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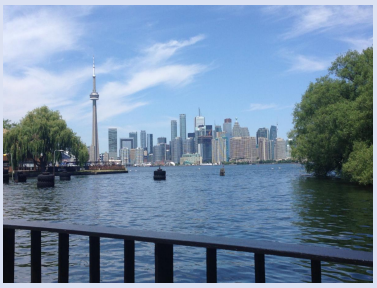
Welcome to Newsletter 2 for 2022 - ADR Notes



Welcome to the summer edition of ADR Notes. It includes a short piece on virtual proceedings and mediation briefs plus my comments on an important med-arb case from Alberta which makes it a longer Newsletter than usual.

If you have time, I would appreciate your feedback on the case.

I have also listed upcoming training in ODR and Med-Arb.

As an aside, I was recently speaking with a lawyer outside the GTA after a successful mediation and I was asked if I could provide the name of a mediator for a real estate dispute. I did but also mentioned that I have mediated quite a few of those disputes. The lawyer remarked, “I didn’t know you did that type of work and always saw you as a condo mediator”. While condo mediation makes up a big part of my practice, I also mediate corporate-commercial, real estate, construction, employment, workplace, estates, commercial leasing, insurance coverage and subrogation technology and general civil litigation disputes. My experience includes from computer software and implementation to a dispute between landowners and a solar farm.

ONLINE OR NOT ONLINE? IS IT STILL A QUESTION?

Now that we have emerged from lockdown, for at least the time being, the option of returning to in-person mediation, med-arb and arbitration is possible, but are there benefits to doing this in most cases?

Online processes have been proven to be a very effective means of resolving disputes. Looking back on the last couple of years, I cannot think of a dispute I mediated or arbitrated where the outcome online was any different than it would have been in-person.

It now seems that most dispute resolution professionals see on-line processes as the new default. This makes the recent Practice Direction from the Ontario Superior Court of Justice mandating the use of in-person attendances for certain court processes, including mandatory mediation, unless the parties agree to an in-person process, more puzzling. With the extensive backlog of cases in the courts this decision is difficult to understand.

While virtual mediation is similar to an in-person process, we have all discovered that online is not quite the same. The benefits of online processes such as flexible scheduling, costs, comfort and convenience outweigh the

challenges. Much has been written about these differences and the need for some degree of technical competence and understanding for those running the processes, but overall, we have all adapted well.

Surely, online processes should now be the default in ADR with in-person available if the case requires it?

It will be interesting to see what happens over the next few months in terms of the continuing and likely expanded role of best practices in online ADR.

MEDIATION BRIEFS AND PRE-MEDIATION CONFERENCE CALLS

The role of mediation briefs in the process is quite clear yet time and time again mediators see mediation briefs that do not help resolve the dispute and sometimes make it more difficult. Some points to consider:

- What is the purpose of a mediation brief?
- Who are you writing for when you prepare your mediation brief? Is it the mediator, the other side or opposing counsel? While the answer is all of them, the most important reader is the other party.
- Since the mediator cannot impose a settlement on the parties, your brief, which is an opportunity for advocacy, should be focused on trying to persuade the other party and opposing counsel of the merits of your case, not the mediator.
- Less is generally more when it comes to the length of mediation briefs especially if, as often happens, they are written from the perspective of the legal positions of the parties involved in the dispute.
- Keep in mind that mediation is about interests, not positions, and law is only part of the story.
- Know what you hope to achieve in the mediation. Decide on your goals and then prepare your brief with that in mind. Craft the facts and issues into a persuasive narrative.
- Consider acknowledging the strengths and weaknesses of your case and the other party's? Remember this may be the first time the other party becomes aware of the strengths of your case so use that opportunity.
- Avoid a cut and paste from the pleadings approach, as it will not really help if your goal really is settlement. The other party has already seen the pleadings so take the opportunity to present a more conciliatory tone in your brief.
- Include all documents you are relying on including expert reports, unless you have a good reason not to.
- Evidence is important, but mediation is not an adjudicative process, and is driven by interests and information.
- Case law can be helpful if it is relevant, but only cite key cases. If you decide to include case law to support your position, hyperlink it in the brief for the reader's ease of reference.

- Although many lawyers are hesitant to do this, it helps the mediator to know what, if any settlement attempts have been made unless you have a good reason not to disclose. Since the mediator cannot impose an outcome in the mediation, there is usually no reason not to provide this information although this can vary from case to case.

- Try to deliver your brief as far in advance of the mediation as you can so that the other side and the mediator will have time to review it. Doing this can provide enough time for opposing counsel to send the briefs to their clients to read which is what you really want to happen as this helps you to begin persuading the other party of the merits of your position.

- Most mediators like to hold a conference call with counsel after receipt of the parties' mediation briefs. In this call you can discuss issues and the most effective way for the mediator to assist the parties. The call also helps the mediator to understand the dynamics of the parties and counsel and is an opportunity to discuss what approach is best for your case.

- Most mediators are trained in a facilitative model while many lawyers prefer an evaluative approach. Are you looking for a purely facilitative approach or a more evaluative one? What does evaluative mean in this dispute?

- If a call cannot be scheduled, suggest that the mediator and counsel meet a half an hour or more, depending on the case, earlier than the start time of the mediation to discuss the briefs and the best process to be used for the mediation.

- Finally, if you do not see mediation briefs preparation as equal in importance to preparing a pre-trial memorandum, you might want to rethink that position. A well prepared mediation brief can really help you and your client achieve a good outcome.

MED-ARB CASE COMMENT

Singh v Modgill, 2022 ABQB 369 (CanLII)

Med-Arb is defined in the ADRIC Med-Arb Rules as:

Med-Arb means a dispute resolution process in which the parties commit that they will:

(a) attempt to settle their dispute through mediation (the mediation phase); and

(b) use binding arbitration to resolve any issues remaining after mediation (the arbitration phase).

While the first use of Med-Arb in North America was over 50 years ago, we are now starting to see Med-Arb cases reported more frequently as its use continues to grow in Canada. In Ontario, Med-Arb has traditionally been restricted to labour and family law disputes. As parties and their counsel become more familiar with the process it has now expanded to include condominium, business, estates and is making inroads in employment disputes.

Med-Arb is grounded in several key concepts including:

- Recognition that it is an integrated private dispute resolution process
- Parties are free to craft their own process if they do so with informed consent.
- The med-arbitrator is bound by the rules of natural justice.
- Requires a written agreement between the parties that is actually a submission to arbitration.
- Distinct phases in the process. Proper transition between phases.

In Singh v Modgill, 2022 ABQB 369 (CanLII), which is a very recent decision from the Alberta Court of Queen's Bench, the court confirms its support of party autonomy in the med-arb process far beyond any other reported case in Canada. This is a case worth reading.

Instead of summarizing and paraphrasing the case details, I have set out some important parts from the decision and added *emphasis* along with my brief comments.

Background From the Case

[1] After 15-years of litigation, on the eve of trial, the parties to this application submitted their dispute to a mediation-arbitration process. *The parameters of the mediation-arbitration were set out in a written agreement*. There was no oral hearing, and the arbitrator was required to deliver an award in five days over the Thanksgiving weekend. The most apt description for the process chosen by the parties is "quick and dirty."

[2] Quick and dirty is not necessarily a bad thing. With a trial date looming, the streamlined process chosen by the parties made sense. *Now the urgency of the moment has passed and with an unfavourable decision from the arbitrator, the applicants have buyer's remorse.* The applicants seek leave to appeal the Arbitration Award or to have the Arbitration Award set aside.

[3] *Arbitration is a party-driven process*. An arbitrator only has the power and jurisdiction conferred by the parties and the Arbitration Act, RSA 2000, c A-43. In the present case, *the parties created a process that prioritized expediency. The arbitrator was stuck with the process designed by the parties.*

[4] The purpose of the Arbitration Act section governing appeals and the section permitting the court to set aside an award *is not to save the parties from themselves*…. *The issues identified by the applicants are rooted in the process chosen by the parties and not in anything attributable to the arbitrator.* Accordingly, I decline to set aside the Arbitration Award or grant permission to appeal.

Paragraph 3's comment that arbitration is a party driven process is strong support for the proposition that arbitration is a private dispute resolution process subject to the provisions of any legislation such as the Arbitration Act in each province.

Paragraph 4's comment that the purpose of the Arbitration Act is not to save the parties from themselves, supports process choice by parties to an arbitration and stands in contrast to the willingness of the Ontario Superior Court to do just that in Campbell v. Toronto Standard Condominium Corp. No. 2600, 2022 ONSC 2805 (CanLII).

[22] The parties entered a "Med/Arb Agreement" dated September 20, 2021….

[23] The Med/Arb Agreement set out typical provisions ….

[24] The Med/Arb Agreement provided that if the mediation phase of the process was not successful, it would automatically convert to an arbitration. *The time and cost constraints on the parties were expressly noted*

[25] *The Med/Arb Agreement did not expressly set out a process for the arbitration phase*. However, the provision in the Med/Arb Agreement for "any and all closing submissions" to be "delivered ... immediately following the Mediation phase on October 8, 2021" may be taken to be the parties' agreement to proceed without an oral hearing and for the arbitration to be conducted only on the written materials submitted at the mediation.

These paragraphs confirm the importance of a written Med-Arb Agreement in every case that should set out the process in detail for both the mediation and arbitration phases of the process. Without a written agreement this case could have had a much different outcome.

[39] As noted above, the applicants make two kinds of complaints about the conduct of the arbitration. First, are the Group 4 complaints that the applicants say are about the law applicable to the arbitration process *including failing "to refuse to exercise his jurisdiction as an arbitrator," failing to "direct the parties to adduce evidence," and proceeding "to render the Arbitration Award notwithstanding serious credibility issues and a lack of documentary evidence instead of referring the parties and the subject matter of this arbitration to trial*." ….

[40] The Group 4 complaints, in essence, *blame the arbitrator for not putting a halt to the arbitration process because it was so flawed that it could not proceed. Of course, the arbitration process was the parties' creation and they impressed upon the arbitrator the urgency of the matter.* The arbitrator was told to deliver a decision quickly without a further hearing and to do so at minimum expense.

[41] The applicants' submission is, in effect, *that the arbitrator should have rejected his mandate from the parties as set out in the Med/Arb Agreement because it was flawed.* But the whole point of the Arbitration Act is that, subject to some limitations, parties may craft their own dispute resolution process.

[54] Section 45 of the Arbitration Act provides that "the court may set aside an award" for various reasons…. The applicants have lumped these grounds together *asserting that they were denied natural justice*.

[55] The applicants allege that the arbitrator failed to demonstrate an understanding or appreciation of evidence that the applicants considered

important. The applicants contend that the misapprehension of evidence is a breach of natural justice. However, *the power to set aside an arbitration award in s 45(1) is not a Trojan Horse for an appeal on the facts*…. To allow the set aside provision to be used as an appeal on the facts would denude the limited appeal provisions of their meaning.

[57] The concept of fairness embodied in s 45(1)(f) requires a*contextual assessment*. In a case such as this where the parties are of*relatively equal bargaining power and have been represented by counsel throughout*, a contextual assessment of fairness must start with the arbitration agreement.

[58] The mediation-arbitration process chosen by the parties was a departure from the norms of natural justice….

The importance of the above paragraphs is the courts view of the parties bargaining power and legal representation as valid consideration that lean away from court interference in the process. Unfortunately, in the recent Ontario case, Campbell v. Toronto Standard Condominium Corp. No. 260, which a statutory arbitration under the Condominium Act, this type of analysis was not applied, and the court set aside an arbitration award even though the parties were represented by counsel in the arbitration.

[59*]* *Mediation-Arbitration has become more common in recent years and performs an important function for those seeking expeditious and cost-effective resolution of disputes without all the formalities and procedural protections found in more robust forms of arbitration or in the courts*….

[60] *The Arbitration Act is based on the principle of party autonomy and, absent clear language, should not be interpreted as prohibiting parties from choosing mediation-arbitration* or what I have called a quick and dirty process to resolve disputes.

Paragraph 60 confirms that parties can use med-arb as their choice of dispute resolution process. This confirms what other courts have said in the past going back to Webb v. 3584747 Canada Inc., 2005 CanLII 3226 (ON SC):

[40] As I commented during argument, “Med-Arb” is a well recognized and often used alternate dispute resolution method….

and Marchese v. Marchese, 2007 ONCA 34 (CanLII), in the Ontario Court of Appeal:

[4] We do not agree with the submission that there is any ambiguity in the words “mediation/arbitration” or that those words mean “mediation or arbitration.” Mediation/ arbitration is a well recognized legal term of art referring to a hybrid dispute resolution process in which the named individual acts first as a mediator and, failing agreement, then proceeds to conduct an arbitration…

Going further than any other reported med-arb decision, the court confirmed that deference should be given to a party selected process over fixed and overly legalistic approaches to dispute resolution.

[62] The applicants have pointed to authorities that emphasize the duty of arbitrators and arbitral tribunals to adhere to the principles of natural justice

and implement fair procedures…. the applicants cite Justice O'Brien.… opining that "arbitration litigation is not some lesser form of litigation than that being conducted in the courts".

[63] All the decisions cited by the applicants deal with circumstances where the arbitration process was in the hands of the arbitrator or arbitral tribunal. These cases may be distinguished from the present case where the parties through the terms of the Med/Arb Agreement dictated a truncated arbitration process. I would revise O'Brien JA's statement that *"arbitration litigation is not some lesser form of litigation than that being conducted in the courts" by adding the caveat "unless that is what the parties bargained for."* Paragraphs 60 and 63 confirm that parties are free to agree and craft their own dispute resolution process if that is what they bargain for. This is an extremely strong endorsement of party autonomy far beyond what other courts have been prepared to say on the topic.

An interesting question arising from the facts and process in this case is whether the med-arbitrator should have taken on the engagement under such abbreviated terms with very tight time constraints?

While the courts in Ontario may not be prepared to go as far in support of party autonomy in med-arb and arbitration, and this case is not at an Appeal Court level, it provides strong support to the use of med-arb in different types of disputes going forward.

UPCOMING TRAINING

Our Comprehensive ODR Course is being offered September 6th – 9th from noon to 5 pm EST each day with the ADR Institute of Canada.

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

Our Med-Arb Course is being offered October 12th – 14th from noon to 6 pm EST each day again with the ADR Institute of Canada.

More information and registration at https://adric.ca/med-arb-foundational-workshop/

If you would like more information or to discuss the courses, please contact me directly.

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