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Colm Brannigan's ADR Notes

Welcome to My Newsletter

I hope everyone is doing well. This has been a difficult year for many, and I have not had the opportunity to write my newsletter since March. The world now looks much different than back then and I suspect we will see many changes in the months ahead.

We have seen a rapid move to virtual mediation and arbitration over the last six months and this is likely to continue in the Post-COVID World. I have also seen an increase in demand for the Med-Arb process in different types of disputes. Properly thought out, Med-Arb makes sense and provides the opportunity to resolve in mediation with the certainty of an outcome in arbitration.

I have found that the quality of the mediation phase of Med-Arb is higher, probably because parties and their counsel prepare in a more comprehensive manner as they understand that arbitration is locked

into the timeline and want to make their best effort to resolve without adjudication. Similarly, I have been told that the outcome in arbitration (usually on a small number of issues than first expected) is more acceptable, even to the losing party, as they know they have exhausted the opportunities for settlement through mediation and accept that a decision has to be made to bring the dispute to an end.

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



Virtual or In Person Mediation?

I recently participated in my first in-person mediation since the COVID disruption began. It was quite unsatisfactory and did not resolve any of the issues. All participants were maintaining social distancing and were wearing face masks. This interfered with communications to an extremely high degree and since the mediation was conducted primarily in caucus, I am convinced that an online video mediation would have been more productive and I believe that two of the three counsel involved also agreed with me.

While the COVID restrictions are in place, and likely after them, it just makes sense to use video platform such as Zoom to conduct the process.

ADR Cases

There have been a couple of interesting cases from Western Canada involving mediation since my last newsletter.

The first, British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd., [2020 BCSC 880 CANLII](#) was a forfeiture action, and among the activities alleged to be conducted at the Hell's Angles Clubhouse was its use as a venue to "adjudicate or mediate disputes including about criminal activity".

The Court determined that mediation of disputes by or between Hells Angels' members/chapters is not an unlawful activity under B.C.'s Civil Forfeiture Act, SBC 2005, c 29 even if the subject matter of the disputes may involve unlawful activity:

[1201] The Director submits that the evidence establishes that the East End Clubhouse has been used as a venue for dispute resolution amongst members of the Hells Angels and between chapters of the Hells Angels.

[1203] The Director submits that mediation of disputes (typically in a clubhouse) among members or chapters of the Hells Angels plays a role in ensuring relative harmony within the organization so that internal discord is kept to a minimum. He further submits that "resolving these disputes maintains the Hells Angels brand so that members and associates of the club continue to benefit from the opportunity to monetize the brand through criminal means".

[1205] Also, the mediation of disputes is not an unlawful activity as defined by the Act. That is so even if the subject matter of the dispute may involve unlawful activity.

While we can only speculate over the model of mediation utilized in the Clubhouse (likely more evaluative than facilitative?) it is good to know that mediation is not an unlawful activity!

The second case is about the potential liability if a lawyer fails to prepare a client for mediation and encourages the client into what is afterwards seem as a "bad" settlement. While the case is very fact driven, we do not often see how the court views counsel's role in the mediation process and for that reason alone is worth reading. In *Raichura v Jones*, [2020 ABQB 139 CanLII](#), the court was highly critical of counsel's alleged failure to properly advise and guide his client in the mediation phase of a med-arb.

The court provides a clear overview of the case through pre-mediation, mediation, and post-mediation phases of the process and interestingly comments that, there are two schools of thought on how to prepare for mediation.

One, which is more typical in southern Ontario, is to prepare as you would for trial, with binders of financial information, written briefs prepared in advance, and the expression of established positions. The mediator is like a referee who expresses their views on the law and tries to bring the parties together.

The other, and more common approach in Calgary, is to enter the process in a transparent and open way. The parties do not take positions up-front or dictate what the facts are or what the outcome should be. The parties attend with a willingness to examine the interests and facts from the other person's perspective. They then go through a process where the mediator helps develop options to be weighed by the parties to see if a compromise is possible.

This may be so, but it seems to me that what is important is the model

of mediation used more than the geographic location. Preparation for an "evaluative" mediation (and you should consider if this model is appropriate in a med-arb) and "facilitative" mediation can be quite different, so clients and their lawyers need to have discussed the type of mediation that is best for their case and how to approach it, well before the process begins.

The case also looks at the "evolution from litigation to mediation/arbitration" and reinforces the importance of clarity in the transition phase between mediation phase and the arbitration phase in a med-arb process.

For an excellent article on the case see Diane Sowter's, Mediation: A Warning Not to Bully a Client Into Settlement, in the October 18, 2002 edition of Slaw which is available at <https://tinyurl.com/y5fz7b79>

Upcoming ADR Training

If you are interested in ADR training, or know someone who is, please take a look at these upcoming programs:

Med-Arb

Online Med-Arb Foundational Workshop. January 21-21, 2021 <https://adric.ca/news/med-arb-foundational-workshop/>
This course is offered through the ADR Institute of Canada and is presented by Colm Brannigan and Richard Moore.

Online Dispute Resolution (ODR)

ODR - A Practical Program for Practitioners. October 5 - 8, 2020 & December 6 - 8, 2020 <https://adric.ca/online-dispute-resolution-course/>

This course is offered through the ADR Institute of Canada and is presented by Colm Brannigan and Marc Bhalla.

Introduction to Mediation

Online Foundational Conflict Management & Mediation (40 hours) Monday October 19 - Wednesday October 21, and Tuesday October 27 - Thursday October 29, 2020. Offered by MDR Associates - contact Richard Moore rmoore@mdrassociates.ca

Advanced Mediation

Online Advanced and Multi Party Mediation (40 hours). Monday November 23 - Wednesday November 25, and Tuesday December 1 -

Thursday December 3, 2020. Offered by MDR Associates - contact
Richard Moore rmoore@mdrassociates.ca

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

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