med-arb and has a brief case comment on two very recent cases from the Supreme Court of Canada. Although both Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 and Bell Canada v. Canada (Attorney General), 2019 SCC 66 are administrative law cases, they are very likely to have an impact on the courts in arbitration cases.

There is also a link to a UK based mediation case law database. If you know of a similar Canadian database, please let me know and I will include it in a future newsletter.

I am also pleased to announce that after completing the Accelerated

Route to Fellowship Course in Toronto in late September, I have now been admitted as a Fellow of the Chartered Institute of Arbitrators in London, England. The CIArb, which was founded in 1915, is widely regarded as the world's leading qualifications and professional body for dispute avoidance and dispute management.

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

Med-Arb

In my last couple of newsletters, I have commented on the growing significance of med-arb as an innovative, effective and fair ADR process.

We are now far beyond the idea of "med-arb" as a mash up hybrid of mediation and arbitration into a well-designed, highly sophisticated ADR process.

Over the last two years during which I have conducted a significant number of med-arbs, less than 15% went on to the arbitration phase, and in 90% of those, the issues arbitrated were reduced by more than 50% through the mediation phase. The time and cost savings achieved through using med-arb can be significant.

An unexpected and very welcome bonus of the process is that the quality of the mediation phase is greatly enhanced as parties are more fully prepared knowing that arbitration is already agreed to and seem to make an even greater effort to settle the dispute on a collaborative basis rather than move to an adjudicated outcome.

ADRIC Pre-Conference Workshop

The ADR Institute of Canada's Annual Conference, "Realizing ADR's Full Value" took place in Victoria, British Columbia on November 21 and 22, 2019.

Before the full Conference, on Wednesday, November 20, 2019, along with Richard Moore of MDR Associates in Ottawa , I presented a highly interactive half-day Pre-Conference Workshop, "Med-Arb: Innovative, Effective and Fair" to approximately 25 participants. The workshop was a scaled down version of our full two-day med-arb course which will be offered in Toronto and Ottawa this year.

Colm presenting with Richard Moore at Pre-Conference Workshop in Victoria.

We were very happy that 80% of the participants who provided feedback rated the presentation as "excellent", with the remainder seeing it as "good" (there was no "very good" category). Some of the feedback received included:

"Have this (topic) as a constant part of conferences."

"Excellent discussion by a very experienced group."

"I learned a lot."

"Full Day?"

"Great Presentation."

"This was an excellent and highly interesting workshop."

"Excellent session."

"Engaging speakers and invigorating discussions."

If you are interested in receiving information about our two-day med-arb course, please contact me.

Lexpert Article on Med-Arb

As part of the attention that now seems to be focused on med-arb, as a result of the upcoming ADRIC Med-Arb Rules, I was interviewed in an article, "Med-Arb: The Med-Arb Option" in the Lexpert 2019 Litigation Special Edition in the Globe and Mail's Report on Business. The article is available at:
https://lexpert.ca/article/the-med-arb-option/

ADRIO Med-Arb Section and Article on Med-Arb

The ADR Institute of Ontario has a new Med-Arb Section, of which I am co-chair along with Marc Bhalla. We have co-written two articles on med-arb for ADRIO's ADR Update Newsletter. In the first, "The Perfect Couple, Strange Bedfellows or Something In Between? Part 1." we discuss the mediation phase of the process. The article is available at:
http://adr-ontario.ca/wp-content/uploads/2019/11/ADR-UPDATE_FALL-2019_Final.pdf#page=9

"Part 2" of the article, focused on the arbitration phase will appear in the next edition of ADR Update.

Med-Arb Cases

While there is a significant amount of med-arb case law in Ontario family law disputes and Brahm Siegel has complied an excellent, comprehensive family law arbitration case law overview: https://www.nathenssiegel.com/Articles/medarb6-1jan14.pdf which includes med-arb cases, there is no overall med-arb data-base, so I have decided to create one on my website.

If you know of any med-arb cases reported or unreported in Canada, please let me know so that I can include them in this project.

Med-Arb Blog

To finish off on the med-arb topic, I am also planning to launch a

"Med-Arb Canada" Blog sometime this month. The blog will complement the med-arb database, my website and this newsletter.

Case Comment - A New Standard of Review in Arbitration?

In two (really three) recent cases released just before the holidays, Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65) and Bell Canada v. Canada (Attorney General); National Football League. v. Canada (Attorney General), 2019 SCC 66, 2019 SCC 66 the Supreme Court of Canada has made two major changes to the standards of judicial review of administrative tribunals which may also impact on review and appeals from arbitration awards in general.

Until now, the leading case on topic was Dunsmuir v. New Brunswick (Dunsmuir) 2008 1 SCC 9 where the Supreme Court decided that there were only two standards of review: "correctness" or "reasonableness". If correctness applied, the reviewing court was permitted to overturn a decision it disagreed with.

If reasonableness applied, the reviewing court was required to generally defer to the administrative body's decision unless the decision was not within a range of reasonable outcomes. This made it much more difficult to succeed on judicial review or appeal if the reasonableness standard applied.

There are two major changes to judicial review because of these new cases.

First, the Supreme Court has simplified the analysis for determining whether a reviewing court must be deferential to an administrative tribunal's decision. Administrative tribunal decisions will be upheld if they are "reasonable".

The Supreme Court explained that a decision will be unreasonable if a court is unable to follow the logic of the decision-maker. In other words, decisions must be supported by the "factual matrix". In arbitration, where the duty of the arbitrator is to provide an enforceable award, clarity in drafting is now even more important.

Second, and the most important change especially from the perspective of its impact on arbitration, is the Court's revised approach to statutory appeal rights. In these cases, questions of law will now be reviewed for correctness if the governing legislation provides for an appeal on this question.

As set out in the headnote to the Vavilov decision (see paragraphs 37-39 in the decision - emphasis added)

> In setting out a revised framework, this decision departs from the Court's existing

> jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.
>
> The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases.... Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. **Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness....** As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.
>
> The presumption of reasonableness review can be rebutted ....in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply.... **Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight, and it expects the court to scrutinize such administrative decisions on an appellate basis.** The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Where legislation provides for an appeal of an administrative body's decision, as is provided from an arbitrator's award under the Ontario Arbitration Act, 1991, it is now presumed that the legislature intended that the reasonableness standard of review not apply, and as a result, the standard to be applied in review is that of correctness.

This new framework will significantly change how appeals of administrative body decisions are viewed going forward and has the potential to a seriously impact on the finality of arbitration awards. It remains to be seen if this change will slowdown what has been a trend in Canadian case law over many years to uphold arbitration awards or if judicial scrutiny will increase.

What is clear is that drafting of arbitration awards around appeal rights and finality in contracting out of the statutory provisions contained in section 45 of the Arbitration Act, 1991 must be even more carefully drafted to definitively express the intention of the parties to exclude judicial review of awards.

The above is a very limited overview of lengthy and complex decisions and there is already significant in-depth commentary on them in the legal press/blogs if you would like to look beyond this.

These decisions will have a significant impact on both administrative law and arbitration. If you practice arbitration, whether as counsel or arbitrator, they are a must read.

Mediation Case Law

There is a real scarcity of mediation case law data bases and indeed any empirical data on the use of ADR in general. A good example from the UK is the Case Law Database from In Place of Strife: The Mediation Chambers, available at: https://mediate.co.uk/case-law

Although UK based many of these cases give a good overview of how courts there see the issues in these types of disputes and can be useful for mediators and lawyers in Canada.

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

Colm Brannigan is a Fellow of the Chartered Institute of Arbitrators as well as a Chartered Mediator and Chartered Arbitrator (ADRIC).

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