

Welcome to the Spring Issue of ADR Notes



It is difficult to believe that we are now over a year into the COVID crisis. It has been a difficult year for many, and while the world now looks much different than such a short time ago, I suspect we will see many changes in the months ahead especially in terms of the use of technology in dispute resolution.

There has also been an increase in demand for Med-Arb in different types of disputes. Properly thought out, Med-Arb makes sense and provides the opportunity to resolve the matter in mediation with the certainty of an outcome in arbitration. I am happy to have been the first person to receive the new [Chartered Med-Arb designation](#) from the ADR Institute of Canada.

The quality of 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.

Med-Arb also provides the opportunity for continuing relationships, especially in business and commercial disputes far beyond what is generally possible in stand-alone mediation followed by arbitration or traditional litigation.

I have been told by a number of counsel that the outcome in the arbitration phase (usually on a smaller number of issues than first expected) is more acceptable to their clients, even if they "lost", because they know they have exhausted all opportunities for settlement through negotiation and mediation and can more easily accept that a decision had to be made by a third party to bring the dispute to an end.

Virtual or In Person Mediation?

We have seen the rapid move to virtual mediation and arbitration over the last year and this is likely to continue in the post-COVID world.

I have only participated in one 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 far more productive.

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

But what do others think? I recently ran a poll on LinkedIn and although it is a small sample of only 89 responses, the numbers are interesting.

After the pandemic and we reach a "new" normal, will you go back to in-person mediation & arbitration, or is "virtual ADR" here to stay?

Return to In-Person 12%
Stay with online 22%
Depends on the dispute 63%
Not sure 2%

From this it seems that “virtual” or online dispute resolution will be around long after COVID although it may be that we may also see a transition to integrated ODR such as [RDO](#) and [CREK ODR](#) in the near future.

ADR Cases

There have been a couple of interesting cases from mediation and med-arb since my last newsletter.

The first, British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd., [2020 BCSC 880](#) was a forfeiture action, where among the activities alleged to be conducted at the Hell’s Angels 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 was not an unlawful activity under B.C.’s Civil Forfeiture Act, 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 potential liability if a lawyer fails to prepare a client for mediation and encourages the client into what is afterwards seen 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 this if this model is appropriate) or a “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 September 18, 2020 edition of [Slaw](#).

ADR Training

Med-Arb

Online Med-Arb Foundational Workshop

Next workshops: May 11-13, 2021 and September 22-24, 2021.

Information and registration at <https://adric.ca/news/med-arb-foundational-workshop/>

This course is offered through the ADR Institute of Canada and is presented with my colleague, Richard Moore.

Testimonials from previous workshops include:

“I recently attended, via Zoom, the Med-Arb Foundational Course presented by Colm Brannigan and Richard Moore and it was a very worthwhile experience. The combination of mini-lectures, small group work, and practice sessions worked very well. I have no doubt that Med-Arb will continue to gain in popularity and this course provides the solid foundation a practitioner requires to competently provide this service. I recommend this course without hesitation.”

“This was a wonderful course, and one of the best ADR education programs I have taken. I highly recommend it to anyone who works in dispute resolution, including mediators, arbitrators and legal professionals. The course instructors are knowledgeable and helpful, and the written materials are first-rate. The chance to interact with fellow registrants online is also a plus.”

“This course was exactly what I hoped for - Colm and Richard have crafted thoughtful materials, and over the several days facilitated highly relevant discussions on the issues. There was a sharp focus on critical steps in setting up these hybrid processes. I came away from this training feeling confident and well equipped and would highly recommend it to anyone working in the field. Heartfelt thanks.”

Online Dispute Resolution (ODR)

ODR – A Practical Program for Practitioners.

Next workshops: July 6 - July 8, 2021 and September 7 - September 9, 2021

Information and registration at <https://adric.ca/online-dispute-resolution-course/>

This course is offered through the ADR Institute of Canada and is presented with my colleague, Marc Bhalla.

Testimonials from previous programs include:

“Take it from me - this is where to start if you are looking to increase your comfort with Online Dispute Resolution and video-based proceedings. Great course! Highly recommended.”

“Thank you Colm and Marc for presenting this excellent introduction to ODR which since the pandemic is now our new online world for Mediation and Arbitration. Great practical tips and a fun group to work with from right across Canada. Keep on zooming.”

Other ADR Training

Introduction to Mediation

Online Foundational Conflict Management & Mediation (40 hours) offered by MDR Associates. Please contact Richard Moore rmoore@mdrassociates.ca or go to <https://www.c4ecm.ca/programs/foundation>

Advanced Mediation

Online Advanced and Multi Party Mediation (40 hours). Offered by MDR Associates - please contact Richard Moore rmooore@mdrassociates.ca or go to <https://www.c4ecm.ca/programs/advanced>

We are also in the final stages of developing an arbitration course and will offer it for the first time in the fall.

ADR Articles

The Canadian Collaborative for Engagement and Conflict Management Inc. has published a [Journal](#) focused on contemporary issues in Canadian ADR. Please visit and if interested subscribe for updates.

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