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NEW COMMERCIAL MEDIATION ACT MAKES ONTARIO A BETTER CHOICE FOR COMMERCIAL DISPUTE MEDIATION

By: Douglas F. Harrison.

There are new and important advantages to mediating a commercial dispute in Ontario, as compared to other Canadian jurisdictions. With the October 25, 2010 enactment of the *Commercial Mediation Act, 2010*, S.O. 2010, c. 16, Sch. 3 (“CMA”), parties settling a commercial dispute through mediation will be able to register their settlement agreement with the court, gaining the advantage of having it treated like a judgment for enforcement purposes. The CMA also provides parties involved in the mediation of a commercial dispute with more certainty about the appointment of mediators, the conduct of the mediation and the confidentiality of the process.

Ontario becomes the second jurisdiction in Canada, after Nova Scotia, to adopt legislation of this nature. Like its Nova Scotia counterpart, the Ontario CMA is based on the UNCITRAL Model Law on International Commercial Conciliation (2002), which is also the basis for similar legislation in Illinois, New Jersey, and Ohio. The CMA applies not only to mediations of commercial disputes conducted in Ontario but also to those governed by Ontario law. Accordingly, parties who include dispute resolution clauses in their commercial agreements and wish to avail themselves of this new legislation should consider stipulating that any mediation be governed by Ontario law or be held in Ontario.

Importantly, if an Ontario mediation of a commercial dispute results in a signed settlement agreement with which a party fails to comply, another party wishing to enforce it may now apply to a Superior Court judge for judgment in the terms of the agreement or to the Registrar of the Superior Court for an order authorizing registration of the agreement with the Court. The Registrar must make such an order unless it is shown that a party did not sign the settlement agreement, did not consent to its

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terms, that the settlement agreement was obtained by fraud, or that it does not accurately reflect the terms agreed to. Once this order has been obtained, the agreement can be registered with the Superior Court, which would have the effect of giving it the same force and effect as a judgment of the Court. Arguably, it could then be registered in other provinces or the United Kingdom under the applicable reciprocal enforcement of judgment rules.

The CMA applies to mediations of commercial disputes only, whether contractual or not, unless parties agree not to have the Act apply to their mediation, or the mediation is governed by the mandatory mediation rule of the *Rules of Civil Procedure*. Family law disputes or disagreements with insurers over accident benefits are not considered to be commercial disputes. The CMA also does not apply to mediations under or relating to the formation of a collective agreement, a computerized or other form of mediation in which there is no individual acting as the mediator, or to attempts by judges or arbitrators during the course of a legal proceeding or arbitration to promote a settlement. The CMA binds the Crown and also provides parties with the flexibility to choose to have some but not all of its provisions apply to a mediation. Mediations commenced before October 25, 2010, the date on which the CMA came into force, are not subject to the Act.

A further benefit is that parties will have greater certainty that the mediators they select are appropriate. Mediators are required by the CMA to disclose any current or potential conflict of interest and any circumstance that

might give rise to a reasonable apprehension of bias. This duty to disclose continues until the mediation is terminated. A conflict of interest is deemed to occur if a mediator has a financial or personal interest in the outcome of the mediation, or has an existing or previous relationship with a party or a person related to a party to the mediation. Once appointed as a mediator, that individual cannot also be an arbitrator of the dispute or a related dispute unless the parties agree.

Once appointed, a mediator has a positive duty to maintain fair treatment of the parties throughout the mediation, taking into account the circumstances of the dispute. Parties cannot relieve the mediator from complying with this obligation. As between the parties, the mediator may disclose to a party any information that he or she receives from another party unless that other party expressly asks the mediator not to do so.

Information relating to the mediation (that is not otherwise public or considered by the parties to be non-confidential) must be kept confidential by the parties, the mediator and anyone else involved in the conduct of the mediation. However, disclosure of such confidential information can be made if the parties agree or if required (a) by law, (b) in order to carry out or enforce a settlement, (c) for a mediator to respond to a claim of misconduct, or (d) to protect health or safety. Similarly, absent consent of the parties (and, if necessary, the mediator), no information concerning the mediation is discoverable or admissible in any judicial, arbitral or administrative proceeding, unless that information is required (a) by law, (b) in order to carry out or enforce a settlement, or (c) for a mediator to respond to a claim of misconduct.

The CMA states that parties can agree not to proceed with arbitral or judicial proceedings before a mediation is terminated. However, an arbitrator or a court may allow the proceedings to proceed if they are necessary to preserve a party's rights or are in the interest of justice (note, however, that agreeing to mediation tolls any applicable limitation period under section 11 of the Ontario *Limitations Act, 2002*). The commencement of an arbitral or judicial proceeding is not of itself to be regarded as a termination of the agreement to mediate or of the mediation.

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MEDIATION IN THE BOARDROOM

By: Clive Lewis.

The management of conflict at work probably represents the biggest unrecognised area for cost savings and market differentiation for organisations today. There is a proven business case for managing conflict at work. To date though, suppliers of mediation services have had limited success in persuading executives to fully engage adopting mediation and conflict resolution strategies. There are a few reasons for this.

First, it can be easy to ignore, avoid or simply put off dealing with conflict. It is one of those matters that require a large amount of energy and effort to deal with. It is often much more convenient to do something else. Secondly, acknowledging that conflict is present can be seen as recognition of failure. Few people, particularly senior managers want to be associated with failure. Third, some problems can go away quickly if you throw money at them. This is far easier to do in the private sector and probably explains why the public sector accounts for around 75% of the revenue related to the workplace mediation market. It also probably demonstrates why three quarters of disputes going to Employment Tribunals are linked to the private sector. Fourth, is a lack of understanding in the board room about how the impact of conflict affects the bottom line. Examples include a decrease in productivity, employee engagement, employee attraction and health & well-being. There is also likely to be an increase in sickness and absence rates, customer complaints, employee turnover and legal fees. On this last point, recent figures indicate the cost of legal fees continue to rise with the average company spending £5.8m on legal fees every year.

Employment Tribunal statistics for 2009/10 highlight a 56% increase in claims year on year. Three of the main increase claim areas are redundancy, breach of contract and unfair dismissal. Dealing with the effects of disputes takes valuable time of team members often meaning that they have to postpone working on value-add areas.

Tension exists at board level too. It can be a prerequisite that part of the criteria for becoming a board room member is that individuals aren't backward in coming forward. The added dimension about conflict in the boardroom is that it can spill over to affect various parts of the organisation. For example, if team members get wind of the fact that their boss is engaged in conflict with a colleague it can mean that they take sides with their leader. In

extreme cases, silos may develop as whole functions may refuse to collaborate with each other out of a sense of loyalty.

The Mediation Process

Mediation is a tool that increasing numbers of organisations are using to help resolve disputes. In mediation, a neutral, independent third party facilitates a process to help parties find a solution to problem. Some advantages of mediation are that:

- It's quick – Most mediation sessions last around one day compared to 12 days to managing a case that is going to an Employment Tribunal
- It saves money – issues can be settled quickly and can avoid further direct and/or indirect costs
- It doesn't stop you litigating – your statutory rights are not affected by participating in mediation
- It's not soft and fluffy – mediation is hard work and can focus on pragmatic and commercial solutions.

The mediation process is voluntary, confidential and without prejudice. The mediator is neutral and impartial.

Mediation has both operational and strategic dimensions. At the operational level mediation can help get parties talking again. At a strategic level, mediation can help identify organisational learning needs and reduce business risk. An example of this latter aspect can be seen as part of the costs of some of the strikes that have hit the UK recently. As well as the direct costs flowing from the disruption of a strike, an organisation may lose corporate customers forever and associated goodwill. Conflict represents a significant risk for organisations.

Mediation in the Boardroom – The Benefits

Operational Level

- Solves disputes
- Gives line managers their time back
- Improves customer service
- Reduces absence
- Improves team work
- Gets people talking again

Strategic level

- Helps organisational learning
- Helps form succession planning
- Improves productivity savings
- Increases the likelihood of achieving organisation objectives
- Enhances competitiveness
- Improves employee engagement
- Improves organisational health and well-being
- Can be linked to operational and financial reviews
- Compelling business case for corporate and social responsibility
- Reduces business risk

Case study

Pursar Technologies is a FTSE 250 global business. A dispute developed between its marketing director, customer service director and chief technology officer. The background to the dispute was that the customer service director sent an email to the chief executive with a proposal on direction for the company. The marketing director and chief technology officer were copied in. The marketing director replied to everyone in the email asking the customer service director to explain why he had proposed an idea about how the company should be adjusting its marketing strategy without discussing it with him first. The situation was made worse when the chief technology officer indicated that he would adopt a third marketing strategy. There was a big fall out. The chief executive decided to let the three of them sort it out. They couldn't, and eventually stopped talking to each other. They also stopped making joint visits to customers and collaborating on organisational initiatives.

Customers began to be negatively impacted and the sales pipeline started to slow down. Three months later, the chief executive realised that something needed to be done about it. He engaged the services of a mediator. The mediator was locked in a room with the three executives for three hours. When the parties emerged they had agreed to put the dispute behind them. Apologies had been exchanged and it was back to business as usual. The chief executive was astonished. He was amazed that three months of stand off could be settled with a three hour conversation. He also realised that the organisation had paid a huge price for pontificating over a dispute that could

have been nipped in the bud as soon as the original email had been sent.

Mediation can, therefore be a like a double edged sword. On one side it can be used to help get senior executives talking again. On another level it can be used to help build organisational capability, reduce organisational risk and increase competitive advantage.

Mediation in any organisation is unlikely to be highly successful unless members of the board understand its benefits and are willing to engage in mediation themselves when trouble strikes.

I end this article as I started. The management of conflict probably represents the biggest unrecognised area for organisational cost savings and market differentiation for organisations today.

Clive Lewis is a former HR director. He has worked in both the public and private sectors. Having mediated hundreds of disputes, he is regarded as one of the UK's thought leaders on the topic of mediation in the workplace. Many high profile disputes are referred to him for mediation. Clive represents Globis on the Board of the Civil Mediation Council. He also chairs the Council's workplace committee. Clive is also a non-exec director of an NHS Foundation Trust, the National Youth Jazz Orchestra and the Open College Network. His book, The Definitive Guide to Workplace Mediation and Conflict Management at Work was published in January 2009. He has two other books, Win-Win Resolving Workplace Conflict: 12 Stories and Difficult Conversations: 10 Steps to Becoming a Tackler not a Dodger will be available at the end of April. © 2011 Clive Lewis.

THE VALUE OF A PSYCHOLOGIST MEDIATOR

By: Ilene Diamond.

Consumers of mediation services have a range of options when it comes to choosing a mediator. For many, especially in this competitive economic climate, conservatism guides their choices. Most consumers of mediation services are attorneys, either in-house general counsel, or private firm attorneys representing clients in litigation. Attorneys are notoriously risk-averse, and name brands, in mediation as with other goods and services, provide a high level of comfort to the risk-averse. Thus it is not surprising when attorneys recommend to their clients that they select

a retired judge, former big firm partner, or famed trial lawyer-turned-mediator.

While a retired judge, former big firm partner or famed trial lawyer-turned-mediator may provide excellent ADR value for large-scale commercial lawsuits, there are many types of disputes in which the client may be better served by a psychologist mediator. Divorce attorneys, dealing as they do with one of the most stressful transitions in anyone's life, are more likely than commercial litigators to see the value in therapist mediators. Often, their clients bring strong emotions into their legal consultation which interfere with the productive resolution of issues in dispute. Though some divorce attorneys have a wonderfully warm "deskside" manner and justifiably take pride in the comforting and personalized service they provide, it is a rare divorce attorney that can deal effectively with the emotional liability or intransigence of, say, someone with a borderline personality or substance abuse disorder.

Divorce attorneys are accustomed to referring clients to therapists for treatment. In the collaborative divorce model, mental health professionals are utilized as a matter of course. From seeing therapists as respected clinical resources, the collateral use of which often results in smoother, less stressful and more efficient proceedings, it is not a large leap to seeing therapists as potentially valuable dispute resolution resources. There is, therefore, a greater comfort level with the idea of psychologists as mediators in the divorce context than in other civil litigation contexts.

The value of a psychologist mediator is not, however, limited to the divorce context. A therapist mediator can be the neutral of choice in other types of family matters, such as estrangement among family members, disputes about elder care decisions, estate planning or inheritance, or dysfunction in family businesses. Less commonly, psychologist mediators have been utilized in sensitive litigation matters such as employment discrimination, sexual harassment, sexual assault or molestation, medical and psychiatric malpractice cases, and a variety of matters involving personal injuries, whether such injuries are physical or psychological. A psychologist mediator brings added value to the table in these delicate matters.

Consider the emotional needs of a personal injury plaintiff at the mediation table. At the most basic level, there is the need to be heard. Meeting this need effectively may require more than the active listening skills which are the stock in trade of every competent mediator. There is a need for accurate empathy, validation and a respectful, appropriately paced process for coming to terms with loss. While attorneys are familiar with the types of loss recognized in law – e.g., financial, reputational, market share – a psychologist mediator may more easily recognize that the

plaintiff may have lost certain hopes and dreams, aspects of their relationships, and meaningful parts of their identity. Beginning to come to terms with loss is an essential precondition for settling litigation or, indeed, to reaching a compromise in any dispute. Psychologists are experts in helping people find meaning and dignity in their experience so that they can come to terms with loss.

On the facilitative-evaluative continuum, attorney mediator styles tend to skew towards the evaluative, in which the mediator helps the participants evaluate their legal position and the costs and benefits of pursuing legal remedies versus a mediated settlement. Psychologist mediators tend to use a facilitative style. Psychologists are trained to closely follow a client's narrative, matching affect, language and pacing when appropriate. In contrast, attorneys are trained to spot issues, apply rules to facts and draw conclusions. Thus, a psychologist mediator is less likely to become impatient with a disputant's pace. An impatient mediator can derail settlement by making a party feel hurried, disrespected, or dismissed. Moreover, whereas attorney mediators tend to focus on the content of communication, psychologists are trained to simultaneously attend to content and process. Thus, a psychologist mediator may pick up on not only what is said, but how that content is talked about, including language, tone, and facial expressions, as well as body language, gestures, and other nonverbal cues. Psychologists are trained to pick up on metaphoric language used by clients, as well as relational dynamics within the mediation room which can either impede or enhance progress, and to use this knowledge in their work.

Psychologist mediators add value in disputes where special psychological needs are a factor in dispute. For example, imagine that a child whose parents are divorcing has learning disabilities and an anxiety disorder. Imagine that the higher earning parent, let's say the father, sees the mother's request for money for treatment, private school and tutoring per the recommendations of the evaluator as an attempt at extortion designed to punish him for his infidelity. Perhaps the father objects to extra-curricular services in part because it will necessitate changes in the schedule. Imagine further that the father has a rigid personality style suggestive of an obsessive-compulsive personality disorder, an autism spectrum disorder such as Asperger's disorder, or a nonverbal learning disability. So, in addition to being angry and suspicious of the mother's motives, as is common in disputes about child support, the father's particular psychological make-up is such that it is more difficult for him to exercise mental flexibility on the issues of child support, schooling and treatment.

Standard child support guidelines and visitation schedules may not meet the actual needs of a child with disabili-

ties. Psychologists are trained in psychological testing and thus are able to understand psychological assessment reports and help interpret them to the recalcitrant parent. In the hypothetical case described, both the child and the parent have special psychological needs; the child needs treatment and tutoring, and the father needs a mediator who can help him understand the child's needs from an unbiased clinical perspective. In this case a psychologist mediator would not diagnose any of the people involved, but the ability to see a "difficult" person as potentially having neuropsychological differences or psychiatric difficulties can be helpful in moving beyond personalities towards problem-solving.

Perhaps the greatest value a psychologist mediator can provide is the ability to think outside the formalism of the legal process. I once co-mediated an employment discrimination case in which a *pro se* plaintiff was suing a government agency for wrongful termination on a novel theory. Exposure was uncertain for the defendant, but the case presented interesting legal questions, and the plaintiff was quite invested in seeing how the judge would rule on his arguments. My co-mediator focused on the plaintiff's legal theory in light of existing case law, the evidence, and the proveability of the case. With each party expressing total confidence in their positions, the mediation was threatening to stall out. I decided to shift the focus away from the case and towards the plaintiff's life and how it was being impacted by the lawsuit.

When I asked him how his wife felt about the litigation, the whole trajectory of the mediation shifted. My co-mediator and I were able to interview the plaintiff about their plans as a couple. Once he began talking about their longstanding plans to move to another state so that he could pursue a law school education and a new career and his wife could be closer to her family, it became painfully clear that the ongoing litigation was a major barrier to the realization of their dreams. This discussion caused the plaintiff's cost-benefit calculus to shift, because the value of settlement had been fleshed out in a way that resonated with him emotionally. The meaning of continued litigation been transformed from a principled stand against injustice to an impediment to marital happiness, and the meaning of settlement had been transformed from capitulation to freedom. Once that happened, the parties were able to agree on a moderate financial settlement and the case was over.

In the case just described, by thinking outside the box of legal formalism, I helped the plaintiff uncover personal

meanings surrounding the conflict. Personal meanings are always present, even in the most routine mediations. At a mediation of a personal injury case, both plaintiff and defense counsel were surprised to find that the impact of an accident upon the plaintiff was far greater than the plaintiff had disclosed at deposition. Trauma impacts how people remember and are able to tell their stories. A psychologist mediator was able to understand how the trauma of the accident and the subsequent depression had impacted the plaintiff's ability to tell her story and thus advocate for herself at the time of the deposition. Further discovery would provide a more informed basis upon which to mediate the case.

Unlike attorneys, psychologists are trained to interview people and get them to open up about their lives. We are also trained to "formulate", i.e., to hypothesize, to visualize the person's life, their family, and their interior psychological landscape, including how experiences are affecting them emotionally, and what personal, perhaps even idiosyncratic, meanings are attached to those experiences. By bringing these abilities into the mediation process, we expand the possibilities for greater understanding, satisfaction with the process and creative options for resolving the dispute.

It must be understood that a psychologist mediator, like any other mediator, operates as a neutral, and not as a treating clinician. The role of the psychologist mediator is never to diagnose or treat any person involved in the mediation, just as the role of an attorney mediator is not to legally advise or represent any person involved in the mediation. However, just as the attorney mediator's legal acumen and experience are assets in mediation, the clinical skills and experience used in assessment, diagnosis and treatment by psychologists are invaluable in the mediation context.

Ilene Diamond is a clinical psychologist and mediator who previously had a career as an attorney. She is a magna cum laude graduate of University of Illinois College of Law, held a two-year federal district court clerkship, and represented legal clients in private practice prior to earning her doctoral degree at the Wright Institute. Dr. Diamond has mediated disputes involving a wide range of subject matters and socio-cultural, family, and psychological dynamics. Dr. Diamond maintains a private practice in the San Francisco Bay Area. © 2011 Ilene Diamond.

RECENT CASES

Findings of Pipeline Arbitration Committee Regarding Costs Upheld by Supreme Court of Canada

Introduction

In the February 2011 case of *Smith v. Alliance Pipeline Ltd.* (2011 SCC 7), the Supreme Court of Canada substantially upheld the findings of the Pipeline Arbitration Committee regarding costs awarded under the *National Energy Board Act*.

Facts

In 1998, the respondent obtained approval from the National Energy Board to build a pipeline that would cross farmland owned by the appellant. The respondent failed to perform agreed-upon reclamation work on the easement, so the appellant proceeded to do the work and submitted an invoice in the amount of \$9,829 to the respondent. The respondent offered to pay only \$2,500 of the amount submitted by the appellant. The appellant filed a Notice of Arbitration and a hearing took place before the Pipeline Arbitration Committee (the “First Committee”). However, these proceedings were aborted when one of the committee members was appointed to the bench. In June 2003, the respondent decided to perform maintenance work on its easement and asked the appellant for permission to use a 100-foot portion of his private property that lay outside the company’s right-of-way. The appellant refused permission unless the respondent paid “up front”. The respondent refused, and subsequently instituted proceedings before the Alberta Court of Queen’s Bench. The respondent sought, *inter alia*, unhindered access to the appellant’s land and a declaration that the appellant’s compensation claim before the First Committee was precluded by releases signed by the parties. The appellant ultimately discontinued the Queen’s Bench action.

A new Pipeline Arbitration Committee (the “Second Committee”) was appointed. In an amended Notice of Arbitration, the appellant sought compensation for his reclamation work, and added claims for his costs before the First Committee, along with \$16,222.57 in solicitor–client costs, which was the balance of his legal expenses fol-

lowing the discontinuance of the Queen’s Bench action. The Second Committee allowed most of the appellant’s claim. It also awarded him a portion of his costs from the First Committee proceedings, and the balance of his solicitor–client costs on the action and motion before the Court of Queen’s Bench. The Federal Court of Canada dismissed the respondent’s appeal. On further appeal, the Federal Court of Appeal concluded that the Second Committee had erred in awarding the appellant his costs before the First Committee and on the Queen’s Bench action. The appellant appealed to the Supreme Court of Canada.

Decision

The Supreme Court of Canada allowed the appeal. It agreed with the Federal Court of Canada which held that the Second Committee’s award of part of the costs incurred before the First Committee was reasonable on the basis that since the appellant was forced to defend the action in order to preserve his claim before the First Committee, his participation in the action was part and parcel of his claim for compensation under the *National Energy Board Act* (the “NEBA”). The Court noted that the “overarching question before the Second Committee was whether ‘costs’ in s. 99(1) of the NEBA refers solely to expenses incurred by an expropriated owner in the proceedings before it”. Subsection 99(1) vests in an arbitration committee a broad discretion to determine the incidental components of full compensation, which include “all legal, appraisal and other costs determined by the Committee to have been reasonably incurred [by the expropriated party] in asserting that person’s claim for compensation” where the amount of compensation awarded to a person by an Arbitration Committee exceeds 85% of the amount of compensation offered by a company.

The Court held that the governing standard of review in this case was reasonableness. The Second Committee was interpreting a section of its home statute regarding awards for costs. The only costs that must be awarded under subsection 99(1) were those determined by the Committee to have been “reasonably incurred”. The reasonableness of the Second Committee’s conclusion that subsection 99(1) merited a broad reading accorded with the plain words of the provision, its legislative history, its evident purpose, and its statutory context. Furthermore, it was not open to dispute that the appellant had incurred all of the costs that he was awarded by the Second Committee.

Arbitrator Not Required To Provide Reasons for Decision

Introduction

In the December 2010 case of *Hashimoto v. Century 21 Carrie Realty Ltd., de Paiva, and Winnipeg Real Estate Board* (2010 MQBQ 271), the Court of Queen's Bench of Manitoba held that in the circumstances, an arbitrator was not required to provide reasons for his decision.

Facts

The applicant sold his home to the purchasers. The respondent, Helen de Paiva ("de Paiva"), was a real estate agent who assisted the purchasers in completing the offer to purchase. The offer provided for payment of a commission of three per cent of the selling price to the purchaser's agent. The applicant, however, told the purchasers that there was no commission payable. de Paiva claimed that she never intended to forego her commission.

After the purchase was completed, the respondent Century 21, on behalf of de Paiva, submitted an invoice for the commission to the applicant. The applicant approached de Paiva seeking to have her sign a letter waiving her commission, which de Paiva refused to do. Both the applicant and de Paiva agreed to have their dispute resolved by arbitration. In that regard, both parties received information packages from the Winnipeg Realtors Association (the "WRA"). The WRA panel awarded the selling portion of the commission for the applicant's house to Century 21. The applicant sought leave to appeal the arbitration award.

Decision

The Manitoba Court of Queen's Bench dismissed the application. The applicant's main argument was that subsection 38(1) of the *The Winnipeg Real Estate Board Incorporation Act* (the "Act"), requires that reasons on which an award is based must be provided. In this case, the applicant argued that the failure of the WRA panel to provide reasons for its decision constituted an error in law. The Court agreed that what the WRA panel had provided was "a bare decision without explaining how or why they arrived at it".

The Court noted that Section 12 of Article II of the WRA Constitution and By-laws makes reference to the WRA panel being required only to deliver a decision. Furthermore, the Court was unable to find any reference in any of the documentation under which the WRA conducted its arbitration hearings to a requirement that reasons had to

be provided. The Court also noted that, at common law, an arbitrator is not required to provide reasons. Accordingly, the Court held that subsection 38(1) of the Act had been excluded by the arbitration agreement under which arbitration hearings conducted by the WRA operate.

Court Dismissed Claim for Costs for Voluntary Mediation

Introduction

In the December 2010 case of *Saltsov and 968831 Ontario Inc. formerly known as Cashcode Co. Inc. v. Rolnick* (2010 ONSC 6645), the Ontario Divisional Court dismissed the appellants' claim for costs relating to a voluntary mediation.

Facts

The appellants, Saltsov and 968831 Ontario Inc., formerly known as CashCode Co. Inc., were entitled to their costs on a partial indemnity basis as a result of their success in a matter heard in the Divisional Court. In the costs hearing, the appellants' claim included an amount of \$8,461.50 for fees and disbursements related to a voluntary mediation, including a portion of the mediator's fees.

Decision

The Ontario Divisional Court dismissed the appellants' claim for costs with regard to the voluntary mediation portion of the claim. The Court took note that the parties had proceeded on the assumption that fees and disbursements incurred in voluntary mediation should be considered by the Court in deciding the matter of costs. However, the Court stated that it was not bound by the agreement of the parties as to what was properly included in an assessment of costs.

The Court cited the decision of Blair J. (as he then was) in *Nanef v. Con-Crete Holdings Ltd.*, [1993] O.J. No. 1756, who stated that the costs of a mediation process should be borne equally by the parties engaging in it. The Court in this case "wholeheartedly" endorsed this position. The Court stated that if mediation-related costs were awarded, the parties might be discouraged from engaging in constructive dispute resolution processes for fear that if such proceedings did not lead to settlement, their costs would be increased. Furthermore, the Court noted that it was neither possible nor desirable to assess the reasonableness of positions taken by the parties at the mediation. Finally, the Court noted that fees charged by mediators vary greatly

and the Court should not treat such fees as *bona fide* disbursements.

Arbitrator in Employee Dismissal Case Lost Jurisdiction Due to Errors – Matter Remitted for Rehearing

Introduction

In the December 2010 case of *Miners' Memorial Manor v. International Union of Operating Engineers, Local 968B and MacDonald* (2010 NSSC 464), the Supreme Court of Nova Scotia ordered that a matter be remitted for rehearing on the basis, *inter alia*, that the adjudicator had used the wrong burden of proof.

Facts

Miners' Memorial Manor (the "Manor") was a residential care facility operating in Sydney Mines, Nova Scotia. The grievor was employed as a Continuing Care Assistant in the Nursing Department. After an investigation, it was determined that the grievor had been abusive to the residents and, consequently, the employer terminated her employment. The grievor was a member of the respondent union, which filed a grievance under the terms of the Collective Agreement. The matter was referred to arbitration.

The arbitrator did not substantiate all of the findings of abuse alleged by the employer, but did agree that the grievor was guilty of some allegations that constituted abuse. In his conclusion, the arbitrator set aside the termination of employment and imposed a lesser penalty of a six-month suspension without pay, with no loss of seniority. The arbitrator found that the employer had exhibited bias against the grievor, because it had dispensed a lesser penalty to another worker that it had investigated at the same time for a similar offence. The employer applied for judicial review, alleging that the arbitrator had committed errors in concluding that he had the authority to impose a different penalty than dismissal, and in imposing a higher burden of proof on the employer than the law called for.

Decision

The application for judicial review was granted and the matter was remitted for rehearing. The employer argued that the issue in this case went beyond the interpretation of the Collective Agreement and involved the grant of powers given to the arbitrator pursuant to the *Trade Union Act* (the "Act"). In particular, paragraph 43(1)(d) of the Act provides that where an arbitrator determines that an

employee has been discharged for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, an arbitrator has the power to substitute any other penalty that the arbitrator deems "just and reasonable" in the circumstances. The employer submitted that Article 20.2 of the Collective Agreement was a specific penalty clause within the meaning of paragraph 43(1)(d). Clause 20.2 stated that the employer had the right to immediately discharge an employee without notice "when the employee had abused or stolen from a Guest". The Court held that the arbitrator did not consider whether Article 20.2 was a specific penalty clause within the meaning of paragraph 43(1)(d) of the Act and, therefore, he did not go far enough in his analysis. He then should have determined whether he had jurisdiction to vary the penalty in consequence of that decision. His assumption of jurisdiction without addressing this issue was an error.

The Court then turned to the issue of whether the arbitrator had erred by imposing a higher burden of proof than the law called for. The arbitrator in this case had adopted the reasoning of Arbitrator Dorsey in *Juan de Fuca Hospital Society v. Hospital Employees Union, Local 180* (1988), 35 L.A.C. (3d) 289, wherein Arbitrator Dorsey had determined that there were levels or degrees within the civil balance of probabilities standard which depended on the subject matter being adjudicated. The Court held that the arbitrator's application of this standard of proof was subject to a correctness standard of review. The Court noted that the reasoning of Arbitrator Dorsey had been specifically rejected by the Supreme Court of Canada and, consequently, the arbitrator in this matter had erred by adopting an incorrect test. He then applied the incorrect standard to the evidence.

Petitioner's Application for Leave To Appeal Arbitrator's Decision Regarding Nuisance Was Dismissed

Introduction

In the February 2011 case of *Mackay v. Her Majesty the Queen in the Right of the Province of British Columbia* (2011 BCSC 270), the British Columbia Supreme Court dismissed the petitioner's application for leave to appeal the arbitrator's decision dealing with nuisance.

Facts

The petitioner purchased the property in Victoria in 2006, with the intention of constructing a single-family home thereon. Unbeknownst to the petitioner, the prop-

erty had been identified as having some archaeological significance; however, nothing was registered against title. Pursuant to the *Heritage Conservation Act* (the “Act”), the Lieutenant Governor may designate land as a heritage site. Furthermore, no one can excavate or make alterations to any heritage site that has historical or archaeological value unless that person has a permit under sections 12 or 14 of the Act. Site alteration permits are issued under section 12, and can include requirements, specifications, and conditions as the Minister considers appropriate. Heritage inspection and heritage investigation permits are issued under section 14 to professional archaeologists.

The petitioner was required to obtain a site alteration permit under section 12 before any excavation work could begin. In addition, the Archaeology Branch of the Ministry of Tourism, Sports and the Arts (the “Branch”) required, as a condition of the issuance of the site alteration permit, that the petitioner retain an archaeologist to obtain heritage inspection and heritage investigation permits under section 14. The petitioner alleged that she had suffered losses in the range of \$500,000 to \$600,000 in her attempts to minimize the impact of the Act on her property. The petitioner brought a claim for recovery of these amounts, contending that the Branch had wrongfully applied the permitting scheme under the Act. The parties decided to have the matter determined by an arbitrator. The arbitrator dismissed the petitioner’s claim on the basis that she had failed to prove any liability on the part of the Crown. The petitioner sought leave to appeal the arbitration award.

Decision

The British Columbia Supreme Court dismissed the petitioner’s application for leave to appeal. The Court first noted that in order for leave to be granted, there must be a question of law, as opposed to a question of fact, or mixed fact and law to be decided. The petitioner argued that the arbitrator had erred in law in failing to apply the correct test necessary to establish nuisance by concluding that the actions of the Branch could not be said to have caused physical injury to the land or interfered with the petitioner’s enjoyment of the property. The Court held that the arbitrator had correctly articulated the test for nuisance by noting in the award that for a finding of nuisance, there must be an act that directly or indirectly causes physical injury to land or substantially interferes with use or enjoyment of land. The petitioner’s argument was an attack on the conclusions of the arbitrator about whether the actions of the Branch constituted a nuisance, which were not within the purview of the appeal since they were findings of fact. The Court further stated that but for the question of law issue, it would have found that the appeal had sufficient substance to warrant the granting of leave.

Arbitrator Not Required To Rely on All Admitted Evidence in Reaching Decision

Introduction

In the March 2011 case of *Milner Power Inc. v. Coal Valley Resources Inc.* (2011 ABQB 118), the Alberta Court of Queen’s Bench dismissed the applicant’s motion for leave to appeal, which was brought on the basis that the arbitrator did not rely on all admitted evidence to reach a decision which favoured the respondent.

Facts

The parties entered into a coal supply agreement (the “Agreement”) whereby the respondent agreed to supply coal from its mine to the applicant. The respondent had the right to call for a price review if anticipated operating costs of its mine would not result in a profit at the price levels provided for in the Agreement. The respondent called for a price review, but the parties were unable to agree. The matter was referred to arbitration. Each party had a different view of Article 7.5 of the Agreement, which contained the price review. The applicant asserted a “mine profitability test” whereas the respondent asserted a “contract profitability test”.

The arbitrator sided with the respondent. The applicant took the position that because the arbitrator admitted a substantial body of evidence (the “Parol Evidence”) from both parties regarding the surrounding circumstances leading up to the finalization of the Agreement, he had erred in law in ultimately ignoring such evidence. The applicant applied for leave to appeal the arbitrator’s ruling.

Decision

The Alberta Court of Queen’s Bench dismissed the application for leave to appeal. The applicant argued that its right to a fair hearing was breached by the arbitrator in not admitting the Parol Evidence. The Court noted that while the test for the Parol Evidence Rule is a question of law, the application of the Parol Evidence Rule is a question of mixed fact and law. Once all of the Parol Evidence had been entered, the task for the arbitrator was to apply the Parol Evidence Rule to the facts presented, and to determine which facts were relevant to the commercial factual context. The Court found that the arbitrator did exactly what he was required to do, which was to apply the Parol Evidence Rule to the Parol Evidence.

Question of Nature of Parties' Relationship Should be Decided by Arbitrator

Introduction

In the March 2011 case of *St. Pierre and St. Pierre v. Chriscan Enterprises Ltd. and Suchoki* (2011 BCCA 97), the British Columbia Court of Appeal dismissed an appeal of lower court's decision allowing a stay of the appellants' court action regarding the same matter.

Facts

The appellants entered into a Project Manager Building Contract (the "Contract") with the respondent, Chriscan Enterprises Ltd. ("Chriscan"), under which Chriscan was hired to construct a residence on property owned by the appellants. The respondent, Len Suchocki ("Suchocki"), was the principal of Chriscan. The Contract contained an arbitration clause which provided that in the event of "any disagreement between the parties hereto as to the interpretation of this contract . . . such dispute will be referred to a single arbitrator . . .". The appellants raised various issues concerning deficiencies in the completed work. They also alleged that Suchocki had taken "secret profits" by hiring PC Contracting ("PC"), which was another entity in which Suchocki was the principal, to undertake certain work.

Chriscan initiated arbitration proceedings, but the appellants took the position that the allegations of breach of fiduciary duty and the taking of secret profits were not within the scope of the arbitration clause. They commenced an action in the British Columbia Supreme Court alleging that the respondents breached their fiduciary duty

by failing to disclose certain facts. The respondents applied for a stay of the appellants' action under section 15 of the *Commercial Arbitration Act* on the basis that the whole of the dispute fell within the scope of the arbitration clause. The chambers judge found that the allegation of breach of fiduciary duties could not be decided without interpreting the Contract to determine the nature of the relationship of the parties and the terms to which they had agreed. He stayed the appellants' action. The appellants' appealed.

Decision

The British Columbia Court of Appeal dismissed the appeal. The Court noted that on an application for a stay, the applicant was required to show that the legal proceedings were "in respect of a matter agreed to be submitted to arbitration". In this case, the parties had agreed to submit any disagreement regarding the interpretation of the Contract to arbitration. The Court also noted that courts have generally taken a deferential approach to a challenge to an arbitrator's jurisdiction, allowing the arbitrator to determine, at first instance, whether a particular dispute is arbitrable.

The Court held that the appellants' statement of claim made clear that the allegations that the respondents had breached fiduciary duties and had taken secret profits turned on a finding that a fiduciary relationship existed between the parties. The source of that relationship was the Contract. It was only by interpreting the Contract in its factual context that the legal nature of their relationship could be determined. The question of the parties' relationship involved a factual inquiry, and that question had to be resolved first by the arbitrator.