Welcome to the First Issue for 2022 of ADR Notes

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This newsletter looks at two cases on ADR topics, suggests some reading about confidentiality (or the lack of it) in mediation and arbitration, some arbitration resources, and ends with my upcoming Med-Arbitration Training.

A Case Supporting Med-Arb:

Fono v. Canada Mortgage and Housing Corporation, 2021 FCA 125 (CanLII), at *https://canlii.ca/t/jgp0n*

Integrated Med-Arbitration is increasing in popularity as an ADR process that provides the potential for resolution in mediation with the certainty of an outcome in arbitration if mediation is not successful.

One of the common concerns about med-arbitration is whether the mediator can take an evaluative approach by providing an opinion about the strengths and weaknesses of a party's position or should the mediator be purely facilitative? The obvious danger of a mediator being evaluative in a med-arbitration is that it can raise doubts about the mediator's neutrality that give rise to allegations that the mediator is biased and should not conduct the arbitration phase if mediation is unsuccessful.

There is very little case law at the appellate level about Med-Arbitration in Canada and most of the case law that exists is focused on family law disputes.

However, a recent case from the Federal Court of Appeal, although in the context of a labour law dispute, provides strong support for med-arbitration even with the mediator offering opinions in caucus.

The court stated:

[9] Further, it is common for labour adjudicators or arbitrators who conduct consensual mediation sessions prior to hearing a case to express tentative views during the mediation as to the potential strengths or weaknesses of parties' positions with a view to fostering settlement, especially where, as was the case here, the parties are represented by experienced counsel. *Such statements are not indicative of bias.* (Emphasis added). See for example Skinner v. Fedex Ground Ltd., 2014 FC 426, 453 F.T.R. 315, at paras 7-10; Santa Fe Masonry v. Bricklayers, Masons Independent Union of Canada, Local 1, 2006 CarswellOnt 8141, [2006] O.J. No. 5099 (QL) (Ont Super Ct J (Div Ct)) at paras 4-10; Richard J. Charney and Thomas E. F. Brady, Judicial Review in Labour Law (Thomson Reuters) (e-looseleaf updated 2021, release 1)

ch. 11 at 11.1100-11.1120. By analogy with mediation/arbitration in the family law context, see also Reilly v. Zacharuk, 2017 ONSC 7216, 2017 CarswellOnt 19316, at paras 67-72.

[10] It would have a chilling effect on employment and labour mediations and undercut their efficacy if statements such as those the appellant alleges were made by the adjudicator were to be placed before the courts. The comments impugned by the appellant merely reflect the adjudicator's tentative views as to the strength of the offer made by the respondent as compared to risks associated with pursuing the adjudication. *This sort of comment is standard fare in a mediation….*

This case strongly supports the use of evaluative mediation in a med-arbitration process and that a mediator's "Tentative Views" in mediation are not necessarily indicative of bias. This should give participants in med-arbitration a great deal of comfort if the process is challenged by a disgruntled party and should further encourage the use of med-arbitration in dispute resolution.

A Case Supporting Mediation and Arbitration in Condominium Disputes:

MTCC No. 1171 v Rebeiro, 2022 ONSC 503 (CanLII), *https://canlii.ca/t/jlwj0*

Whether condominium disputes should proceed through court, mediation and arbitration or the Condominium Authority Tribunal (less frequent given its limited jurisdiction) is a question that continues to pop up in the now voluminous case law on condominium disputes.

In this case, Metropolitan Toronto Condominium Corporation No. 1171 sought a compliance order against a unit owner from the Superior Court. However the court decided the appropriate venue of this dispute was mediation or arbitration. In reaching that decision, Justice Myers provided a succinct review of the existing case law as follows,

[32] In Mckinstry and Dempster v. York Condominium Corporation No. 472 and Verrier (2003), 2003 CanLII 22436 (ON SC), at para. 19 Jurianz J (as he then was) held that where a dispute concerns a breach of the Condominium Act, 1998 itself, as opposed to a breach of the declaration, by-laws, or rules of the condominium corporation, ss. 132 (4) and 134 (2) **do not require mediation or arbitration**.

[33] The condominium corporation submits that its claim is based on breaches of ss. 117 and 119 of the act and therefore this is not just a dispute over breaches of the condominium's declaration, by-laws, and rules...

[34] How do I distinguish whether the claim is under the statute or the condominium's internal documents?

[35] In Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636, 2021 ONCA 360 (CanLII), the Court of Appeal dealt with a similar argument. Section 135 of the Condominium Act, 1998 allows a party to come to court to seek a remedy if she, he, or it is being "oppressed". A condominium corporation claimed it was being oppressed by another condominium corporation. The responding party argued that despite the relief being claimed under the statutory oppression remedy, the issues should be resolved by arbitration pursuant to an arbitration agreement between the two entities.

The Court of Appeal stated:

[25]. In our view, courts should generally be cautious in their approach to oppression claims of the type asserted here. *In particular, courts should be wary of allowing such claims to overtake, and potentially distort, the dispute resolution process that lies at the heart of the*

Condominium Act, 1998, a central aspect of which is a preference for arbitration over court proceedings. (emphasis added) In other words, courts should be alert to the possibility that persons, who are party to an arbitration agreement, are attempting to avoid that process by "piggybacking" onto claims made against others: see e.g. MTCC No. 965 v. MTCC No. 1031 and No. 1056, 2014 ONSC 5362, at para. 18; see also TELUS, at paras. 76, 98.

[28] The language of s. 135(1) is permissive, not mandatory. It contemplates that, in certain circumstances, it may be necessary to have resort to the Superior Court of Justice to obtain relief. However, s. 135(1) does not oust the jurisdiction of an arbitrator to consider the same relief, if that relief is part of the dispute in question that properly falls within the terms of the arbitration provision or within the terms of s. 132….

[38] Similarly, nothing in ss. 117 or 119 prevent the resolution of issues by mediation and arbitration if they fall under the arbitration agreement imposed in s. 132 (4) of the statute.

[39] The Court of Appeal then went on to discuss how to tell whether the claim is one for arbitration for court.

[42] In this case, there is no question that the core issues are the disputes under the condominium's documents. The assertions that ss. 117 and 119 apply are weak and clear efforts to pigeonhole the facts into statutory claims to get out of arbitration.

[48] *I leave for another day or level of court whether Mckinstry remains good law in light of the recognition by the Court of Appeal that the "central preference" of the Condominium Act, 1998 is for arbitration over court proceedings.*(emphasis added) Like the Court of Appeal above, I can stay this proceeding while the "core" dispute goes to mediation and arbitration. Then, if anything remains outstanding under ss. 117 or 119 after those proceedings, parties may move to lift the stay and continue this application (or to convert it to an action).

[49] Why do these cases keep happening? … So why do condominium corporations keep coming to court with "she said/she said" neighbour disputes instead of going to mediation and arbitration as intended by the statute and which should be a quicker, cheaper, and more conciliatory way to resolve these kinds of disputes.

[50] Sadly, the answer lies in the statute itself. *The statute provides an unintended incentive for condominium corporations to inflame the dispute and then to come to court.* (Emphasis added)

[55] Both of these economic incentives work against the central preference of the statute for mediation and arbitration...

[62] But, where a party brings the proceeding in the less preferable venue of a courtroom and the other party delays in moving to stay the action, the underlying reasons for the preference for arbitration do not change. Arbitration remains preferable. But what is at issue is a supervening risk that the moving party is abusing the process by delaying, running up the other parties' costs, perhaps benefiting from some delay in the outcome, or otherwise causing unfair prejudice to the applicant.

[69] In my view, mediation and arbitration are required and there is no basis to refuse the stay sought by the respondents for that purpose. Accordingly, the application is stayed pending the outcome of mediation and arbitration pursuant to the arbitration agreement deemed by s 132 (4) of the Condominium Act, 1998.

This is an example of a growing number of cases in which judges are exercising their discretion to divert the parties to alternative dispute resolution as a better option for the parties.

Justice Meyers found that the solution to the parties' "neighbours' disputes" was not a court proceeding:

"[46] The fix for neighbours' disputes, whether in condominiums or houses, is not found in an expensive, drawn out court proceeding. The court certainly can find facts and impose a remedy after an expensive trial perhaps. But, until the neighbours agree to cease hostilities, the court's decision is just a battle in an ongoing war. It becomes fodder for the next

salvo.

[47] The fix is in making the parties sit down, hear each other, and realize that the only win-win is peace. As said in the movie WarGames, "The only winning move is not to play"."

If you are involved in a condominium dispute a judge or arbitrator will want to see that you have been reasonable. Even if mediation is not required and if it is not an emergency/danger type of court application, consider if you should invite the other party to mediate the dispute. If the other party suggests it, do not reject the opportunity unless you have good reason to do so. This will confirm your reasonable approach to resolving the dispute before adjudication and will play a major role when it comes to the condominium corporation recovering its legal and arbitration costs.

Confidentiality in Mediation and Arbitration

Are mediation and arbitration private and/or confidential processes? Many assume they are although there can be no guarantee about this.
Two recent blog posts that are well worth reading are:

Michael Erdle, February 16, 2022, **When Mediation and Arbitration Are Not Really Confidential or Private at:** *http://www.slaw.ca/2022/02/16/when-mediation-and-arbitration-are-not-really-confidential-or-private/*

and

Mitch Rose, February 9, 2022, **When What Happens in Vegas Doesn't Stay There: Two Recent Court Decisions About Mediation Confidentiality May Surprise You** at: *https://mitchellrose.ca/when-what-happens-in-vegas-doesnt-stay-there-two-recent-court-decisions-about-mediation-confidentiality-may-surprise-you/*

Arbitration Resources

If your practice includes arbitration, you may want to look at these resources:
The Canadian Journal of Commercial Arbitration at *https://cjca.queenslaw.ca/*

Arbitration Matters found at *https://arbitrationmatters.com/*

Upcoming Training Workshops

I have just completed a very successful ODR Workshop offered through the ADR Institute of Canada. This workshop will be run again September 6-9, 2022.

More information at: *https://adric.ca/online-dispute-resolution-course/*

My next workshop will be Foundational Med-Arb, March 8-10, 2022, and there are still some spaces available. This workshop is presented through the ADR Institute of Canada.

Comments from previous participants 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. …. 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.

Rick Weiler, Mediator & Arbitrator

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, ….. The course instructors are knowledgeable and helpful, and the written materials are first-rate….

Mitchell Rose, Mediator, Arbitrator, and Lawyer

Med-Arb is definitely increasing in popularity; there is an increasing expectation from counsel that we try to 'mediate' matters on the first scheduled day of arbitrations. This course was exactly what I hoped for …. There was a sharp focus on critical steps in setting up these hybrid processes. I … highly recommend it to anyone working in the field….

Joy Noonan, LL.B., LL.M., C.Med.

Further information and registration at *https://adric.ca/med-arb-foundational-workshop/ or https://www.ccecm.ca/workshops*

As usual, if you have any comments or questions, please contact me.

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