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AUTHOR: "TEACHING DISPUTE RESOLUTION IN A MULTICULTURAL ENVIRONMENT- *SEE PAGE 34*

ADR Institute of Canada
Institut d'arbitrage et de médiation du Canada ™/MC

ARBITRATION. MEDIATION. RESOLUTION.

NEWS AND EVENTS

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PRESIDENT'S MESSAGE

I am delighted to have been elected as ADRIC's new president at the AGM on October 19th, taking over for Scott Siemens who did an amazing job for the past three years. Scott is now in the role of Past President, and my previous position as Vice President - President Elect has been filled by Laura Bruneau of Bruneau Group, one of ADRIC's Corporate Members. I am looking forward to continuing my work on the board in my new role.

As I begin my term as ADRIC President, I would like to celebrate our achievements of the past year and share some of the Board's new initiatives and directions to grow ADRIC into an even more vibrant organization.

The ADRIC 2017 National Conference in St. John's NF was an outstanding success. Thank you to the national and local planning committees for organizing that valuable learning and networking experience. Some of the sessions were recorded and will be online soon. Be sure to have a look at the *many photos taken throughout the Conference* on our website.

Save the dates, and plan to attend the ADRIC 2018 Conference November 21-23, 2018 in Montreal! Sponsorship and speaking spots are already being reserved, so we encourage you to express your interest soon. Visit the *Conference section* of our website for details.

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ADRIC launched an unprecedented important new resource at the ADRIC 2017 Conference: the **Disability Accessibility Guidebook for Mediators**, during a session presented by Martha E. Simmons who co-authored the guide with David Lepofsky. The session was well-attended and the guide has proven very popular as there is no other resource which provides concrete information on the importance of, and how to increase accessibility in the mediation process. *Download your copy now* from the ADRIC website.

ADRIC initiated its new Corporate Membership package in the Fall, with enhanced benefits such as discounts on arbitration administration services and more interaction with our regional affiliates. We are developing a Corporate Advisory Board and welcome any suggestions for organizations that should become members.

ADRIC continues to seek out benefits for members across the country. You will have seen the recent communiqué from ADRIC's Insurance committee on how it is succeeding in acquiring greater coverage at lower premiums for our members. It truly is a superior program. ADRIC is now working to arrange a members' health, vision and dental plan, which will be especially helpful to independent practitioners.

ADRIC is continuing to mature as an organization. Through an unprecedented project with all Affiliates, we have been working to develop new Memorandums of Understanding for our collective relationships and activities. Conceived by the Presidents' Roundtable, the MoU Taskforce has been working since 2015 to review, renew, and recreate the covenant relationships between ADRIC and its Affiliates, and between the Affiliates themselves. We are nearly finished, and the result will be a better, stronger and more efficient federation and organization.

To learn more about any of these activities, events and services, contact our Executive Director, Janet McKay.

NEW DIRECTIONS:
One of my goals during my term is to reposition the board as a Governance/Policy body and away from a working/operational board to provide the Executive Director greater autonomy and control in carrying out her mandate. To this end, the board underwent a full strategic orientation process at our October meetings to provide our Executive Director with priorities for the next twelve to eighteen months. We will further discuss the items that arose and make some decisions in December so that we may launch the new plans early in the new year.

As we near the end of 2017, I encourage you to become involved with your regional affiliate and with ADRIC. There is much work to be done in advocacy and promotion of ADR. Send us your suggestions and/or what you might be able to do. We look forward to hearing from you.

All the best for the holidays and new year.

THIERRY BÉRIAULT,
C.MED, D.PRD, LL.L

Thierry Bériault is a Chartered Mediator and lawyer. He is regularly mandated in complex files where there are important relational, organizational, political or financial issues to be resolved. He is a specialist in mediation processes, which he teaches at several universities in Canada, Europe and Africa.

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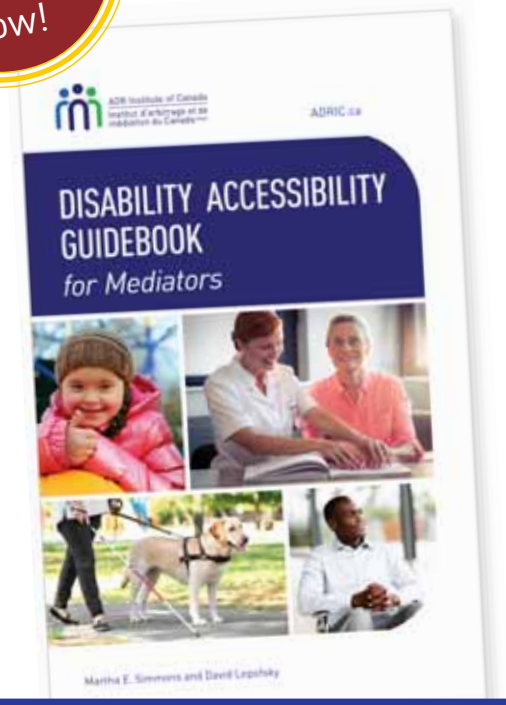

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Written by Martha E. Simmons and David Lepofsky, the guide has proven very popular as there is no other resource which provides concrete information on the importance of, and how to increase accessibility in the mediation process.

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MESSAGE FROM THE EDITOR

With this edition of *CAMJ*, we are proud to present an extraordinary collection of articles on a wide range of important topics.

WILLIAM G. HORTON, C.ARB, FCIARB
Bill practices as an arbitrator and mediator of Canadian and international business disputes. Prior to establishing his current practice, Bill served as lead counsel in major commercial disputes in arbitrations, mediations and before all levels of courts, up to and including the Supreme Court of Canada.
http://wghlaw.com/

Since our edition, two important court decisions have been handed down to widespread comment and reaction in the legal community. In *Teal Cedar Products v. British Columbia***, 2017 SCC 32 the Supreme Court of Canada affirmed its landmark decision in** *Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, [2014] 2 S.C.R. 633 and declined to broaden the scope of judicial review of arbitration awards merely because the question in appeal related to a matter of statutory interpretation. In** *Wellman v. TELUS Communications Company* **2017 ONCA 433, the Ontario Court of Appeal interpreted the Ontario** *Arbitration Act* **so as to allow non-consumer claims which were identical to consumer claims to be adjudicated in a class action involving the latter, despite the existence of arbitration clauses which could, realistically, never be used to provide an effective remedy to the non-consumer claimants. In doing so, the Ontario Court of Appeal produced a different result than the Supreme Court of Canada had reached in** *Seidel v. TELUS Communications Inc.* **2011 SCC 15.**

Alexander Gay has written an incisive review of the *Teal* **decision, placing it in the context of evolving Canadian jurisprudence on the vexed subject of judicial review of regulatory and arbitral decisions and awards. Michael Schafler and Barbara Capes have contributed a superb legal analysis of the** *Wellman* **decision and offered a solution to the apparent conflict between objective statutory interpretation and a sensible and just result.**

As the subject matter of both of these articles is of particular interest to me, I cannot resist offering a few thoughts of my own on each of these cases.

In the case of arbitrations mandated by statute, as was the situation in *Teal***, it must be remembered that the legislature is effectively outsourcing the adjudication of a regulatory dispute to the private sector. This creates a potential conflict as to whether the issues thereby resolved are public law or private law issues. The Supreme Court has held, in effect, that once the statute refers a matter to arbitration the dispute is governed by the same standards as private arbitrations in terms of judicial review. But, of course, it is open to the legislature to do that which it is not open to a private party to do and that is assign a different review jurisdiction to the courts if that is what is desired. Also, as the SCC noted in the** *Teal* **case, Parliament could have avoided the dispute entirely by specifying the standard of compensation if it was of the view that only one standard was objectively reasonable.**

The subject of class actions and arbitrations has been a fraught political battle, particularly in the United States where it has been front page news for many years. Within the last few weeks the US Senate voted 51 to 50 (with Vice President Pence casting the tiebreaking vote) to override the Consumer Financial Protection Bureau's Arbitration Rule which would have prohibited providers of financial products and services to consumers from using pre-dispute arbitration agreements to compel consumers to participate in arbitration to resolve disputes. In Canada, we already have legislation to protect consumers from arbitration clauses such as these that are not really intended to promote arbitration as a more efficient way of resolving disputes, but to shut down access to class actions. But what about non-consumer claims which are often indistinguishable from consumer claims, as the *Wellman* **case dramatically demonstrates. In such cases, inadequate as they might be in many respects, class actions when certified by the courts usually offer the only effective method of providing a remedy. They are also the only effective way of achieving one of the major policy goals of class proceedings legislation, i.e. modifying corporate behaviour.**

As Judge Richard Posner of the Seventh Circuit Court of Appeals in the United States once observed "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." The same is often true when arbitration is the only alternative. Those who care about arbitration and its use as an effective form of dispute resolution should be concerned about its misuse to achieve the opposite objective. One of the risks created

by tolerating such abuse is the risk that, in the process of righting that wrong, the courts will erode some of the principles that are very much needed to protect arbitration when it is undertaken for more legitimate purposes.

Also in this edition, I highly commend to you the article by Eric K. Slone on the professional life and contributions of the legendary arbitrator and mediator (not to mention counsel) Martin Teplitsky, who passed away in 2016. How often do we wish, particularly in the early years of our careers, that we could follow one of the giants in our field around and see how they do what they do. Teplitsky was an innovator and, in many ways, a creator of the ADR landscape we enjoy in Canada today. Eric Slone gives us brilliant and highly readable insights into his philosophy and methods.

In her article on Quebec's new rules on expert evidence, Sara Nadeau-Séguin explains and discusses that province's new initiative to encourage parties involved in litigation to use a single expert. This solution has often been proposed and discussed as a way of addressing the seemingly insoluble problem of experts providing opinions, all said to be completely independent and objective, which nevertheless diverge exponentially as to their conclusions. With its new rules, Quebec initiates an experiment to see whether a single expert jointly retained by the parties may be able to address the problem. Will it work? Read this very thoughtful article on the subject.

Another perennial issue in dispute resolution is the question of cultural differences. Often these differences are overlooked at the stage when we acquire our ADR training. Verlyn F. Francis has contributed a thought provoking article on how the issue of culture arises when teaching dispute resolution in a multi-cultural environment. The diversity of our society is now a well established fact. This article reminds us of the need to scrutinize our pre-conceptions regarding dispute resolution to ensure that what we take to be universal truths and insights are not in fact a product of our particular social, racial and cultural antecedents.

Rounding out this edition is an article by Paul Ivanoff and Lauren Tomasich reporting on two recent decisions of the Supreme Court of Newfoundland and Labrador involving lien claims in construction disputes. The cases involved the relationship between court proceedings and arbitration, a crucial issue on which the reputation of Canada and its provinces as acceptable venues for the resolution of commercial disputes rests.

I hope you enjoy this edition and, as always, that you will consider contributing an article to a future edition on any interesting subject or case relating to dispute resolution which crosses your path.

THE STANDARD OF REVIEW IN COMMERCIAL ARBITRATION: A MOVING TARGET?

ALEXANDER GAY

Alexander Gay is litigation counsel at the Department of Justice and the authority of Annotated Ontario Arbitration Act, 1991 and numerous other articles.

This paper was prepared for the CIArb Annual Symposium September 28, 2017.

The standard of review on commercial arbitration decisions has been in a state of flux in the last year. The standard of review on commercial arbitration decisions has been in a state of flux in the last year. The extent to which the reasonableness standard applies to questions of mixed fact and law and the extent to which an extricable question of law can be extracted from mixed questions has been the subject of much legal debate. This has now been clarified in the recent decision of *Teal Cedar Products v. British Columbia***, 2017 SCC 32 ("Teal Cedar"), where the Supreme Court provides a number of important new clarifications which lend strong support to arbitration. The road traveled in the last year as it relates to the standard of review is worthy of consideration.**

The Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, [2014] 2 S.C.R. 633 ("Sattva") held that on an extricable question of law, the standard of review was reasonableness, unless the question is one that specifically calls for the correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole. The problem with** *Sattva* **was that it was decided under the British Columbia** *Arbitration Act* **where the only right of appeal is on a question of law. Until the release of** *Teal Cedar***, the Supreme Court had yet to explicitly pronounce itself on the application of the reasonableness standard to questions of mixed fact and law or on when an extricable question of law could be extracted from mixed questions. The latter is important under some provincial legislation which only allow appeals on questions of law.**

Following *Sattva***, the Ontario Court of Appeal released both** *Ottawa (City) v. Coliseum Inc.***, 2016 ONCA 363 (CanLII) ("Coliseum") and** *Intact Insurance Company v. Allstate Insurance Company of Canada***, 2016 ONCA 609 (CanLII) ("***Intact***"). *Coliseum* was an opportunity for the Ontario Court of Appeal to apply** *Sattva***. It was heard in first instance before the** *Sattva* **decision was issued, but decided approximately eight months after. The Applications Judge in** *Coliseum* **granted leave to appeal on the basis that the proposed appeal did raise extricable questions of law. The Judge then reversed the arbitral award on the basis that it was unreasonable. The Court of Appeal did not deal with the question as to whether the arbitrator had erred on an extricable error of law. It reinstated the award, based on its finding that the arbitrator's interpretation of the contract was reasonable. The Court of Appeal made it clear that the standard of reasonableness would be applied and that there would be deference to decisions of adjudicators chosen by the parties. In the case of** *Intact***, it was an appeal of an award issued under a statutory scheme created under the** *Insurance Act***. The decision proved to be novel in that it provides that the administrative law framework found in** *Dunsmuir v. New Brunswick***, [2008] 1 SCR 190, 2008 SCC 9 (CanLII) ("***Dunsmuir***") applies to all appeals of arbitral decisions. The application of the appellate standard of review in** *Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33 ("***Housen***") to questions of mixed fact and law was finally abandoned in Ontario with** *Intact***.**

Much like it did in *Coliseum***, the Court of Appeal in** *Intact* **held that there is a presumption that the standard of review on all arbitration decisions is that of reasonableness unless there is an extricable question of law in which case** *Sattva* **applies.** *Sattva* **calls for a correctness standard on a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. As stated in** *Dunsmuir***, the standard of reasonableness is concerned with the existence of justification, transparency, and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The standard of reasonableness also allows for multiple conflicting results, all of which falls within the confines of the standard:** *Chriscan Enterprises Ltd. v. St. Pierre***, 2016 BCCA 442 (CanLII);** *Ottawa (City) v. Coliseum Inc.***, 2016 ONCA 363 (Ont. C.A.). On the other hand, when applying the correctness standard in respect of constitutional questions or questions of law that are of central importance to the legal system, for example, a review-**

ing court will not show deference to the arbitrator; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the arbitral award; if not, the court will substitute its own view and provide what it believes is the correct answer.

Intact was not well received by the arbitration community. The arbitration community was divided on the scope of its application, with some in the arbitration community wanting to circumscribe its application to only mandatory arbitrations created under the *Insurance Act* and not to commercial arbitrations at large. The distinction was grounded on the belief that a statutorily mandated arbitration attracted a standard of review that was different from that of a commercial arbitration where the parties had consensually agreed to arbitration. Some courts in Ontario even ignored *Intact* and continued to apply the appellate standard in *Housen* to questions of mixed fact and law. The reasons for the resistance on the part of the arbitration community is that under *Housen*, which applies to civil cases, the standard of review on a mixed question of fact and law is that of palpable and overriding errors and correctness on an extricable legal question. Thus, there are differences in the standard of review of these two legal matrixes.

Following *Intact*, the Supreme Court released *Teal Cedar*. The case concerned the quantum of compensation that British Columbia owed to Teal Cedar, a forestry company when the latter's access to Crown land was reduced following a number of changes under the *Revitalization Act*. The dispute concerning the amount of compensation that was owed to Teal Cedar was subsequently referred to arbitration under British Columbia's *Arbitration Act*. The Supreme Court, in this case, re-affirmed *Sattva* and provided some clarifications on its application. Firstly, the Court again held that the standard of review applicable to arbitration awards is almost always reasonableness unless the appeal raises a constitutional question or a question of law of central importance to the legal system as a whole. This statement of the law is not new, although the arbitration community now has clear confirmation with *Teal Cedar* that the standard of reasonableness applies to all arbitration decisions, regardless of whether it is a question of law or a question of mixed fact and law. The majority, in this case, applied the reasonableness standard to the arbitrator's interpretation of provincial legislation, adopting a deferential standard of review consistent with court review of administrative decisions under *Dunsmuir*. This is an important conclusion in that prior to *Teal Cedar*, there were some in the arbitration community that believed that the standard of reasonableness could not apply to statutory interpretations. Again, this stands in contrast to civil cases before the courts where legal questions (including extricable questions of law) are reviewed for correctness. As it relates to the interpretation of a settlement agreement, the Court held that it was a question of mixed fact and law which also attracted a reasonableness standard. Secondly, the Supreme Court held that in the arbitration context, the applicable standard of review is not to be determined solely by the nature of the question that the court is reviewing. The Court warns against creative lawyers formulating extricable questions of law in order to gain access to an appeal right. The issue of what constitutes a genuine extricable question of law as opposed to a question of law that only attempts to gain access to the right of appeal. In any event, the consequence *Teal Cedar* is that the scope of review on what is said to be an extricable question of law has been narrowed.

The result of *Teal Cedar* is that we now have confirmation that the administrative law framework found in *Dunsmuir* applies to all appeals of commercial arbitration decisions, be they on questions of law or on questions of mixed fact and law. The reasonableness standard even applies to statutory interpretations of arbitrators. The second point is that the exercise of identifying an extricable question of law from mixed questions may be more challenging for counsel in that courts will be reticent to accept them unless they are genuine questions of law. Access to the courts on arbitration award has been further reduced, which may not be a bad thing if arbitration is to be a viable alternative to the courts.

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IS CANADA READY FOR CLASS ARBITRATION?

*A Discussion about the Implications of the Ontario Court of Appeal decision in Wellman v. TELUS Communications Company**

BARBARA CAPES

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MICHAEL D. SCHAFLER

Mike's practice at Dentons Canada LLP focuses on commercial dispute resolution, including international and domestic arbitration. He is a member of Dentons' national management board, co-leads Dentons' national litigation and dispute resolution group and is also a practice leader of the global litigation and dispute resolution group. He has been interested in the intersection of class actions and arbitration for several years and has previously written and presented on class arbitration.

INTRODUCTION

Many consumer agreements in Canada contain arbitration clauses that require any dispute arising from the consumer transaction to be determined by way of private arbitration. These clauses often also preclude any form of class dispute resolution. In recent years, most Canadian jurisdictions have enacted consumer protection legislation that effectively overrides such clauses.[1] Consequently, Canadian consumers, notwithstanding any contractual commitment to the contrary, may resort to the courts in the event of a dispute with a supplier, including by way of class action. But what happens when the litigation includes non-consumers, who are subject to the same contract with the supplier as the consumers, but to whom the consumer protection legislation does not apply?

This question raises important legal and policy considerations as, generally speaking, domestic arbitration legislation requires the courts to stay any court proceeding in respect of a matter that the parties have agreed to submit to arbitration. Canadian appellate courts, but not yet the Supreme Court of Canada, have grappled with whether to permit the entire class action to proceed or to stay the non-consumer claims in favour of arbitration while the consumer claims continue. What has emerged is an apparent bright line rule that precludes such a partial stay, as most recently seen in the Ontario Court of Appeal's decision in *Wellman v. TELUS Communications Company.*[2] **Citing the usual concerns about a multiplicity of proceedings, which impair judicial efficiency and risk inconsistent findings,** *Wellman* **appeared to follow an earlier Ontario Court of Appeal decision,** *Griffin v. Dell Canada Inc.*[3] **The effect of this jurisprudence is to allow non-consumer claims to avoid being determined by way of arbitration on the basis that they are sheltered under legislation that applies only to consumers. Subject to one important caveat, it would seem that the policy objective of encouraging parties to private arbitration has thus been judicially eroded.**

This caveat comes courtesy of the concurring opinion of Justice Blair in *Wellman***. The** *Wellman* **Court had been asked to opine on whether the** *Griffin* **analysis as it applies to mixed consumer and non-consumer class actions had been overtaken by the Supreme Court of Canada's intervening decision in** *Seidel v. TELUS Communications Inc.*[4] **While all three judges agreed that** *Seidel* **had not overruled** *Griffin***, Justice Blair expressed reservations about the correctness of** *Griffin***, raising two fundamental questions:**

(1) Did the court in *Griffin* **give appropriate weight to the policy objectives of encouraging parties to resolve their disputes through private arbitration and to support their contractual agreements to do so?**

(2) Ought non-consumers be entitled to "sidestep" substantive and statutory impediments to proceeding in court with an arbitral claim "by the simple expedient" of adding consumer claims to their action?

In this paper, we explore these issues and seek to resurrect an idea that has received some attention in the past but thus far has not materialized – class arbitration. While this proposed solution

has its own challenges, it seems to be best equipped to foster the seemingly competing policy objectives of promoting access to justice, improving judicial economy and supporting contractual agreements favouring arbitration.

THE LEGISLATIVE CONTEXT

(A) STAY PROVISIONS IN DOMESTIC LEGISLATION

The starting point for this discussion is domestic arbitration legislation that is fairly uniform across Canada.[5] In particular, most Canadian jurisdictions have enacted provisions, such as s. 7 of Ontario's *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "**Ontario Arbitration Act**") whose overriding legislative intent is to promote arbitration.[6]

> **STAY**
> **7 (1)** If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> **EXCEPTIONS**
> **(2)** However, the court may refuse to stay the proceeding in any of the following cases:
> 1. A party entered into the arbitration agreement while under a legal incapacity.
> 2. The arbitration agreement is invalid.
> 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
> 4. The motion was brought with undue delay.
> 5. The matter is a proper one for default or summary judgment.
>
> **ARBITRATION MAY CONTINUE**
> **(3)** An arbitration of the dispute may be commenced and continued while the motion is before the court.
>
> **EFFECT OF REFUSAL TO STAY**
> **(4)** If the court refuses to stay the proceeding,
> (a) no arbitration of the dispute shall be commenced; and
> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect.
>
> **AGREEMENT COVERING PART OF DISPUTE**
> **(5)** The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.[7]
>
> **NO APPEAL**
> **(6)** There is no appeal from the court's decision. [emphasis added]

It is apparent that s. 7 is akin to a rulebook that delineates how arbitration and court proceedings are to relate to one another, if at all, in circumstances where party A and party B have entered into an arbitration agreement:

1. The overarching principle is that the courts must stay any proceeding in respect of a matter to be submitted to arbitration under an arbitration agreement;[8]
2. The courts can deviate from this rule only in very limited circumstances (none of which applied in *Griffin* or *Wellman*);[9] and
3. Where A has commenced a court proceeding against B in respect of matters that were supposed to be submitted to arbitration, along with other matters not so to be submitted, the courts may grant a partial stay, if it would be reasonable to separate the matters.[10]

To foreshadow our analysis, neither *Griffin* nor *Wellman* dealt with the party A and party B paradigm that is the foundation of s. 7. Instead, the courts in those cases, while applying s. 7(5), were in fact dealing with not only the relationship between A and B (non-consumers) but also A and C (consumers), who had their own, independent, contractual relationship with the supplier. Essentially, the courts appear to have ignored the rule of contractual privity upon which all domestic arbitration legislation is premised. For example, while the Ontario Arbitration Act defines "arbitration agreement" with reference to two or more parties, it is also clear that only one contract between those parties is contemplated. To the extent that multiple contracts and resulting arbitrations are involved, the Ontario Arbitration Act also makes it clear that these matters remain separate unless expressly consolidated (under s. 8). It would appear that the courts' analysis in *Griffin* and *Wellman* assumed that "other matters" in s. 7(5) of the Ontario Arbitration Act applies not only to matters arising between A and B but hundreds or thousands of additional contracts, i.e., A and C, A and D, etc.[11]

(B) CONSUMER CLASS ACTIONS AND ARBITRATION PROVISIONS

Disputes such as the one at issue in *Wellman* are not new. In early 2002, Justice Nordheimer dealt with a class action in which it was alleged that the defendant had charged customers full internet rates notwithstanding that internet service had allegedly been interrupted or slow: *Kanitz v. Rogers Cable Inc.*[12] As in *Wellman*, the contract contained a mandatory arbitration clause and the defendants successfully moved for a stay under s. 7(1) of the Ontario Arbitration Act. During the course of his analysis, Justice Nordheimer made a number of observations that bear directly on this discussion.

Justice Nordheimer found that class proceedings legislation and domestic arbitration legislation engage different public policies (access to justice and encouraging appropriate dispute resolution). He also noted there was no reason to prefer one over the other and that in any event the legislation did not have to be interpreted in a manner such that it conflicted. He justified his reasoning, in part, on the preferability analysis to be undertaken by a court being asked

to certify a proceeding as a class action. This preferability requirement was intended to capture the question of whether a class proceeding would be preferable when compared to other procedures, including, in Justice Nordheimer's view, class arbitration.[13] This may be inferred from his comment that s. 20 of the Ontario Arbitration Act would appear to permit an arbitrator to consolidate a number of individual arbitrations which raise the same issue.[14] Justice Nordheimer did not refer to s. 8(4) of the Ontario Arbitration Act, which permits the court to consolidate multiple arbitrations "on the application of all of the parties".[15] In any event, Justice Nordheimer was clearly alive to the possibility of individual arbitrations effectively being converted into one class arbitration. Justice Nordheimer also found that such a process would save time and expense for all parties and that this would militate against the argument that a private arbitration clause operates as an "economic wall", barring consumers from effectively seeking relief against a supplier.[16] As discussed below, this view was rejected by all levels of court in *Griffin* and *Wellman*. (Surely, Justice Nordheimer's elevation to the Ontario Court of Appeal this month adds another interesting twist to this story.)

Three years after *Kanitz*, the Ontario *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("**Ontario CPA**") came into force. Sections 7 and 8, which have similar counterparts in other provinces,[17] are of particular significance:

> NO WAIVER OF SUBSTANTIVE AND PROCEDURAL RIGHTS
> **7 (1)** The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> LIMITATION ON EFFECT OF TERM REQUIRING ARBITRATION
> **(2)** Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.
>
> PROCEDURE TO RESOLVE DISPUTE
> **(3)** Despite subsections (1) and (2), after a dispute over which a consumer may commence an action in the Superior Court of Justice arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law.
>
> SETTLEMENTS OR DECISIONS
> **(4)** A settlement or decision that results from the procedure agreed to under subsection (3) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.
>
> NON-APPLICATION OF *ARBITRATION ACT, 1991*
> **(5)** Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (2) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.
>
> CLASS PROCEEDINGS
> **8 (1)** A consumer may commence a proceeding on behalf of members of a class under the *Class Proceedings Act, 1992* or may become a member of a class in such a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or a related agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.
>
> PROCEDURE TO RESOLVE DISPUTE
> **(2)** After a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.
>
> SETTLEMENTS OR DECISIONS
> **(3)** A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply.
>
> NON-APPLICATION OF *ARBITRATION ACT, 1991*
> **(4)** Subsection 7 (1) of the *Arbitration Act, 1991* does not apply in respect of any proceeding to which subsection (1) applies unless, after the dispute arises, the consumer agrees to submit the dispute to arbitration.

While the outcome in *Kanitz* would have been different had these provisions then been in effect, Justice Nordheimer's discussion of the various policy considerations and his views on class arbitration remain particularly apt.

POST-2005 DECISIONS

The interface between provisions similar to s. 7(5) of the Ontario Arbitration Act and sections 7 and 8 of the Ontario CPA spawned the decisions in *Griffin* and *Wellman*, amongst others.

The relevant facts in *Griffin* were as follows: A non-consumer brought a class action against Dell, seeking damages for defective laptops. The standard form sales agreement contained a mandatory arbitration clause that also restricted any arbitral proceeding to the individual consumer and Dell. Presumably in response to Dell's motion to stay the proceeding in favour of arbitration, and to engage the Ontario CPA, the non-consumer plaintiffs moved to expand the

class to include consumers. The record before the court indicated that 70% of the plaintiffs were consumers and 30% were non-consumers.

Citing s. 7(5)(b) of the Ontario Arbitration Act, the court found that it would not be reasonable to separate the consumer from the non-consumer claims such that a partial stay ought not to be granted.[18] The court found that granting a partial stay would lead to inefficiency, a potential multiplicity of proceedings, and added cost and delay, all of which would be contrary to s. 138 of the *Courts of Justice Act* ("**CJA**").[19] The court also found that since the consumer claims "dominate[d]" (ie. 70%), it was reasonable that the remaining claims should follow the same procedural route as the consumer claims.[20] Potentially contradicting that finding, the court was also concerned that a partial stay would require an examination of each claim and a determination of whether it was a consumer or non-consumer claim. The court accepted the evidence that individual arbitration claims would be too costly to prosecute,[21] such that a stay of any of the claims would not result in them being arbitrated and that, in reality, a stay would "clothe" Dell with immunity from liability for defective goods.[22]

These reasons do raise a number of questions, some of which Justice Blair seems to have adverted to in *Wellman*. Does s. 7(5)(b) of the Ontario Arbitration Act really involve asking whether it would be reasonable to separate the consumer from the non-consumer claims? This approach assumes multiple arbitration agreements between two or more parties when the express language of s. 7 seems to contemplate only one agreement between two or more parties, and claims arising in connection with this singular agreement, as well as other claims involving the same contracting parties. As Justice Blair pointed out, correctly we think, s. 7 of the Ontario Arbitration Act "appears to address circumstances relating to a single arbitration agreement, and not the interconnection between a number of such agreements involving different parties".[23] Certainly, the underlined portions of s. 7 (set out above) would support this view.

The next difficulty relates to s. 138 of the **CJA**. Presumably, the **CJA** deals with legal proceedings before the *courts*, and not *private arbitrations*. Accordingly, when considering a partial stay motion under s. 7(5) of the Ontario Arbitration Act, the fact that the consequence of granting a stay would be a class action (before the courts) and one or more private arbitrations (not before the courts), should be neutral. One class action and one or more arbitrations does not entail a multiplicity of "legal proceedings" within the meaning of s. 138 of the **CJA**. As such, s. 7 of the Ontario Arbitration Act and s. 138 of the **CJA** do not need to be interpreted as being in conflict with one another.

It is also unclear, at best, why a partial stay would result in added cost and delay. One of the advantages of arbitration is that it is typically faster and often cheaper than court proceedings. Arbitration, particularly *ad hoc* arbitration, can be tailored to take into account the claimant's lack of resources. As Justice Nordheimer observed in *Kanitz*, s. 20 of the Ontario Arbitration Act confers broad power on the tribunal to determine any procedure to be followed in the arbitration, so long as basic rules of equal and fair treatment of the parties are observed.[24]

The impact of the court's determination that the consumer claims "dominate[d]" the non-consumer claims raises other concerns. What if only 51% of the plaintiffs were consumers? 49%? 33%? In any event, as the record disclosed in *Griffin*, it was already known that 70% of the plaintiffs were consumers, so it is unclear why, as the court cautioned, any further examination of the claims was necessary to determine who was a consumer and who was not.

All of this is to suggest that *Griffin* cannot have been intended to introduce a rule of general application to the effect that a partial stay would *never* be granted in class actions involving both consumer and non-consumer claims, thereby defeating the legislative intent of s. 7(5) of the Ontario Arbitration Act. Indeed, the court in *Griffin* considered whether class arbitration was reasonable in the circumstances, and concluded otherwise:

> It is important to note in this regard that Dell's arbitration clause not only requires all claims to be arbitrated, but also provides that "[t]he arbitration will be limited solely to the dispute or controversy between Customer and Dell", thereby precluding the possibility of a class arbitration. I would have found Dell's position much more persuasive had Dell been prepared to submit to an arbitration that would allow for the efficient adjudication of the claims on a group or class basis. However, in oral argument, Dell's counsel confirmed that his client would insist upon the enforcement of this provision and resist any attempt before an arbitrator to join together the claims of a group or class of consumers.[25]

It would appear, then, that *Griffin* simply turned on its own specific facts, and the court's views on class arbitration were greatly affected by Dell's position. It would be difficult to imagine the same outcome had Dell agreed to class arbitration, for example. Yet, from *Griffin* emerged what appears to be a bright line rule for determining whether the courts should grant a partial stay of non-consumer claims in a class proceeding.[26]

A little more than one year after *Griffin* was decided the Supreme Court of Canada released its reasons in *Seidel*. The case arose in British Columbia, which does not have an equivalent of s. 7(5) of the Ontario Arbitration Act. British Columbia's consumer protection legislation is also different. The relevant facts were that consumer and non-consumer plaintiffs had sought class certification of their claims against **TELUS** for unfair billing practices. **TELUS** applied for a stay of all claims on the grounds that the arbitration agreement precluded the court proceeding.[27] The Court of Appeal for British Columbia granted the stay, reasoning that British Columbia's consumer protection legislation did not expressly exclude arbitral jurisdiction in the consumer context, and that the competence-competence

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principle required that a challenge to the existence, validity and scope of an arbitration agreement be brought before the arbitrator in the first instance.[28]

On further appeal, Justice Binnie, writing for a 5-4 majority, varied this result and ordered a partial stay. In his view the British Columbia legislature had clearly delineated which consumer claims could proceed in the courts, and by way of class action, notwithstanding contractual language to the contrary, and which could not (and therefore needed to be arbitrated). Justice Binnie specifically turned his mind to the very same concerns that had persuaded the court in *Griffin not* to grant a partial stay, commenting:

> On the other hand, I would uphold the stay in relation to her other claims which may, if she pursues them, go to arbitration. This may lead, if the arbitration is proceeded with, to bifurcated proceedings. Such an outcome, however, is consistent with the legislative choice made by British Columbia in drawing the boundaries of s. 172 [of the *Business Practices and Consumer Protection Act "BPCPA"*] as narrowly as it did.[29] [emphasis added]

Given that the policy objectives underlying s. 172 of the BPCPA and ss. 7 and 8 of the Ontario CPA are substantially the same, the different outcomes in *Griffin* (no partial stay) and *Seidel* (partial stay) are difficult to rationalize. The latter, we suggest, is more closely aligned with Justice Nordheimer's thinking in *Kanitz*.

It was hardly surprising, then, that TELUS, when confronted with the claims advanced against it in *Wellman*, argued that a partial stay of the non-consumer claims should issue, since *Seidel* had essentially overtaken *Griffin*. In *Wellman*, TELUS conceded that the relevant arbitration agreement was void as against the consumer plaintiffs (which, as in *Griffin*, comprised 70% of all plaintiffs), but argued that the non-consumer claims should be stayed pursuant to the reasoning in *Seidel*. The motions judge, determined that section 7(5) of the Ontario Arbitration Act "permits the court to deny a partial stay where one party is subject to an arbitration clause and another party is not"[30] and "[p]ursuant to *Griffin*, this discretion may be exercised to allow non-consumer claims (that are otherwise subject to an arbitration clause) to participate in a class action, where it is reasonable to do so."[31] In her view, essentially for similar reasons as in *Griffin*, a partial stay should be refused.

The sole issue on appeal was whether the *Griffin* analysis and framework for determining whether a partial stay of proceedings should be granted had been overtaken by *Seidel*. The majority decision, penned by Justice van Rensburg, concluded that *Seidel* had not overtaken *Griffin*. In fact, the court concluded that "*Griffin* is consistent in principle with *Seidel* but was decided in a different legislative context".[32] According to the court's analysis, s. 7(5) of the Ontario Arbitration Act reflects a legislative choice (not present in British Columbia) that confers a judicial discretion "to refuse to enforce an arbitration clause that covers some claims in an action when other claims are not subject to domestic arbitration".[33]

COMMENTARY

Is the current state of the law satisfactory? We expect that the answer to this question depends on one's views regarding arbitration. *Griffin* suggested that the following factors are relevant to the partial stay analysis:

i. Whether consumer claims "dominate";[34]
ii. Whether the specific liability and damage issues can be administered effectively in arbitration;[35]
iii. Whether the arbitration agreement provides for class arbitration;[36] and
iv. The willingness of the non-consumers and the supplier to submit to class arbitration.[37] (Interestingly, in *Wellman*, the issue as to TELUS' willingness to submit to class arbitration appears not to have arisen. One wonders if that would have changed things.)

We offer the following food for thought as this issue will undoubtedly need further refinement, particularly in light of Justice Blair's opinion in *Wellman*.

As mentioned earlier, the dominance criterion is not without its challenges. Suppose there is a class action where 70% of the class members are non-consumers. Applying the dominance criterion, a partial stay should issue. But what if the arbitration agreement regarding this non-consumer class did not provide for class arbitration and the claims were required to be heard individually? In the event of a partial stay there would be many individual arbitrations. According to the courts' views expressed to date, this would engage a new concern: namely a multiplicity of proceedings within the meaning of s. 138 of the CJA. That very concern, however, was not one shared by the majority in *Seidel*.

The inherent danger of the current framework, in that it relies on notions of "dominance" and the application of s. 138 of the CJA (or similar legislation), is that it is inconceivable to imagine a scenario where non-consumer claims will ever be stayed under s. 7(5) of the Ontario Arbitration Act (or equivalent). Given that s. 7(5) of the Ontario Arbitration Act uses a reasonableness test, one additional factor – previously not considered – ought to play a role: the parties' reasonable expectations. Any supplier aware of consumer protection legislation would presumably know that any mandatory arbitration clause would be invalid against consumers. But by the same token, the supplier – and the sophisticated non-consumer alike – must be taken to have understood their arbitration agreement as binding on both parties. In some way, this approach is consistent with the majority approach in *Seidel* that found it perfectly acceptable to have multiple proceedings, essentially because this was the result the legislature favoured. Yet, under *Griffin* and *Wellman*, with the introduction of even one consumer claim, the risk is that non-consumer claims become sheltered under consumer protection legislation. Certainly Justice Blair appears to have had some misgivings when he questioned a litigant's right to add consumer claims to non-consumer claims in order to "wrap [...] all claims in the cloak of a class proceeding".[38]

Is there a way to harmonize these

seemingly competing values? Class arbitration in Canada has been a topic of lively discussion for many years. One of the co-authors has previously hypothesized as to what legislative landscape and/or judicial authority would be required for class arbitration to take root in Canada.[39] *Kanitz* and *Griffin* left open this possibility. Perhaps it is time to embrace the idea of class arbitration which is well entrenched south of the border. At the very least a fulsome debate is in order.

In an era where judicial resources are scarce,[40] it would seem appropriate to encourage class arbitration wherever possible. Consider in this context the broad wording of s. 25(1)(c) of the Ontario *Class Proceedings Act, 1992*, SO 1992, c.6 (the "**Ontario Class Proceedings Act**") that appears to permit arbitration of individual issues after the common issues are determined, provided that the parties agree. Further, s. 12 of the Ontario Class Proceedings Act confers tremendous power on the court to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose such terms on the parties as it considers appropriate. Why not order the class arbitration of non-consumer complaints?[41] This would be particularly apt where the supplier and the non-consumers are willing to submit to class arbitration, regardless of the wording of their arbitration agreement, as the Court appears to have contemplated in *Griffin*.

Where this is all headed remains unclear. Certainly Justice Blair has breathed some interesting life into the conversation. Some will argue that the outcomes in *Griffin* and *Wellman* were pragmatic and therefore acceptable. Others will want to better understand why a contractual agreement can be overridden by a statute that does not govern the contract. We hope that this paper at least contributes to a healthy discussion. On August 30, 2017, TELUS did its part to keep the conversation alive, filing an application for leave to appeal the Ontario Court of Appeal's judgment to the Supreme Court of Canada. If leave is granted, the Court's final decision may be expected to have far reaching consequences on consumer and non-consumer class actions alike and, perhaps, even usher in a framework for class arbitration in Canada.

The authors would like to thank Nadia Kadri, Student-at-law at Dentons Canada LLP, for her contributions to this publication.

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1 Some consumer protection legislation expressly prohibits arbitration clauses and waivers of class proceedings: see *Consumer Protection Act*, 2002, SO 2002, c 30, Sched A, ss. 7, 8 [Ontario CPA]; *Consumer Protection Act*, CQLR c P-40.1, s. 11.1 [Quebec CPA]; *The Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, s. 101 [Saskatchewan CPA]. In Alberta, arbitration agreements will not bar a consumer from commencing an action unless the arbitration agreement is in writing and it has been approved by the Minister: see *Fair Trading Act*, RSA 2000, c F-2, s. 16 [Alberta FTA]. There are general non-waiver provisions that may similarly invalidate arbitration agreements and/or class action waivers in the consumer protection legislation of British Columbia, Manitoba, Nova Scotia, Yukon, Northwest Territories, and Nunavut: see *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss. 3, 172 [BPCPA]; *Consumer Protection Act*, CCSM c C200, s. 96 [Manitoba CPA]; *Consumer Protection Act*, RSNS 1989, c 92, s. 28 [Nova Scotia CPA]; *Consumers Protection Act*, RSY 2002, c 40, s. 88 [Yukon CPA]; *Consumer Protection Act*, RSNWT 1988, c C-17, s. 107 [NWT CPA]; *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, s. 107 [Nunavut CPA].

2 2017 ONCA 433 [*Wellman*].

3 2010 ONCA 29 [*Griffin*].

4 2011 SCC 15 [*Seidel*].

5 See *Arbitration Act*, RSBC 1996, c 55 [BC Act]; *Arbitration Act*, RSA 2000, c A-43 [Alberta Act]; *The Arbitration Act, 1992*, SS 1992, c A-24.1 [Saskatchewan Act]; *The Arbitration Act*, CCSM c A120 [Manitoba Act]; *Arbitration Act, 1991*, SO 1991, c 17 [Ontario Arbitration Act]; *Code of Civil Procedure*, CQLR c C-25.01, art. 622 [Quebec CCP]; *Arbitration Act*, SNB 2014, c 100 [New Brunswick Act]; *Arbitration Act*, RSNS 1989, c 19 [Nova Scotia Act]; *Arbitration Act*, RSPEI 1988, c A-16 [PEI Act]; *Arbitration Act*, RSNL 1990, c A-14 [Newfoundland Act]; *Arbitration Act*, RSY 2002, c 8 [Yukon Act]; *Arbitration Act*, RSNWT 1988, c A-5 [NWT Act]; *Arbitration Act*, RSNWT (Nu) 1988, c A-5 [Nunavut Act].

6 See BC Act, *ibid*, s. 15; Alberta Act, *ibid*, s. 7; Saskatchewan Act, *ibid*, s. 8; Manitoba Act, *ibid*, s. 7; New Brunswick Act, *ibid*, s. 7; Nova Scotia Act, *ibid*, s. 7; PEI Act, *ibid*, ss. 6, 7; Newfoundland Act, *ibid*, s. 4; Yukon Act, *ibid*, s. 9; NWT Act, *ibid*, s. 10; Nunavut Act, *ibid*, s. 10.

7 The jurisdictions of British Columbia, Quebec, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories, and Nunavut, do not permit a partial stay in its legislation similar to s. 7(5) of the Ontario Arbitration Act.

8 Ontario Arbitration Act, *supra* note 5, s. 7(1).

9 *Ibid*, s. 7(2).

10 *Ibid*, s. 7(5).

11 See Anthony Daimsis, "All is Not Well, Man: Ontario Courts Should Pay Closer Attention to Arbitration in Law when Deciding Arbitration Cases" (August 8, 2017), Bay Street Chambers (Blog), online: <http://baystreetchambers.com/2017/08/08/all-is-not-well-man-ontario-courts-should-pay-closer-attention-to-arbitration-law-when-deciding-arbitration-cases-2/>. We agree in this regard with Anthony Daimsis' analysis, but question his view on whether the consumer arbitration agreement is an offer to arbitrate or, rather a valid contract, leaving this point for another day.

12 (2002), 58 OR (3d) 299 (SCJ) [*Kanitz*].

13 *Ibid* at para 53, citing *Hollick v Toronto (City)*, 2001 SCC 68 at para 31.

14 *Ibid* at para 55.

15 Ontario Arbitration Act, *supra* note 5 at s. 8(4).

16 *Kanitz*, *supra* note 8 at para 55.

17 *Supra* note 1.

18 *Griffin*, *supra* note 3 at para 47.

19 *Ibid*.

20 *Ibid* at para 50.

21 *Ibid* at para 51.

22 *Ibid* at para 57.

23 *Wellman*, *supra* note 2 at para 104.

24 *Kanitz*, *supra* note 8 at paras 46, 55.

25 *Griffin*, *supra* note 3 at para 60 [emphasis added].

26 See *Briones v National Money*, 2013 MBQB 168 at para 61.

27 *Seidel v TELUS Communications Inc.*, 2008 BCSC 933.

28 *Seidel v TELUS Communications Inc.*, 2009 BCCA 104.

29 *Seidel*, *supra* note 4 at para 50.

30 *Wellman and Corless v TELUS and Bell*, 2014 ONSC 3318 at para 85.

31 *Ibid* at para 89.

32 *Wellman*, *supra* note 2 at para 59.

33 *Ibid* at para 73.

34 *Griffin*, *supra* note 3 at para 50.

35 *Ibid* at para 58.

36 *Ibid* at para 60.

37 *Ibid.*

38 *Wellman*, *supra* note 2 at para 105.

39 Michael Schafler & Amer Pasalic, "Is Canada Ready for Class Arbitration?", (Paper delivered at the ADRIC 2013 – Gold Standard ADR Conference, October 25, 2013) [unpublished].

40 See *R v. Jordan*, 2016 SCC 27 at paras 27, 116, 117: The Supreme Court of Canada found that Canadians expect a justice system that is reasonably efficient and timely, and that all justice system participants should be more proactive in avoiding inefficient practices to reduce the strain on limited judicial resources. Similarly, in *Hyrniak v. Mauldin*, 2014 SCC 7, at paras 1, 2, 24, 27, 28, the Supreme Court of Canada established that access to justice is a serious concern and that undue process and lengthy trials create costs and delays, which prevent fair and just dispute resolution. The Court stated that Canada is in need of a culture shift that incorporates the view that alternative models of adjudication are legitimate.

41 See *Lundy v. VIA Rail Canada Inc.*, 2015 ONSC 1879, at para 49: Justice Perell acknowledged that s. 12 of the Ontario Class Proceedings Act does not give the court jurisdiction to outsource its judicial function beyond s. 25(1) and Rules 54 and 55 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, thus it cannot force parties to enter into an arbitration agreement to resolve their dispute without the parties' consent.

BREAKING ALL THE RULES

Reflecting on the thought-provoking and controversial views of Martin Teplitsky on mandatory mediation, facilitative mediation and evaluative mediation.

(This paper is an updated version of a reflective journal written in 2003 as part of the author's course work in the Advanced Mediation section of his Osgoode Hall LL.M.(ADR) degree. Martin Teplitsky, Q.C. died in 2016 with a reputation as one of the great mediators, arbitrators and lawyers of his time. The republishing of this paper is dedicated to his memory.)

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Eric Slone is a practicing arbitrator, mediator and lawyer in Halifax, concentrating on labour, family and commercial cases. He has been a Board member of the ADR Atlantic Institute for about 15 years and is a past president. He articled and then practiced with the late Martin Teplitsky, Q.C. from 1979 to 1993.

In June 2003, while working on my LL.M. in ADR at Osgoode, I was able to spend a social evening with my old mentor, law partner and friend, Martin (Marty) Teplitsky, Q.C.

Teplitsky was my first year Torts professor at Osgoode in 1975. When he eventually concluded that he was not cut out for a career of law teaching, he returned to litigation practice, though not without first recruiting some of his graduating students (including me) to join his fledgling firm. I articled with him in 1978-9 and joined him as an associate in 1980. I practised full time with what was by then "Teplitsky Colson" until my move to Nova Scotia in 1989.

My years with Teplitsky coincided with his emergence as one of Ontario's pre-eminent labour arbitrators and mediators. I had occasion to observe him in action, and to get the inside scoop on his activities and reflections. Marty was an uncommon sort of arbitrator and mediator. Unlike many active arbitrators, he was a man of very few words. I know because I sometimes copy edited his terse awards. His approach was to answer the question put to him in as few words as possible. He did not write with the hope of being published in the Labour Arbitration Cases, and was scornful of those who did. As such his awards were infrequently published. As a mediator, he was fearless, flamboyant and occasionally downright quirky. On one memorable occasion in the 1980's, with a police strike looming, he insisted that the bargaining representatives hold their weekend sessions in New York because he had promised to take his son to some crucial Blue Jays games at Yankee Stadium.

Although I like to say that ADR is in my blood, I cannot deny that much of my inspiration to become an arbitrator and mediator came from my association with Teplitsky. Having spent as much time with him as I did from 1978 to 1989, it is inescapable that something of the man would have rubbed off on me. Of course, I have never lost sight of the fact that my personality is very different from Teplitsky's, and I could never pull off his shtick in a million years.

In many ways Teplitsky was unique, a marvellous "one-off." Even his detractors would not deny his popularity and influence. Whatever one's own opinion, there is value to be had from consideration of his clearly intelligent, influential and often controversial views.

In the course of the evening in 2003, Teplitsky succeeded in challenging much of what I had been reading and discussing in my LLM courses. I had expected no less, as I was already familiar with many of his opinions. He spoke with admiration and pride of the then-recent endeavours of an Ontario judge (former Chief Justice Warren Winkler), a personal friend (and Teplitsky might have said disciple) of his, who had successfully mediated an issue between Air Canada and its pilots pending in the Bankruptcy Court. He delighted in telling me that Winkler had "hijacked the process" and "broken all of the rules" that mediation theorists hold dear. The implication was that Winkler had succeeded where others with a more conventional approach would almost certainly have failed. Teplitsky claimed to have taught him much of what he knows.

During the evening I had the brainwave to take a closer look at Teplitsky's thoughts as part of the LLM program. I asked for and received copies of a number of papers that he had written, both published and unpublished. I also took care shortly after our meeting to jot down as much as I could recall that he had said that evening.

What emerged was a Reflective Journal, not a research paper, exploring the ideas that Teplitsky expressed. No effort was made to weave them into a

coherent thesis.

THE TEPLITSKY MODEL

What does it say about mediation as we study and teach it, when one of the most sought-after mediators in the country was heard to make statements such as the following:

- "My job is to decide what is a reasonable range of settlement and negotiate with each of the sides until they are in my range."
- "One of the incentives I use is to promise each party separately that if he is the first one to adopt a position that is reasonable, I won't beat him up for any more. I'll beat up on the other guy."
- "Unless you are a good negotiator, you cannot be a good mediator."
- "Most parties just want to know whether their assumptions are correct. The reason that they haven't settled already is because each side has come to believe their own assumptions. It is human nature. They will only give up some of their assumptions if someone else whose opinion they respect tells them that they are mistaken."
- "It's not their process to be conducted as they wish. It's my process."
- "In most disputes the parties do not need a mediator to tell them what their 'interests' are. They already know that."
- "The reason that I [or someone else like me] am brought in is because parties want or need to settle, either because of internal or external pressures. I get repeat business because my cases settle, not because everyone has had a pleasant experience."

There are some facile responses to these views which immediately spring to mind, but which are not entirely adequate. One could say:

- "This is just muscle mediation, or evaluative mediation. It is not the "real thing"."
- "The mediation process is broad enough to encompass many different models."
- "That is part of the merits of mediation. There is no one model that fits all."

It is probably fair to say that Teplitsky's views were moulded largely by his experience and by his fundamental assumptions about human nature. In "*Mediating Dangerously*," Kenneth Cloke offers a number of alternative definitions for the role of the mediator, according to the mediator's view of human nature. If people are basically bad, he says, a mediator needs to be forceful, evaluative and directive. If people are basically good, the mediator needs to be facilitative, non-directive and conciliatory. The intermediate position is that where basically good people are simply behaving badly, the mediator needs to be elicitive and transformative.

In Cloke's view, mediators who operate on the evaluative or directive model regard conflict as something to be ended, whether or not the settlement addresses the underlying issues that gave rise to the conflict. By this reckoning, one might speculate that Teplitsky had a dim view of human nature and saw his role as ending a dispute, though not necessarily resolving the conflict that gave rise to it. I am more inclined to the view that Teplitsky simply took people at face value, judging them by their behaviour, and did not try to see into their souls.

THE SPECIAL CONTEXT OF LABOUR RELATIONS

It is important to appreciate that as a mediator, Teplitsky largely operated in the rough and tumble world of industrial relations, which has typically been served by a very pragmatic model of mediation. The people Teplitsky dealt with were rarely the principals; they were professional representatives being paid to resolve a problem, not to engage in personal growth. When representatives are involved in the process, the dynamic is invariably different from those situations where the principals are directly involved. He would not have presumed to tell the parties or their lawyers what their deeper interests were because if they were half worth their salt they would already have taken those interests into consideration. Unions and management obviously have an interest in their ongoing relationship but are frequently quite willing to hurt each other and are often uninterested in actively working on that relationship. Unions and management are stuck with each other, for better or worse, and may actually have a perverse sort of interest (or believe that they do) in maintaining fractious relations.

Someone like Teplitsky was called in to mediate because a strike was either looming or already occurring, and a workable, if not entirely honourable, solution had to be found. Teplitsky understood that the parties submitted to having their arms twisted because it was more palatable to the representatives to blame him than to take full responsibility for agreeing to a particular result. One can imagine how many times someone told his client "we didn't want to do it but Teplitsky told us what would happen if we held out." When someone like Teplitsky has the clout and reputation, he not only gets away with this but becomes a unique driver of settlement.

Teplitsky took the time to understand the substance of the dispute, drawing (where possible) on his vast experience. Back in 2003, he was about to embark upon a mediation between a doctor and hospital over some issues of professional misconduct, and worried aloud whether he knew enough about the internal politics of a hospital to mediate effectively.

Knowing about the substance of the dispute is not simply a precondition to offering an evaluation. For Teplitsky the evaluative function was inseparable from each party's proper consideration of his or her best alternative to a negotiated agreement (BATNA.) When he said - *"Most parties just want to know whether their assumptions are correct. The reason that they haven't settled already is because each side has come to believe their own assumptions. It is human nature."* - he was really working with the parties to help to narrow the bargaining range within which a resolution could be found. This was no maverick view. It is precisely what Ury et al.[1] describe as the inevitable outcome of a power contest. Teplitsky actively assisted the parties to understand the actual strengths or weaknesses of their

bargaining position.

As such, I believe it is fair to say that Teplitsky was exquisitely tuned into the way power, and in particular the power derived from legal rights, operated in disputes. Perhaps it is just as fair to ask: how can a mediator actually bring parties closer together - a process that inevitably requires them to measure and readjust their own Batna's (Best Approach to a Negotiated Agreement) - without the mediator intelligently challenging parties' assumptions about those alternatives? Teplitsky would have considered it ineffective and naive to believe that the mere facilitation of dialogue between parties will lead inexorably to a narrowing of the gap between bargaining positions that is necessary for eventual agreement. Teplitsky was no fan of ineffective processes.

Teplitsky revealed a lot about his approach when he said *"unless you are a good negotiator, you cannot be a good mediator."* The art of negotiating is the same as the art of persuasion. If Teplitsky could persuade a party that its position was overblown, if he could "negotiate" a reconsideration of its stance that narrowed the gap between bargaining positions, then a settlement was closer. He rewarded a party for taking a realistic position by working on the other party - challenging its assumptions. It is not really "muscle mediation" when he said (perhaps a bit hyperbolically) that "*one of the incentives I use is to promise each party separately that if he is the first one to adopt a position that is reasonable, I won't beat him up for any more. I'll beat up on the other guy."*

The derisive term "muscle mediation" generally refers to the practice of using strong arm tactics to force the capitulation of the weaker party, where the weakness has less to do with its real bargaining position and more to do with its stamina or self-confidence. Teplitsky's approach was actually the opposite. By easing off on the party that showed flexibility and reasonableness in its assessment of the situation, Teplitsky was actually promising not to exploit that as a source of weakness. His mediation was muscular, in the sense that he was forceful and direct in his challenges to the parties, but it did not smack of strong-arm tactics or exploitation. Moreover, as will be discussed below, Teplitsky was willing to take responsibility for the fairness of the result.

THE CIVIL LITIGATION CONTEXT

Teplitsky's style was heavily influenced by his many years doing civil litigation, and principally commercial litigation.

The kind of parties that Teplitsky typically represented were people of action and people with money. Teplitsky respected business people and saw them as responsible, intelligent adults. As a lawyer, he would explore with his own client the many dimensions of the dispute before a writ was dropped or a defence was filed, as the case may be. He saw his job as finding the shortest distance between the point of dispute and the point of resolution. His principal way of doing this was to engage the opposite lawyer in frank discussion and negotiation. If his cases failed to settle it was because the parties and their lawyers had different views of the facts and the results that flow therefrom; not because they have overlooked the possibilities of an integrative solution.

As such, if he was in the position of being offered or even forced to accept third party assistance, he expected no less from the third party than he himself provided. He wanted to know if he had misapprehended something and was overplaying his hand. Although supremely confident and impressive as a negotiator, he had sufficient humility to appreciate that he was just as susceptible as the next guy to the dangerous phenomenon of "falling in love with his own case."

MANDATORY MEDIATION

Given his comments about mediation generally, it should be no surprise that Teplitsky was scathingly critical of mandatory mediation. In his undated (c.2000) unpublished paper titled "Mandatory Mediation," delivered to an audience of faculty and alumni at the University of Toronto Law School's 50th Anniversary, he made a number of salient points. Ultimately it came down to his view that in areas where mediation is used extensively such as labour, family and neighbourhood disputes, cost-effectiveness[2] is less important, whereas in civil litigation cost-effectiveness is of huge importance. He predicted that mandatory mediation in the civil courts would not prove cost-effective, for a number of reasons:

- there was no evidence that parties can improve on their already high settlement rate (estimated at 95%).
- intractable disputes will inevitably go to trial regardless of how much third party assistance is offered.
- there was no cogent evidence to suggest that mandatory mediation would reduce overall cost by causing a case to settle earlier.
- he estimated the total cost to the parties at that time of a one-day mediation at $3,000 to $5,000 for each party, and posited that there was no reason to believe that the costs wasted in cases that do not settle would be outweighed by the cost saved in cases that do.
- the best way to reduce the cost of litigation and promote settlements is to make trials easier to access quickly, rather than harder. The immediacy of adjudication is a prime motivator to settle.
- knowing that mediation is available, parties will be less likely to attempt direct negotiation.
- Time-based billing is the enemy of settlement, because it discourages early settlement.
- Settlements require lawyers to take risks that do not exist if the result is endorsed by a neutral (judicial) party.

I will consider these theses in turn:

ALREADY HIGH SETTLEMENT RATE

It is difficult to quarrel with the point that very few cases go to trial, but the question may well be asked whether the right ones go to trial. Ideally the ones that go to trial would not simply be those where one side was intractable and needed a judicial kick in the teeth, in the form of an adverse trial verdict. A more productive use of court time would see cases going to trial where there is uncertainty in the law and value in es-

tablishing a precedent. So the more potent question that Teplitsky did not ask is whether mandatory mediation (intelligently done) can help to weed out the cases that should not be tried, while having the courage to de-emphasize settlement and allow those cases that should be tried to go to trial.

NO EVIDENCE THAT MANDATORY MEDIATION WILL CAUSE CASES TO SETTLE EARLIER

It may have been a bit premature for Teplitsky to ask this question at the time that his paper was written, given the infant state of the Toronto mandatory mediation project, but this question raised the important issue of whether or not cases are "ripe" for settlement at the time that the mandatory mediation must be held. Experience bears out that some cases settle early because there is sufficient information known and the parties have an appetite for settlement, whereas for other cases settlement initiatives are simply not timely. The question that might well be asked is whether mandatory mediation can be flexible enough to allow for mediation at a time when it is most likely to do some good. I will touch later upon the question of whether mandatory mediation is a viable Early Neutral Evaluation model.

COSTS WASTED MAY EXCEED COST SAVED

This was Teplitsky's intuitive sense. I am not aware of any attempt to study this very good question. Likely it would be very difficult to generate figures for comparison.

IMMEDIACY OF ADJUDICATION IS PRIME MOTIVATOR TO SETTLE

As Samuel Johnson famously remarked, "nothing so wonderfully concentrates the mind as the prospect of one's own hanging." This is apt in the context of civil litigation. The immediacy of a trial does many things:

1. It forces one to concentrate on the case at hand to the exclusion of all others. Litigation lawyers typically carry a caseload of several dozen active files and are unable to give each case regular undivided attention. Trial preparation is one of those times when the telephone is not answered and other distractions are avoided.
2. In preparing the case for trial the lawyer's ability to predict the result grows more acute as they marshal the evidence and argument for trial. While it is tempting to believe that the lawyer's objectivity is fully awake at all times from start to finish, the reality is that most lawyers leave a great deal of preparation to the end - preparation that fleshes out their appreciation of their own case.
3. Lawyers tend to be good actors, but they hate to lose. The ability to bluff and self-deceive keeps many a case going through the early stages, but as lawyers contemplate the imminent humiliation of losing they will inevitably drop the act and "get real."

The challenge for mediators in a mandatory mediation setting is whether they can accomplish the same thing that the immediacy of adjudication inevitably produces. Can they force parties to confront the reality of their power position so that settlement becomes more attractive than proceeding with the case? One wonders.

KNOWING THAT MEDIATION IS AVAILABLE, PARTIES ARE LESS LIKELY TO ATTEMPT DIRECT NEGOTIATION.

This observation conforms with my own experience. In a number of relatively routine insurance files, I tried without success to persuade the opposing party to devote some effort to direct negotiation, only to be told that the insurer would prefer to mediate or go through a settlement conference. In the end, even though the cases eventually settled, my impression was that the mediator or settlement judge provided little real value to the process and the very same settlement could have been achieved without third-party intervention. It is a bit of a sad commentary to consider that many lawyers won't talk to each other on a matter as important as settlement without the presence of a referee.

TIME-BASED BILLING IS THE ENEMY OF EARLY SETTLEMENT

The problem with time-based billing was one of Teplitsky's favourite hobby horses, which he wrote about on several occasions.

Teplitsky was not shy to infer base motives to explain some of what he saw. He was openly critical of a system that tends to discount the value of the result (a timely, favourable settlement) yet consistently rewards failed efforts to produce it - in the same way that a taxi meter rewards the failure rather than the success in finding the direct path to the ultimate destination.

Anecdotally, both then and now, within the legal culture of many litigation firms or departments, there is a sense that the client is willing to pay to ensure that no factual stone is left unturned. This leads to endless discovery and requests for documentation that must be pored over in great detail. The theory seems to be that clients are unwilling to run the small risk that some fact or argument might be overlooked. But has anyone properly explained to the client the diminishing returns that inevitably flow from this approach?

This phenomenon is not a factor for value-based billing systems such as contingency fees, which were illegal in Ontario for much of Teplitsky's career. Contingency or value billing has become the norm for Plaintiffs' lawyers in personal injury and other types of cases. But it is not true for defence counsel

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who must bill by the hour. This creates a different set of incentives for the lawyers on opposite sides of the same case. Plaintiffs' lawyers may be willing to forego steps in the litigation - such as lengthy discovery - and go directly to a settlement forum. Defence lawyers have a perverse incentive to do the opposite. They are paid to do discoveries, which are very labour intensive. They are also paid at full rates to do fairly mundane work such as "baby-sitting" the discovery of their own clients. They will rarely be criticized for having done too much discovery or investigation. So it is easy to see why early settlement initiatives will meet with little favour in many types of cases.

SETTLEMENTS REQUIRE LAWYERS TO TAKE RISKS THAT DO NOT EXIST IF THE RESULT IS ENDORSED BY A NEUTRAL (JUDICIAL) PARTY.

Often the obstacle to settlement is the fact that the lawyer has engendered high expectations in the client. It may be more difficult for the lawyer to persuade the client to lower those expectations than it is simply to relay the fact that a neutral party does not agree with them. In the former exercise the lawyer appears to be in conflict with the client, and may be accused of disloyalty, while in the latter scenario the lawyer and client remain in solidarity.

MEDIATION TRAINING AND THE ADR MOVEMENT

Teplitsky was quite cynical about some of the motives of the ADR movement. He suspected that there was more money being made in mediation training than in the mediations that such people end up conducting. He was derisive of the notion that someone can be an effective mediator with just a little training:

> "Our system operates on the assumption that anyone who has taken 40 hours of mediation training can be an effective mediator. The assumption is almost too silly for comment. In the labour field in Ontario where mediation has been actively practised for more than 50 years, very few recognized mediators have emerged. Their paucity results from the fact that it takes enormous skill, experience and knowledge to mediate successfully. Contrary to the prevailing facilitative approach, experience and knowledge of the subject matter of the dispute is essential. Few lawyers have the necessary combination of intelligence, bargaining know-how, subject matter expertise, personality, people skills and reputation. A lay gestalt therapist gets more training than a mediator and their work is not unlike a mediator's. Effective mediators will always be a scarce resource."

He went on to offer the cynical observation that facilitative mediation is the preferred model because of the growth of mediation and mediation training as an industry. Evaluative mediation, which is equally or perhaps more concerned with substance than process, cannot be taught in the space of 40 hours.

I agree that the qualities that make for an effective and acceptable evaluative mediator cannot be taught in a short time, if at all. Such an evaluative mediator must have, above all, the respect of the parties to a sufficient degree that those parties will be prepared at some considerable personal cost to adjust their possibly entrenched expectations.

Teplitsky was far from the only exponent of evaluative mediation. One very compelling description of evaluative mediation in practice can be found in a piece by Frances Burton, who described the experience of observing a mediation conducted by the late retired Ontario judge, R.E. Holland. The description is worth quoting:

> A popular retired judge on the Toronto panel is The Honourable Richard Holland QC, a Canadian of English descent from a 17th century Chief Justice of the Common Pleas. His approach immediately belies a quite popular conception that judges may not be good at mediation because they are too judgmental and cannot get down to the parties' level to facilitate a settlement...
>
> A morning's close observation of this highly skilled ADR operator revealed that in his case it is an openly evaluative method that underpins the reasons for his success. It was clear from the moment that the parties arrived that they expected, and indeed knew that they would get, a mediator who would have a shrewd idea (from his careful perusal of the case papers) of whose case was stronger, and of what was likely to be both a trial outcome and a fair settlement. Moreover, the parties had confidence that the whole dispute would be quickly unravelled and authoritatively analysed: that what may properly be described as the positive "unpacking" process would be completed within a couple of hours (or perhaps four or five hours - well within the routine judicial day - for what would be a more complex case). The usual opening statements and caucus with each side in turn crystallised these impressions within the first hour, and by the end of the second this obviously enormously respected retired judge had done what the parties had come for. Thus they had been told who had the stronger case, had discovered what the judge considered to be the "going rate" if the case went to court, had ascertained what he thought would be fair as to costs and the gap between them had been narrowed either to vanishing point or alternatively to one of such microscopic proportions as not to be worth fighting about, so that everyone could then go home satisfied.

People like R.E. Holland will always be a scarce commodity. We cannot all be "learned elders." Few individuals will ever have the experience or command the respect that he did. Most "garden-variety" mediators do not have this type of gravitas.

EARLY NEUTRAL EVALUATION AND FACILITATIVE MEDIATION

Teplitsky differentiated between evaluative mediation and early neutral evaluation (ENE). The former requires the mediator to explore the correctness of party assumptions which are standing in the way of settlement. He referred to

this process as "confronting the reality of your alternatives." Teplitsky did not say much about ENE, although he likely equated the Ontario mandatory mediation project with ENE.

One cannot envision ENE being successful in most cases where the facts are seriously in dispute. ENE is best utilized selectively, where someone such as a case managing judge determines that the case is well suited to such a process. Mandatory mediation sweeps all cases into the same net and such a wholesale approach is open to serious criticism from the likes of Teplitsky, who suffered neither fools nor foolish schemes gladly.

FAIRNESS

Teplitsky was critical of facilitative mediation in that, he said, it distances the mediator from the quality of the result. If the mediator has no responsibility to ensure the fairness of the result then there is no real commitment to justice, which is measured by the extent to which it reflects the probability of an adjudicated result. An evaluative mediator, however, must take responsibility for the result, and must offer opinions competently and in good faith.

This observation exposes some interesting aspects to what we mean by neutrality and why it is so important. Facilitative mediators may have opinions about the merits of a case, but as a matter of professional discipline refrain from expressing them. Their brand of neutrality can be crafted. Their allegiance is to the process, and so long as they work with the parties on the level of facilitating communication, there is little danger that partiality will become a problem. An evaluative mediator needs to be free of general bias or partiality, but is expected ultimately to form a case-specific bias that is openly shared with the parties. Indeed, the main criticism that can be levelled against an evaluative mediator is that he or she formed the bias too early. To that extent, the desirable qualities of an evaluative mediator are precisely those expected of a judge or adjudicator, who has the duty to "hear both parties."

ADDRESSING POWER IMBALANCE

Teplitsky cautioned that facilitative mediation runs a greater risk than evaluative mediation of simply allowing the settlement to favour the stronger party. In other words, in a facilitative mediation the weaker party may not have the resources to resist the stronger party, despite the strength of their legal case. Where evaluation is offered, the mediator can shore up the weaker party and promote a more favourable settlement.

Put another way, in a facilitative mediation the result is more likely to be driven by power, while in an evaluative mediation it is more likely to be driven by rights. This observation exposes Teplitsky's faith in rights and the legal process generally. Perhaps he gave too much credit to the law to produce justice and fairness.

The defenders of interest-based mediation would argue that rights are not everything, that sometimes rights are arbitrary and stand in the way of better, more acceptable and ultimately more durable results. Who among us has not occasionally, or more often, agreed with Dickens's Mr. Bumble that "if the law supposes that, then the law is an ass."

Teplitsky was not the only commentator to question the ability of facilitative styles of mediation to deliver fair results. Author Michael Coyle[3] has devoted a lengthy article to the subject. Coyle's central question was whether mediation can consistently deliver fair outcomes in the same way that litigation does, by virtue of the latter's openness, and its adherence to precedent and the rule of law. But Coyle's article must be read with an understanding that he is true to what he believes to be the central virtue of mediation, that of party autonomy.

It is clear from Teplitsky's comment to the effect that it is "his process" that he was largely unconcerned with whether or not the parties enjoy some form of "autonomy." To engage in a mediation with Teplitsky was to enter - voluntarily - his world. This would have been rather like getting on a roller coaster, where the choice is made at the outset, but once aboard you have little control, and simply have to surrender to the experience. Given Teplitsky's success, it is clear that there was no shortage of happy riders.

CONCLUDING REFLECTIONS

The question may well be asked: are those advocating and practising evaluative styles of mediation an integral part of the ADR movement, or do they stand ultimately to stifle it? One possible answer is that we have to be more discerning about which mediation model really works in a particular setting. Calling it all "mediation" may do more to confuse than to enlighten.

It is unrealistic to expect most mediators to have the generic skills enabling them to operate effectively in a variety of settings using a variety of approaches. A mediator who is skilled at helping divorcing spouses work out a parenting plan for their children should probably not try to mediate a complex shareholders dispute, personal injury claim or labour strike. In practice few would, but mandatory mediation schemes tend to ignore the subtle matching of mediator and problem that operates in a free market and upon which much of the success of mediation is grounded.

It is also fairly clear that most ordinary disputants will not seek out, if only because they cannot afford, high-powered, expensive mediators like Martin Teplitsky or Richard Holland, or their current equivalents. Such individuals will always tend to operate in a world where cost is no object, or the cost is simply small compared to the enormous stakes involved, and where the personality or prestige of the mediator is the commodity being purchased.

1. W. Ury, J. Brett and S. Goldberg, *Getting Disputes Resolved* (San Francisco: JoseyBass, 1988)
2. Much civil litigation, and commercial litigation in particular, is just about money with no important non-monetary issues at stake. As such the bottom line cost of resolving the dispute should be proportional to what is at stake.
3. Michael Coyle, *"Defending the Weak and Fighting Unfairness: Can Mediators Respond to the Challenge"* (1998) 36 Osgoode Hall L.J. 625-666

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QUÉBEC NEW RULES ON EXPERT EVIDENCE

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INTRODUCTION

The province of Québec recently undertook a comprehensive reform of the rules of civil procedure. The new Code of Civil Procedure, which came into force on 1 January 2016 (the "New Code"), is only the fourth complete recodification of procedural law in the history of Québec, and the first since 1965.

The New Code is the culmination of a wholesale reform initiated by the Québec Government some 15 years ago with the objective to make the justice system speedier, less costly, more efficient, less adversarial, and of course more accessible. The preamble of the law enacting the New Code indicates that the ambitious objectives of the reform are to *"ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice."*[1]

Some of the most controversial changes in the New Code relate to expert evidence, which has long been criticised in Québec and elsewhere as one of the most problematic features of the adversarial process. We discuss these changes in more detail in Part I of this article. In short, the New Code seeks to limit the role played by party-appointed experts and gives courts an increased role in case management. In Part II, we take a step back to look at these changes in the wider context not only of Québec's mixed legal heritage, but also against the backdrop of the differences between the Common Law and the Civil Law approach to procedure. While expert witnesses under the New Code still function within a broadly adversarial framework, the reform takes Québec a few steps closer to its Civil Law roots. In Part III, we look at whether this new "toned-down" version of adversarial procedure for expert evidence adequately addresses the concerns related to the use of expert witnesses, and is likely to fulfill the legislature' stated aim of reducing delays and costs and increasing access to justice.

I. THE NEW RULES OF PROCEDURE FOR EXPERT EVIDENCE

Notable changes implemented by the New Code include: a new provision clarifying the mission of expert witnesses; a push towards single, joint experts whenever possible; a limit of one expert per subject area or matter; a requirement that experts disclose their instructions; a new provision encouraging meetings between experts where more than one expert testifies on the same subject; and a provision limiting direct examinations of experts at trial. We discuss each of these changes below.

AN EXPRESS ACKNOWLEDGEMENT THAT EXPERT WITNESSES ARE NOT ADVOCATES

The New Code specifies that the role of experts is to "*enlighten the court and assist it in assessing evidence***" and that this mission "***overrides the parties' interests***".[2] In other words, and as the Ministry of Justice's Commentary on this article indicates: experts are not to plead a party's case.[3] The same notion appears in Article 235, which provides in its first subparagraph that "***experts are required to give an opinion on the points submitted to them***".[4]**

THE PUSH FOR SINGLE JOINTLY-APPOINTED EXPERTS

Under the New Code, parties are required to indicate in their case protocol (essentially a joint timeline the parties agree on), at the latest 45 days following the date on which the originating application is served, whether they intend to seek one or more expert opinions, and to specify the nature of such opinions as well as the foreseeable costs. If the parties do not propose to seek a joint expert opinion, their case protocol must explain why that is. [5]

This provision goes hand in hand with the new Article 158(2), which gives courts the power to impose joint expert evidence upon the parties at any stage of the proceeding, if considered necessary to uphold the principle of proportionality and if doing so is considered conducive to the efficient resolution of the dispute.[6]

Both provisions are new law. Under the previous rules, the provisions on case management powers did not mention expert witnesses. There equally was no obligation for a party to justify its choice to appoint its own expert as opposed to a single jointly appointed expert. The Ministry's Commentary on these provisions indicate that they reflect the New Code's general approach of encouraging joint expertise as a means of "*limiting expert debates, speeding up proceedings, and reducing the significant costs associated with expert evidence***."**[7]

THE LIMITATION TO ONE EXPERT PER AREA OR MATTER

The New Code also provides that parties may not submit more than one expert opinion, whether joint or not, per area or matter of expertise, unless the court so authorizes in view of the complexity or importance of the case or the state of knowledge in the area or matter concerned.[8] Under the previous code, parties could of course – and regularly did – retain multiple experts per area of expertise if they wished to do so.

THE DISCLOSURE OF INSTRUCTIONS GIVEN TO EXPERTS

Under the New Code, experts are required, on request, to provide the court and the parties with the instructions they receive from the party(ies) instructing them.[9] There was no equivalent provision in the previous regime. Indeed, under the old code, courts asked to rule on objections to the disclosure of instructions given to experts usually ruled that instructions given to an expert were covered by the litigation and solicitor-client privileges, and therefore exempt from disclosure.[10]

EXPERT CONFERENCING

Where more than one expert is appointed on a given subject, the New Code invites the parties to organize (it states "*the parties may call*") a meeting of experts in order for the experts to reconcile their opinions, identify points on which they differ and prepare an additional report on these points.[11] It further provides that the court may on its own order expert conferencing at any stage of the proceedings.[12] This provision builds on an article of the previous code which entitled the court to order experts to meet when they had authored contradictory reports,[13] but goes further by expressly inviting the parties to organise the expert conferencing.

EXAMINATION DURING TRIAL

The New Code also provides that the report of an expert stands *in lieu* of his or her direct testimony. This means that in theory, the examination of an expert at trial begins with cross-examination. The New Code does allow a party, however, to examine an expert in chief in order to clarify points covered in the expert report or to obtain the expert's opinion on new evidence. In all other situations, the party must seek the court's permission.[14] In practice, this provision may allow for a brief presentation for the expert and his or her report.

This provision too builds on a provision of the previous code, which provided that the filing in the record of the whole or abstracts only of the out of court testimony of an expert witness could stand in lieu of his written report.[15] The legislator has now taken a step further and provided that expert reports stand in lieu of their direct testimony.

II. THE ROLE OF EXPERTS IN THE CIVIL LAW AND COMMON LAW TRADITIONS

A discussion of the changes listed above would be incomplete without a few words placing them in context. The context of the recent reform includes not only Québec's distinct legal landscape, but also the differences between the Common Law "adversarial" approach to procedure and the traditional Civil Law "inquisitorial" approach. When analysed against this backdrop, it appears that the rules Québec recently adopted with regards to expert evidence are closer in philosophy to the "inquisitorial" approach.

QUEBEC'S DISTINCT DUAL HERITAGE

Québec is often described as Canada's only Civil Law province, but the legal landscape in Québec is more accurately described as "mixed" or "hybrid". While Québec follows the Civil Law in all matters of private law, it follows the Common Law in matters of public law. Even in private law matters, however, while the substantive law is primarily Civil Law, the procedural rules in Québec are mainly derived from the Common Law. As such, the rules of procedure in Québec – as opposed to the rules, say, of many continental European jurisdictions – are accurately described as "adversarial".

THE ADVERSARIAL AND INQUISITORIAL APPROACHES TO PROCEDURE

The terms "adversarial" and "inquisitorial" are crudely used to refer to the Common Law and Civil Law approach to procedure, respectively. With the *caveat* that generalisations are by nature imperfect, the Common Law adversarial approach is best described as party-driven: it takes shape from a dispute based on a confrontation between the parties, who are each responsible for developing their arguments and claims through their pleadings and examinations at trial. The inquisitorial system, in contrast, is authority-led. The decision-maker is ultimately in charge of the search for truth, and drives the fact-finding and evidentiary process, with a strong preference for written proof.

Expert evidence is a prime example of the difference between the traditionally adversarial and the traditionally inquisitorial approach. In an adversarial system, each party appoints its own expert or experts, who accordingly work according to a partisan logic. Experts receive instructions by the party appointing them, and will draft one or multiple reports, on which they will be cross-examined at trial. In the traditional inquisitorial system, in contrast, the power to appoint experts lies with the judge, not the parties. Experts are appointed by the court and must meet requirements similar to those imposed on judges when they carry out their fact-finding mission. Court appointed experts are neutral and only receive instructions from the court, to which they ultimately report. While parties may present submission to court-appointed experts, they do not examine the experts at trial.

THE FRENCH EXAMPLE OF THE "*EXPERTISE JUDICIAIRE*"

The French law example of the "*expertise judiciaire*", a procedure sometimes described in English as "court survey", provides a good illustration of just how different the inquisitorial and adversarial approach to expert witnesses are.

- Under the French Code of Civil Procedure, judges may order an "*expertise judiciaire*", an investigative measure whereby the judge appoints a neutral third party with expertise in a given field. The rules state that

the purpose of this procedure is to "enlighten" the court on a question of fact which requires the knowledge of an expert. To carry out this mission, the expert is vested with the powers conferred on him by the court by reason of his qualifications and must personally carry out the terms of reference given to him with "conscientiousness, objectivity and impartiality". The rules further provide that the expert must never give a legal opinion, or reach legal conclusions.

- The default rule is for the appointment of one, rather than multiple experts. It is also the default rule that experts are chosen from an existing list of experts pre-selected by the court.
- Once appointed, the expert is given access to all documents in the court file and vested with relatively wide investigative powers, including the power to request the parties to provide any document which he or she considers necessary to pursue his or her mission.
- While they carry out their work, experts are bound by the "*principe du contradictoire*", meaning that each party must be granted an opportunity to present its position to the expert. In this process, it is common for parties to be assisted by their own expert. Court appointed experts are obliged to include and address all formal submissions the parties make to them in their report.
- Once the expert has completed the "expertise", the judge may ask the expert to explain his or her conclusions orally during the hearing, although in most cases, the expert will provide a written report to the judge. Even in cases where the court appoints multiple experts, which is rare, there is always a single expert report, in which the different experts indicate the reasons for their differing opinions.
- There is no examination of experts at trial. Litigants can challenge the report of the expert, including by filing a report of another expert of their choice or requesting the court to appoint a new expert, but these attempts are rarely successful. In most cases, courts accept the findings of the expert they appointed as findings of fact, without any modification.

A "TONED-DOWN" VERSION OF THE ADVERSARIAL RULES FOR EXPERT WITNESSES IN QUÉBEC

As the comparison with the French "*expertise judiciaire*" shows, through its reform of the rules of civil procedure for the presentation of expert evidence, Québec appears to be moving away from a purely adversarial approach to expert evidence and closer to its civilist roots, as scholars have noted.[16] In particular, the limitations placed on direct examination of experts, as well as the push for a single joint expert, and even the express reminder that experts are to serve the court rather than the parties seem to have been inspired by, if not borrowed from, the original, continental Civil Law tradition. While it is true that these rules continue to operate within a system of procedure which remains rooted in adversarial logic (as shown by the fact that parties retain the right to appoint their own experts and to conduct cross-examination of the other side's expert), it is a "toned-down" version of the pure adversarial approach, in which the parties have less the control

over the evidence process, and the courts more case management powers.

Québec is not the only jurisdiction in which we are witnessing a departure from the traditional adversarial ways. Even in England, the reform of the rules of civil procedure suggested by Lord Woolf, now known as the Woolf reform, was largely predicated on the idea that an excessively adversarial legal culture was to blame for the problems of costs, delays and access to justice plaguing the justice system. Fingers were often pointed at expert witnesses, described as one of the most problematic features of the adversarial system. Lord Woolf himself famously wrote: "*Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their client*".[17] Critics both at home and abroad also add that "battles of experts" make it more difficult for judges to accomplish their mission as trier of facts, because they are by definition not experts and consequently ill-placed to choose between conflicting expert opinions and sift out the real from the false. Party-appointed experts are also criticised as perpetuating problems of access to justice, since the less economically well-off may not be able to afford an expert, let alone a good expert.

The adversarial approach to expert evidence certainly has its limits, but is the inquisitorial approach inherently better? Even in its countries of origin, such as France or Germany, the inquisitorial approach is the subject of criticism, including on the basis that it deprives decision-makers of the full benefits of expert evidence, and that the reduced role of counsel does not make the system more efficient. We would also add that it encourages parties to engage their own experts to guide their work with the court appointed expert, a practice which increases the costs associated with expert evidence and poses the same problems of access to justice identified above. Against this background, the next section provides a brief comment on the merits of the changes implemented in Québec.

III: THE BEST OF BOTH WORLDS?

THE EXPRESS ACKNOWLEDGEMENT THAT EXPERTS ARE NOT ADVOCATES

The formal clarification of the expert's mission and the express rule that experts owe their duties to the court rather than the party retaining them is a welcome addition to the rules of civil procedure. These are not new concepts, but rather the codification of pre-existing obligations that also applied to experts under the former code. While it is too early to say whether these new provisions will foster any change in the practice of expert witnesses and their instructing counsel, the new provisions have the advantage of clarity, and will at least serve as an important, if gentle, reminder (or reprimand) to the parties and their experts.

THE PUSH FOR A SINGLE JOINTLY-APPOINTED EXPERT

The idea of a single jointly-appointed expert is not new; many jurisdictions have considered implementing such a reform. The claimed benefits of single joint experts include that they reduce the total time and cost of proceedings by eliminating the risk of a lengthy "battle of experts". Joint experts are also said to result in a better understanding of the issues by the judge, because it dispenses with the need to choose between conflicting opinions on a question which is, by definition, outside a judge's field of expertise. Single joint experts are also said to be more reliable because they receive instructions from both parties and do not suffer from any "adversarial bias" in favour of the party paying them. Lastly, single joint experts are presented as an opportunity to "level the playing field" by giving each party access to the same expert.

While such arguments make sense, some of the claimed benefits are not necessarily evident in practice. The disconnect in large part appears to come from the misconception that joint experts completely eliminate the utility or need for party-appointed experts. As noted above, the French example of the "*expertise judiciaire*" actually shows that parties often retain their own expert to guide their work with the court-appointed expert. Anecdotal evidence in Québec also indicates that parties often hire "ghost experts" or "shadow experts" to assist in their dealings with single joint experts, which leads to more – not less – costs and delays in the proceedings.

In addition, the argument that single joint-appointed experts facilitate the task of decision-makers by dispensing with the need to choose between conflicting opinions fails to acknowledge that conflicting expert evidence can sometimes reflect a genuine difference of professional opinion. Reasonable experts may reasonably disagree, and the limitation to a single joint expert risks depriving decision-makers of the opportunity to understand the full range of differing opinions that may legitimately exist within a given field of expertise.

Considering the limitations inherent to single joint appointed experts, a strict requirement that parties jointly appoint an expert would be problematic. This is not what the New Code proposes, however. Under the New Code, parties retain the right to appoint their own experts, though they must explain their reasons for doing so. The court, for its part, may nonetheless order the parties to appoint a single joint expert at any stage of the proceedings. There are many instances in which it will be appropriate for parties not to retain a joint expert, for instance when there are complex valuation questions, and it is to be hoped that courts interpreting these provisions will recognise this reality and not impose a single joint expert in all cases.

THE LIMITATION TO ONE EXPERT PER AREA OR MATTER

The new rule that parties cannot seek more than one expert opinion per area or matter of expertise unless the court authorizes it is another welcome change. There are only rare cases in which the parties will need to call more than one expert in a given field of expertise, and in such cases parties can apply to leave from the court to retain

multiple experts given the complexity of the dispute or importance of the case. This provision should help limit the abuse of expert evidence and limit the risk of protracted battles of experts.

THE DISCLOSURE OF INSTRUCTIONS GIVEN TO EXPERTS

The obligation for experts to disclose their instructions has the obvious advantage of ensuring greater transparency. It also reduces the risk that experts disagree not because of a genuine difference of opinion, but simply because they have received different instructions from the party instructing them.

This change has generated a fair amount of criticism from various stakeholders. Many denounce it as an undue encroachment upon the protections from disclosure granted by the solicitor-client and litigation privileges. Courts have not, so far, been receptive to this argument. In a recent decision concerning objections to a request to disclose the instructions given to an expert, the Québec Superior Court confirmed that Article 235 of the New Code did infringe upon the principles of professional secrecy and litigation privilege, but held that such infringement was justified by the objectives of impartiality and search for truth that the provision seeks to advance.[18]

A second, distinct problem with this provision is that it does not specify when the disclosure of instructions given to an expert should take place. Requiring experts to disclose their instructions at an early stage of the proceedings might mean that parties have to disclose their case strategy prematurely, which litigants might try to avoid by not having an expert on the record until they are ready to lay all of their cards on the table. What we are also seeing in practice is that it is becoming more and more common for counsel to instruct experts orally only, so that there are no written instructions to be disclosed. In some cases, experts are also instructed to continuously overwrite preliminary versions of their reports, so that there are no drafts which could be subject to a disclosure order. Such practices are likely to increase the costs associated with expert evidence.

A less problematic alternative might have been to require experts to include their instructions in their written report. In England, for instance, the rules of civil procedure provide that "the expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written".[19]

EXPERT CONFERENCING

The New Code expressly invites the parties to consider expert conferencing, in addition to vesting courts with the power to order it. The aim of expert conferencing, sometimes referred to as "hot tubbing", is to foster discussion between contradicting experts in order to find points of agreement and narrow the issues in dispute. When it works, expert conferencing can reduce the time and cost of litigation. The condition "when it works" is, however, an important one. There are cases for which expert conferencing will not work, for instance if the experts are so involved that they refuse to reach agreement, if they are too antagonised or simply unable to agree because from a different school of thought. It is to be hoped that decision-makers will use their discretion appropriately and not force expert conferencing on those cases.

EXAMINATION DURING THE TRIAL

The limitations the New Code imposes on the direct examination of expert witnesses undoubtedly shorten the time devoted to considering expert evidence at trial. To the extent that one considers, however, that direct examination of expert witnesses is time well spent, the advantages are debatable. There are many benefits to having direct examination of expert witnesses, including that it is a helpful way for experts to transmit their knowledge to the decision-maker. Expert witnesses have an important pedagogical role to play, of which direct examination can be a significant element. It gives experts the opportunity to present their expertise and findings to the judge, who can ask questions as the expert goes along, without interrupting the flow of a rapid-fire cross-examination.

The New Code does not eliminate direct examinations of expert witnesses altogether. It allows it for points of clarification and new evidence, and limits it to the leave of the court in all other cases. There is therefore scope for limited direct examination of witnesses, and it is to be hoped that courts applying the provisions of the New Code will use their discretion to allow for brief direct examinations when appropriate.

CONCLUSION

The New Code has implemented a number of changes relevant to the collection and adducing of expert evidence in Québec. All in all, the reform seeks to limit the role played by party appointed experts and gives courts greater case management powers. The most notable changes include an express acknowledgment that experts owe their duties to the court rather than to the party instructing them, a default rule in favour of single joint experts (as opposed to multiple party appointed experts), an obligation incumbent on experts to disclose their instructions, limitations on the direct examination of experts at trial, and provisions encouraging expert conferencing.

Many of these changes seem to have been inspired by, if not borrowed from, the inquisitorial approach to procedure. While the general procedural framework in Québec remains largely adversarial in design, the new rules for expert evidence are taking the province a few steps closer to its civilist roots. Critics of the adversarial approach to procedure will undoubtedly see this as a positive development: party appointed experts have long been dismissed as unreliable "hired guns" and described as one most problematic features of the adversarial tradition. It bears noting, however, that the inquisitorial approach, in particular in respect of expert evidence, also has its flaws, and has been criticised as inefficient. Has Québec struck the right balance? There certainly remains a bit of both worlds in the New Code, but the answer to the question ultimately depends on how courts will interpret and apply these new rules. How judges decide to exercise the important discretion accorded them by these rules will determine whether or not the changes implemented in the New Code successfully foster attainment of the goals of judicial efficiency pursued by the legislator.

1 Available here: http://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html. The New Code is available here: http://legisquebec.gouv.qc.ca/en/showdoc/cs/C-25.01.

2 Articles 22 and 231 of the New Code.

3 The provincial Ministry of Justice has published commentaries for each provision of the new code. They are available here, in French: https://elois.caij.qc.ca/C-25.01.

4 Article 245 of the New Code.

5 Articles 148 and 232 of the New Code.

6 Article 158(2) of the New Code: « *For case management purposes, at any stage of the proceeding, the court may decide, on its own initiative or on request to : (2) assess the purpose and usefulness of seeking expert opinion, whether joint or not, determine the mechanics of that process as well as the anticipated costs, and set a time for submission of the expert report; if the parties fail to agree on joint expert evidence, assess the merits of their reasons and impose joint expert evidence if it is necessary to do so to uphold the principle of proportionality and if, in light of the steps already taken, doing so is conducive to the efficient resolution of the dispute without, however, jeopardizing the parties' right to assert their contentions* ».

7 The French version reads: "*Cette disposition s'inscrit dans la démarche générale du Code de favoriser l'expertise commune à titre de moyen de limiter les débats d'expert, d'accélérer le déroulement des instances et de réduire les coûts importants liés aux expertises*. » See, https://elois.caij.qc.ca/C-25.01/article232.

8 Article 232 of the New Code.

9 Article 235 of the New Code.

10 See, for instance : *Laviolette* c. *Bouchard*, (2001 CanLII 20646) (Québec Court of Appeal).

11 Article 240 of the New Code.

12 Article 240 of the New Code.

13 Article 413.1 of the 2014 Code of Civil Procedure reads: "*Where the parties have each communicated an expert's report and the reports are contradictory, the court may, at any stage of the proceeding, even on its own initiative, order the experts concerned to meet, in the presence of the parties and attorneys who wish to attend, and reconcile their opinions, identify the points which divide them and report to the court and to the parties within the time determined by the court.*"

14 Articles 293 and 294 of the New Code.

15 Article 402.1 of the 2014 Code of Civil Procedure provided, in the relevant parts: "*The filing in the record of the whole or abstracts only of the out of court testimony of an expert witness may stand in lieu of his written report.*"

16 Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's New Code of Civil Procedure", 93 Canadian Bar Review (2015).

17 Lord Wolf MR, Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, London, 1995, p. 183.

18 SNC-Lavalin inc. v. ArcelorMittal Exploitation minière Canada (2017 QCCS 737).

19 CPR, Rule 35.10 (3). The CPR is available here: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35.

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Mr. Angus Gunn, QC was awarded the national McGowan award for his achievements in overhauling the ADRIC Arbitration Rules. As Chair of the ADRIC Rules Committee Angus led an intense three year initiative to revise the Rules during which he distinguished himself as a thoughtful, energetic and meticulous leader. The new Rules are now among the best in the world, contributing significantly to the quality of modern arbitration planning and practice in Canada. Thank you, Angus, and congratulations!

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FOR REGIONAL SERVICE

Ms. Heather Swartz, C.Med received the Regional McGowan award for her many years of dispute resolution leadership in Ontario including serving on the ADRIO Board (including a term as President); leading initiatives with the Attorney General and provincial government on matters such as Family Law Process and the adoption of the Apology Act, 2009; serving on the Provincial Advisory Committee on Formal Dispute Resolution regarding special education programs and services; leading a joint initiative with the OBA and OAFM which led to significant family law reforms; helping to develop roster opportunities for members; providing internships for new family mediators; and providing training in the profession. Thank you, Heather, and congratulations!

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TEACHING DISPUTE RESOLUTION IN A MULTICULTURAL ENVIRONMENT

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I. INTRODUCTION

In an increasingly multicultural world, this article explores ways to acknowledge cultural differences while consciously seeking not to impose the instructor's worldview when teaching and training across cultures. To achieve this goal, it is important to understand what "culture" is, and the impact that personality and learning styles have on teaching dispute resolution in North America and abroad.

II. TOWARDS A DEFINITION OF "CULTURE"

At the outset, it is important to reiterate that "culture is one of the two or three most complicated words in the English language."[1] However, this paper will attempt to provide an overview of the meaning of "culture" in the context of dispute resolution.

For ease of reference, culture specialists offered typographies to attempt to comprehensively define different cultures. Differences in cultural values were categorized into patterns such as individualism v. collectivism or communitarianism; universalism v. particularism or specificity v. diffuseness; high power distance v. low power distance; uncertainty avoidance; masculinity v. femininity; and locus of control.[2] Cultural communication was divided into two styles: low or high-context communication, and monochronic or polychronic time orientation.[3] These "types," while convenient for the user, can easily give way to stereotyping.[4] It is therefore helpful to heed Ken Avruch's warning that culture is not homogeneous, is not a thing, is not uniformly distributed among members of a group, is not custom, is not timeless, and individuals can possess more than one culture.[5]

There are numerous definitions of "culture" developed by anthropologists, social scientists, and others, but a good place to start is with the definition offered by Thomas Regulus and Kimberley Leonaitis who see culture as a set of values, beliefs, and expected behaviours that guides the lives of a group's members. It provides meaning and purpose, and organizes lives and experiences. Cultures develop as a means of solving problems that groups experience over time, and cultures are different because their problems and experiences have been different.[6]

The complex nature of culture is captured by Avruch who takes a broader view and expands on intracultural differences. He makes the important point that culture refers to the socially transmitted values, beliefs and symbols that are more or less shared by members of a social group. These constitute the framework through which members interpret and attribute meaning to both their own and others' experiences and behavior. One key assumption implicit in this definition is that culture is a quality of social groups and perhaps communities, and that members may belong to multiple such groups. Therefore, an individual may "carry" several cultures, for example, ethnic or national, religious, and occupational affiliations.[7]

This acknowledgment that one individual can be multicultural should instill caution in instructors who might resort to "cultural stereotyping." Focusing training on what could be perceived as cultural stereotypes could generate animosity and result in resistance to learning.

Another lens through which to view "culture" is put forward by Mark Davidheiser who proposes a more nuanced view, especially in the context of conflict resolution. His contextualized analysis of the complexity and importance of culture in conflict resolution convincingly argues for the adoption of the term "worldview" over "culture". As he indicates, the term "worldview" is less suggestive of a single, homogenous cognitive–interpretive mazeway shared among all members of a given group. Worldviews encompass not only shared mores, norms, and behavioral patterns, but they also connote shared and individual expectations and are less suggestive of a single, homogenous cognitive–interpretive mazeway shared among all members of a given group. Worldviews also encompass connote shared and individual expectations and the interpretative filters inherent in cognition (how we perceive and understand life and particular events).[8]

The combination of all these definitions only begins to capture the complexities and differences that is "culture" or, preferably, "worldview."

Michelle LeBaron and Mario Patera have suggested that North American negotiation instructors have been slow to adopt new ideas for teaching what they term "culturally fluent" negotiation. They offer a paradigm shift in the approach to teaching negotiation across cultures in which culturally fluent negotiation education would feature a series of tools and processes applicable to different ways of being, seeing and responding to issues and diverse others. These tools are not easily packaged in prescriptive modules. To be responsive to a wide range of differences, these tools must tap flexibility and intuition, drawing trainees' attention to symbolic dimensions of negotiation including perceptions, identities, and worldviews[9].

This developing view of culturally appropriate negotiation training is the antithesis of the way dispute resolution has developed in North America over the last forty years. We have developed toolboxes, assigned "types" to cultures, championed interest-based negotiation, role play, individualistic perspectives, etc., for "getting to yes."[10] As Mark Davidheiser opined, "The predominant training procedures emphasized that there was a proper way to mediate which entailed following a unilinear staged model with specific ground rules. Mediators were trained in a structured problem-solving model, derived in large measure from principled or integrative negotiation which did not account for sociocultural diversity. Within that framework, mediators are called to be impartial facilitators who use a structured process model to create an opportunity for productive communication and problem solving."[11]

These North American teaching methods do not necessarily have application in other cultures with different worldviews. Besides, as we branch out into the world to resolve disputes across cultures and even within our own multicultural cities, DR education must evolve to take account of the personality types and learning preferences in the multiplicity of cultures and worldviews. In addition, with increasing cross-cultural interactions in DR, the instructor must be careful not to disrupt student learning through inadvertent resorting to type. To do so could arouse anxiety and lower student performance. Inadvertent stereotyping imposes extra cognitive burdens upon students such as reduced working memory capacity, increase heart rate variability, and decreased self-control, memory and organizational skills. Importantly, the student does not have to believe a stereotype in order to feel threatened by its implications. Feelings of unease or alienation are sufficient to undermine performance.[12]

III. PREPARING TO TEACH "CULTURE"

How does one prepare to teach culture and diversity within dispute resolution, both domestically and internationally? Parker Palmer has posited that teaching and learning are always reciprocal.[13] "Before a teacher can know what she needs to teach, she should know the people she is teaching."[14] In addition, the teacher must know herself. She must be open to learning from her students and she must be open to other worldviews.

The first step in becoming an effective DR instructor is to understand who you are, your worldview, and how it affects the way you impart knowledge. It is also helpful to know your personality type and your learning style. Knowing yourself will enable you to expand on those features that will enhance student engagement and learning, while tempering your personality traits and learning style that could deter the learning of others who do not share your worldview.

1. WHO ARE YOU?

The DR instructor might answer this question by indicating where she was born, the schools she attended, the profession she has chosen, etc. but, to become an effective DR instructor, she must delve deeper for the answer. One place to start is by exploring her personality type and learning preferences.

(A) PERSONALITY TYPE

One personality type tool that is readily available on line is Myers-Briggs Type Indicator (MBTI).[15] The MBTI has four categories that describe key areas which combine to form the basis of a person's "personality."

- Where you focus your attention: Extraversion(E) or Intraversion (I)
- The way you take in information: Sensing (S) or Intuition (N)

- The way you make decisions: Thinking (T) or Feeling (F)
- How you deal with the outer world: Judging (J) or Perceiving (P)

The MBTI will provide you with a combination of four of the letters above to form your personality type. After obtaining your personality type, you should consult the Preference Clarity Index[16] which shows the level of preference. For example, an INTJ personality type might show a clear preference for Intuition, but other preferences for Introversion, Thinking and Judging might be slight. In other words, by clearly leaning towards Intuition, the strongest preference is for taking in information from patterns and the big picture with a focus on future possibilities. Intuition also provides hunches that enable one to pause, listen and, when required, re-evaluate a chosen direction.[17] The information gleaned from taking a test such as the MBTI, when honestly and critically evaluated, can give insight into one's personality.

How can your personality contribute to teaching dispute resolution across cultures and worldviews? Still using the example of the INTJ, the insightful, conceptual and creative aspects of that personality will assist in developing tools and processes to engage learners in the learning experience. To develop ways of engaging learners, the instructor must maintain a clear vision of future possibilities. These tools and processes must be knowledge-based and able to capture the imagination of DR learners who are usually adults. In the continuous development that is required, the instructor must be rational, detached and objectively critical of his or her work to ensure the content is challenging but attainable. This, of course, requires extensive knowledge of the subject matter and the ability to convey the material to others in interesting and diverse formats.

Discussions of culture and difference can be fraught with pitfalls that create defensiveness and set up barriers to learning. All the hard work and planning will be of little use if the instructor is perceived to be dogmatic and not open to hearing other points of view.

(B) LEARNING STYLE OR PREFERENCE

Kimberlee Kovach, in examining the impact of culture on preferences for learning, noted that:

> In current negotiation instruction, the subjects of diversity and culture nearly always appear with regard to the impact of culture on the negotiation itself, not the learning of the process. For example, experts examine numerous cognitive impacts of negotiation behaviour, as well as nuances in communication, highlighting cultural tendencies and differences. Absent is the recognition that these elements impact the learning of negotiation.[18]

She convincingly argues that, in culturally diverse negotiation training, more deliberation must be placed on "learning abilities and preferences, beginning with an awareness and recognition that learning differences exist and are culturally based."[19]

In preparing to teach dispute resolution in an intercultural environment, the instructor must understand learning styles or preferences. Do you make handwritten notes when reading a text in preparation for class? Do you skim the text and eagerly await the classroom discussion to hear the comments of the group? Do you learn best working in seminar settings where you can discuss ideas with the group? Do you like crosswords but have no interest in the Sudoku? Do you read the newspaper from cover to cover? Do you have music playing in the background while you work? Is it easier for you to illustrate a point by telling a story? These questions are all answered by your learning style or preference.

Learning styles use different parts of our brains. They guide the way we learn, change the way we internally represent experiences, the way we recall information, and even the words we choose. There are on-line tools that can help to discover your learning style including the Memletics Learning Styles Questionnaire[20] and the North Carolina State University (NSUC) Learning Styles[21].

North Carolina State University divides learning styles along four dimensions:
(1) Active and Reflective
(2) Sensing and Intuitive
(3) Sequential and Global
(4) Visual and Verbal[22]

In the Active/Reflective dimension, the designers indicate that if you always act before reflecting, you can jump into things prematurely and get into trouble. However, if you spend too much time reflecting, you may never get anything done. Active learners retain information better if they find ways to do something about it. Reflective learners will find it helpful to write short summaries of readings or class notes in their own words to retain the material more effectively.

In the Sensing/Intuitive dimension, you should be careful not to rely too heavily on memorization and familiar methods while not concentrating enough on understanding and innovative thinking. If you overemphasize intuition, you miss important details or make careless mistakes in calculations or hands-on work. To be an effective learner and problem solver, you need to function in both parts of the dimension.

In the Sequential Global dimension, Raymond Felder and Barbara Soloman explain that what makes one a sequential or global learner is what happens before you "get it." Sequential learners may not fully understand the material but they can do something with it since they have logically connected the pieces they absorbed. Strongly global learners who lack good sequential thinking abilities may have serious difficulties relating the material to other aspects of the subject or different subjects until they get the whole picture. While global learners might encounter difficulty understanding the material initially, when they do, they are usually able to apply it in more novel ways than sequential learners.

In the Verbal Visual dimension, verbal learners can help themselves by writ-

ing summaries or outlines of course material in their own words. Working in groups can be particularly effective for the verbal learner who will gain understanding of material by hearing classmates' explanations. Verbal learners comprehend even more when they do the explaining. Visual learners perform best with photographs, sketches, graphs, etc., which provide a pictorial depiction of ideas.

THE MEMLETICS LEARNING STYLES ARE DIVIDED INTO SEVEN TYPES:

(a) Visual (spatial) – prefer using pictures, images, and spatial understanding.
(b) Aural (auditory-musical) – prefer using sound and music.
(c) Verbal (linguistic) – prefer using words, both in speech and writing.
(d) Physical (kinesthetic) – prefer using the body, hands and sense of touch.
(e) Logical (mathematical) – prefer using logic, reasoning and systems.
(f) Social (interpersonal) – prefer to learn in groups or with other people.
(g) Solitary (intrapersonal) – prefer to work alone and use self-study. [23]

The North Carolina State University Learning Styles and the Memletics Learning Styles Questionnaire can provide confirmation of and explanation for different learning styles. Importantly, they remind DR teachers to design the presentation of their course materials so that they are accessible to all learning styles.

2. PERSONALITY TYPE, LEARNING STYLE, AND CULTURE IN DR INSTRUCTION

Bernard Mayer concludes that at the centre of all conflicts are human needs (survival needs, interests, and identity-based needs). He argues that people engage in conflict either because they have needs that are met by the conflict process itself, or because they have or believe they have needs that are inconsistent with those of others. Those needs are central to and give rise to the five basic sources of conflict: communication, emotions, values, structures within which interaction takes place, and history.[24] To be able to teach how to resolve conflicts, the DR teacher or trainer must have a sophisticated understanding of the interaction between culture or worldview and conflict, along with how misinterpretation of learning styles and personality types can contribute to conflict in the learning environment.

Teaching is a mutual exchange between instructor and learner. An effective teacher will seek to acquire as much knowledge from students as students will glean from the teacher. To be successful, instructors in a culturally complex environment would not go far wrong in adopting the thought process of Caucasian Nancy Bereano in learning how some Black women navigated North American society:

> I was ashamed by my arrogance, frightened that my ignorance would be exposed, and ultimately excited by the possibilities becoming available to me. I made a promise to my future to try and listen to those voices, in others and in myself, that knew what they knew precisely because they were different. I wanted to hear what they had to tell me.[25]

It is precisely the acknowledgment that the instructor does not know everything about his or her students and the commitment to listen to difference that will make him or her a successful teacher.

DR learners are usually adult learners who bring their life experiences to the classroom. DR teaching should be a reciprocal exchange of information gleaned by mutual listening and learning from student and instructor's worldviews. As seen from the learning types set out above, individuals have different learning styles. Within large multicultural North American cities[26] there are differences in culture that necessitate taking into account the variety of personality types and learning styles when teaching DR.

In discussing negotiation training abroad, Harold Abramson suggests that North American trainers should recognize which of their behaviours are culturally shaped and the range of cultural behaviours exhibited by the people being trained. Two of his guidelines for trainers going abroad are:

1. Acquire a culturally educated lens; and
2. Behave like a guest: Be flexible, open-minded, and elicitive.[27]

The argument could also be made that these guidelines are relevant to training in any multicultural setting, including North American cities.

To acquire a culturally educated lens, Michelle LeBaron has advocated acquiring "cultural fluency," which she described as "awareness of culturally bound world views – our own and others – and the capacity to be attentive to how these world views shape what we see, interpret, and attribute in conflict."[28] LeBaron goes on to make it clear that cultural fluency is a "developmental process" which is never fully achieved. LeBaron's "cultural fluency" focuses on the cultural group while making it clear that there can be more diversity within a group than between groups. Therefore, one can become culturally fluent by understanding intercultural communication patterns and worldviews.[29]

In the same vein, the Prince Edward Island (PEI) Public Service Commission suggests that we should strive to develop cultural intelligence:

> Cultural intelligence means being skilled and flexible about understanding a culture and learning more about it from your ongoing interactions with it. Gradually reshaping your thinking to be more sympathetic to the culture and developing your behaviour to be more skilled and appropriate when interacting with others from that culture will also improve your cultural intelligence.[30]

Similar to LeBaron's "cultural fluency," the term "cultural intelligence" suggests a continuous learning process in a quest for deeper understanding of and connection to other cultures. This definition also emphasizes the need to engage in continuous learning to develop cultural intelligence.

What is clear is that, as Abramson

notes, we cannot simply read books to learn about cultural practices because each person can be a product of multiple cultural experiences.[31] Therefore, his admonition to "behave like a guest" should be kept in mind when teaching DR. How should the good guest or DR instructor behave? He must recognize that we live in a multicultural world and he does not know all the rules. She must ask questions, listen to the answers, and learn so that she can develop an appreciation for the worldviews of DR learners. The DR instructor must be respectful and accommodating. She must not impose her will, but seek to continuously learn instead. Using Abramson's analogy to a house guest, to teach across cultures, the DR teacher or trainer should be flexible, open-minded, and elicitive. She should be ready for the unexpected while developing her cultural intelligence. The PEI Public Service Commission suggests that, to build your own cultural intelligence, you can read books and articles, view videos and DVDs about cultural differences, as well as attend events and activities specific to particular groups. You can simply begin to foster relationships with people from groups that are different from yours. They can help you better understand and navigate your way through their culture. Show individuals from another culture your interest in learning about their lives. Ask appropriate questions, and listen to the answers.[32] In other words, the DR instructor must acknowledge that while it is impossible to know everything about another culture, he or she can gain knowledge by respectfully asking questions, listening, learning, and being mindful.

IV. CONCLUSION

To achieve some level of success in teaching dispute resolution, an instructor has the enormous responsibility to know the basic subject matter while being cognisant and respectful of the students' cultures or worldviews, personality types, and learning styles or preferences. This will temper the instructor's inclination to impose his or her culture, personality, and learning preferences which could hinder students' learning. The DR instructor must recognize that he can learn as much from students as they can learn from him. He must be flexible, elicitive and engage in continuous learning to develop his cultural intelligence. In intercultural encounters, the instructor must pay full attention to the interactions without imposing her own evaluative lens to the cultural stranger's behaviour. The DR instructor or trainer must, as Stella Ting-Toomey indicated, move from ethnocentric thinking to viewing through an ethno-relative lens so that he can be alert to his own and others' mindless behaviours.[33] This will reduce the possibility of the instructor resorting to stereotyping and unwittingly inhibiting the students' learning. In our interconnected world with diverse cultures and worldviews, the challenges are complex but not insurmountable.

1 **Raymond Williams,** *Keywords: A Vocabulary of Culture and Society* **(London: Fontana Press, 1976 rev. 1983) at 87.**

2 **For a concise exploration of these concepts of culture, see Venashri Pillay, "Culture: Exploring the River" in Michelle LeBaron and Venashri Pillay, eds.** *Conflict Across Cultures* **(Boston, Intercultural Press 2006) 25-35. See also: Geert Hofstede,** *Culture's Consequences: International Differences in Work-Related Values* **(Beverly Hills, California: Sage Publications 1984); Charles Hampden-Turner and Fons Trompenaars,** *Building Cross Cultural Competence: How to Create Wealth from Conflicting Values* **(New Haven and London: Yale University Press 2000).**

3 *See* **Florence Rockwood Kluckhohn & Fred L. Strodtbeck,** *Variations in Value Orientations*, **(Evanston, IL: Row, Peterson, 1961) researched cultural value orientations and determined there are five universal questions that every person must deal with: a) What is the character of innate human nature? b) What is the relation of man to nature? c) What is the temporal focus of human life? d) What is the value placed on human activity? and e) What is the relationship of people to each other?).** *See also* **Charles Hampden-Turner & Alfons Trompenaars,** *Building cross-cultural competence: how to create wealth from conflicting values* **(New Haven: Yale University Press, 2000).** *See also* **Geert H. Hofstede,** *Culture's Consequences: comparing values, behaviors, institutions, and organizations across nations,* **2d ed (Thousand Oaks: Sage Publications, 2001). Hofstede, a Dutch social psychologist, from research on differences among national cultures, detected what he termed cultural value patters: power distance, collectivism versus individualism; femininity versus masculinity; and uncertainty avoidance.**

4 **Stereotypes have also been characterized as highly exaggerated pictures, the invention of supposed traits, and the formation of incomplete images leaving little room for change or individual variation. This raises additional questions of myth versus reality, and the problem of evaluating the content of stereotypes. Stereotyping may involve categorization (filling information when little is known about the group) or simplifying information if there is too much of it. The result was described by Leo Driedger as follows: "People form a** *gestalt* **which may be fairly accurate or very biased and inaccurate. The assumption that when we know the facts about another person or group, we will act on those facts is not necessarily true. Reason does not always prevail: emotions often impose positive and negative evaluations. When images of others become rigid, like the printer's stereotype, and when they produce the same reaction automatically without further examination, then we have a social stereotype". Leo Driedger,** *The Ethnic Factor: Identity in Diversity* **(Toronto: McGraw-Hill Ryerson, 1989) at 343-4.**

5 **Kevin Avruch, "Culture and Negotiation Pedagogy" (2002) 14(4) Negotiation J. 339 at 341.**

6 **Thomas A. Regulus and Kimberley Leonaitis, "Conflict, Violence, and Cultural Diversity", (1995) 19 Update on L Related Educ 41.**

7 **Kevin Avruch, "Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiations" (2004) 9 Harv Negot L Rev 391 at 393.**

8 **Mark Davidheiser, "Race, Worldviews, and Conflict Mediation: Black and White Styles of Conflict Revisited" in (2008) 33:1 Peace & Change 60 at 61-2. "Culture" is often glossed as the values, norms, and habituated patterns of behavior shared among members of a given social group. There is a widespread tendency in conflict resolution and other fields to equate culture with national, racial, and ethnic identities. That standard view of culture is congruent with Kochman's differentiation between Black and White orientations. Conventional treatments of culture often fail to capture its significance or profound impact on conflict styles. Cultural orientations impact more than communication styles or goal hierarchies. Sociocultural influences extend to the deepest level, fundamentally influencing cognition and behavior by shaping one's view of life and how one perceives, interprets, and responds to particular events and phenomena. Due to the complexity of these influences, the term "worldview" may be preferable to "culture," since the former is less suggestive of a single, homogenous cognitive–interpretive mazeway shared among all members of a given group. Worldviews encompass not only shared mores, norms, and behavioral patterns, but they also connote shared and individual expectations and the interpretative filters inherent in cognition (how we perceive and understand life and particular events). A notable benefit of using "worldview" over "culture" derives from the outdated, but seemingly indestructible, notions associated with the latter construct. While it is not a tabula rasa, readers encountering "worldview" are less likely to assume full comprehension of the term and skip over explanations or miss nuances in usage. Even if not defined, "worldview" is arguably more likely to be interpreted as denoting a phenomenon that is dynamic, multidimensional, associated with experience, and variable both across and within groups. Worldviews, then, may be described as elaborate systems of understanding, expectations, and action that are continually reconstructed by individuals embedded in wider social systems. These interpretive maps are fluid; cognitive structures and filters evolve over time, undergoing continual iteration as they are reforged in the cauldrons of life experience and social learning."**

9 **Michelle LeBaron & Mario Petra "Reflective Practice in the New Millennium" in Christopher Honeyman, James Coben & Giuseppe De Palo, eds.,** *Rethinking Negotiation Teaching: Innovations for context and Culture* **(Saint Paul: DRI Press, 2009) 45 at 49.**

10 **Carrie Menkel-Meadow, "Introduction: What Will we do When Adjudication ends: A Brief Intellectual History of ADR" (1996-1997) 44 UCLA L. Rev. 1613.**

11 **Davidheiser** *supra* **note 8 at 61-2.**

12 **C.M. Steele and J. Aronson, "Stereotypes and the Fragility of Academic Competence, Motivation, and Self-Concept" in Andrew J. Elliott & Carol S. Dweck, eds,** *Handbook of Competence and Motivation* **(New York: The Guildwood Press, 2005) 436 at 446-448.**

13 **Parker Palmer,** *The courage to teach: Exploring the inner landscape of a teacher's life* **(San Francisco: Jossey Bass, 1998).**

14 **Melissa Nelken, Bobbi McAdoo & Melissa Manwaring, "Negotiating Learning Environments" in** *Ibid*, **199 at 201.**

15 **Isabel Briggs Myers,** *Introduction to Type*, www.cpp.com. **Introverts tend to focus their attention on the inner world of ideas and impressions. People who prefer Intuition tend to take in information from patterns and the big picture and focus on future possibilities. Thinking people tend to make decisions based primarily on logic and on objective analysis of cause and effect. People who prefer Judging tend to like a planned and or organized approach to life and prefer to have things settled.**

16 *Ibid.* **The preference clarity index shows how clear you were in expressing your preference for a particular pole over its opposite.**

17 **Karenjot Bhangoo and Venashri Pillay, "Capacities and Skills for Intercultural Conflict Resolution" in LeBaron and Pillay,** *supra* **note 2, 111 at 132.**

18 **Kimberlee K. Kovach, "Culture, Cognition and Learning Preferences" in** *supra* **note 1, 343 at 345.**

19 *Ibid* **at 345.**

20 **Memletics Learning Style,** *http://www.learning-styles-online.com/overview*.

21 *http://www.engr.nscu.edu/learningstyles*

22 **Raymond Felder & Barbara Soloman, "Learning Styles and Strategies" (18 October 2015)** *http://www.engr.nscu.edu/learningstyles*. **(1) Active learners tend to retain and understand information best by doing something active with it, like discussing or applying it or explaining it to others. Reflective learners prefer to think about it quietly first. (2) Sensing learners tend to like learning facts. Intuitive learners often prefer discovering possibilities and relationships. (3) Visual learners remember best what they see – pictures, diagrams, flow charts, time lines, films, and demonstrations. Verbal learners get more out of words – written and spoken explanations. (4) Sequential learners tend to gain understanding in linear steps, with each step following logically from the previous one. Global learners tend to learn in large jumps, absorbing material almost randomly without seeing connections and then suddenly "getting it."**

23 **Memletics,** *supra* **note 20.**

24 **Bernard Mayer,** *The Dynamics of Conflict Resolution: A Practitioner's Guide* **(San Francisco: Jossey-Bass, 2000) at 7 – 19. In the Continuum of Human Needs: Survival Needs are food, shelter, health, and security; Interests are substantive, procedural, and psychological; and Identity-based Needs are meaning, community, intimacy, and autonomy.**

25 **Nancy K. Bereano, "Introduction" in Audre Lorde,** *Sister Outsider* **(Freedom, CA: The Crossing Press, 1984) at 10.**

26 **Example: The 2011 National Housing Survey from the 2011 Census reveals that Toronto's 2.6 million population is made up of 230 ethnic groups; 49 percent identified as visible minorities; 51 percent were born outside Canada.** *http://www.toronto.ca/demographics/pdf/2011-censusbackgrounder.pdf*

27 **Harold Abramson, "Outward Bound to Other Cultures: Seven Guidelines", in C. Honeyman, J. Coben & G. De Palo,** *Rethinking Negotiation Teaching: Innovations for Context and Culture*, **Saint Paul: DRI Press, at 293.**

28 **Michelle LeBaron, "Shapeshifters and Synergy: Toward a Culturally Fluent Approach to Representative Negotiation", in Colleen M. Hayncz, Trevor C.W. Farrow & Frederick H. Zemans eds.** *The Theory and Practice of Representative Negotiation* **(Toronto: Emond Montgomery Publications Limited, 2008 139 at 140.**

29 *Ibid* **at 141.**

30 **CompassPoint Management Group, Inc.,** *Cultural Diversity Program,* **online: Prince Edward Island Public Service Commission at 9** *http://www.gov.pe.ca/diversity/index.php3?number=1035849&lang=E*

31 **Abramson, s***upra* **note 27 at 295.**

32 **PEI,** *supra* **note 30 at 12.**

33 **Stella Ting-Toomey, "Teaching Mindful Intercultural Conflict Management" in Nakiye Avdan Boyacigiller, Richard Alan Goodman & Margaret E. Phillips, eds,** *Crossing Cultures: Insights from Master Teachers* **(New York: Routledge, 2003) 253 at 254.**

NEWFOUNDLAND COURT AFFIRMS PUBLIC POLICY OBJECTIVE OF UPHOLDING COMMERCIAL ARBITRATION AGREEMENTS

Two recent decisions of the Supreme Court of Newfoundland and Labrador Trial Division (General) resulted in a stay order of legal actions that had been commenced in the face of commercial arbitration clauses.

KAEFER V. VALE

In *Kaefer Industrial Services Ltd.* **v.** *Vale Newfoundland & Labrador Limited*,[1] **Kaefer contracted with Vale to provide painting and insulation work at Vale's nickel processing facility in Long Harbour, Newfoundland. The contract was terminated by Vale and a Notice of Dispute was sent to Kaefer as required by the dispute resolution process in the contract.**

Kaefer registered a mechanics' lien shortly after receiving the Notice of Dispute under the Newfoundland and Labrador *Mechanics' Lien Act*,[2] **and started an action against Vale in the Newfoundland court. Vale sought a stay of the litigation pending arbitration. At issue before the Court was implementation of the dispute resolution provision of the contract in the context of the** *Arbitration Act*[3] **and the MLA.**

NEWFOUNDLAND & LABRADOR *ARBITRATION ACT*

Under the *Arbitration Act*, **the Court has discretion to order a stay of legal proceedings in the event of an arbitration clause:**

4(1) Where a party to a submission, or a person claiming through or under a party, begins legal proceedings against another party to the submission, or a person claiming through or under a party, in respect of a matter agreed to be referred, a party to the legal proceedings may, after appearance and before delivering pleadings or taking other steps in the proceedings, apply to the court for an order staying the proceedings.

(2) The court may make an order staying the proceedings under subsection (1), upon being satisfied,

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission; and

(b) that the applicant was, at the time the proceedings started, and still is ready and willing to do all things necessary for the proper conduct of the arbitration.

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STRONG PUBLIC POLICY CONSIDERATIONS SUPPORT STAY IN FAVOUR OF ARBITRATION

Vale asked the Court to consider the strong public policy considerations which support upholding the agreed-upon commercial arbitration clauses while preserving Kaefer's rights under the MLA. Where parties have agreed by contract to have their disputes arbitrated, the parties should be held to their contract.[4]

The importance of adhering to arbitration agreements has been affirmed by the Supreme Court of Canada. Binnie, J., writing for the majority in *Seidel* **v.** *Telus Communications Inc.*, **stated that:**

"Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause."[5]

As noted in *Kaefer v. Vale*, the Newfoundland and Labrador Court of Appeal had previously considered a request for a stay in the face of an arbitration clause in *Midnight Marine Ltd.* v. *Lloyd's Underwriters*.[6] This was a marine insurance claim and the parties had agreed to have "every dispute arising" referred exclusively to arbitration.[7] The dispute in that case was governed by Article II.3 of the Convention on the Recognition and Enforcement of Foreign Arbitration Awards which is incorporated into the laws of Newfoundland and Labrador by the *International Commercial Arbitration Act*.[8] Barry, J.A. found that the statute expressed a policy in favour of arbitration. The Court of Appeal stated that "granting the stay requested in the present case will promote the legislature's policy expressed in our provincial statute".[9] The parties had expressed their intention and agreement to seek arbitration and the court was satisfied that there was no basis not to enforce this agreement.

MLA REMEDIES REMAIN IN PLACE

In *Kaefer* v. *Vale*, the Court concluded that it was satisfied that this was an appropriate case to exercise its discretion to grant a stay. Kaefer had failed to establish "sufficient reason why the matter should not be referred to arbitration".[10] The Court stated that the issue of compensation payable under the contract was clearly captured by the definition of disputes which the parties, both sophisticated business entities, freely chose as their dispute resolution method. In the end, the Court noted that the remedies available under the MLA remained in place and would be available to Kaefer, that Kaefer contracted to pursue commercial arbitration, and that the important public policy objective of upholding commercial agreements as recognized by the courts was factored into this decision.

AECOM V. TATA

In the recent decision of *AECOM Consultants Inc.* v. *Tata Steel Minerals Canada Ltd.*[11], the court came to a similar conclusion. This case concerned a contract between AECOM and Tata for engineering, procurement and construction management services for a Direct Shipping Ore Project in Labrador.

AECOM registered a mechanics' lien and started legal action against Tata. On the same day it filed the Statement of Claim, AECOM submitted a Notice of Arbitration to Tata claiming the sum "as more fully appears from the claim for lien document."[12]

Tata sought a stay of the litigation pending arbitration, submitting that AECOM could not proceed in two separate forums simultaneously. At issue was whether a stay of the mechanics' lien action was appropriate pending determination by arbitration of any monies owing under the Contract.

The plaintiff opposed the stay on the basis it never contracted to forego its lien claim rights, the litigation addressed

matters and sought remedies outside of the arbitrator's jurisdiction, and that they were one of several lien claimants involving the defendant.

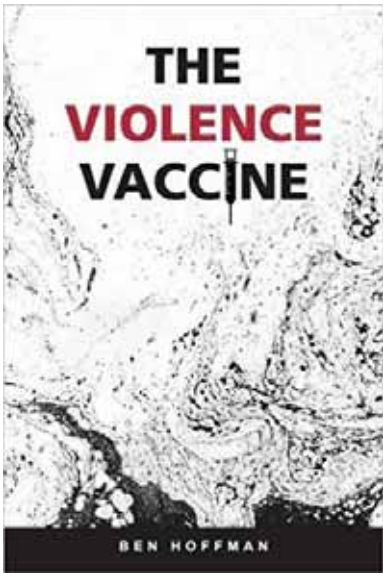
As with *Kaefer v. Vale*, in *AECOM*, the Court concluded that the plaintiff's intent was to arbitrate its dispute and thereafter, enforce its lien through its rights under the MLA. The plaintiff failed to establish sufficient reason the matter should not be referred to arbitration. In sum, the Court held that the parties' dispute was clearly within the contractual dispute resolution provision, it would be inappropriate to permit the plaintiff to maintain two live proceedings in the circumstances, and that a stay pending arbitration was appropriate.

These two decisions reflect the Newfoundland and Labrador Court's willingness to exercise its discretion to stay litigation commenced in the face of commercial arbitration clauses. This is consistent with the public policy objective in favour of arbitration when there is a contractual agreement to resolve disputes in this manner.

1 2017 NLTD(G) 65 ("Kaefer v. Vale").
2 R.S.N.L. 1990, c. M-3 (the "MLA").
3 R.S.N.L. 1990, c. A-14.
4 David I. Bristow et al, Construction Builders' and Mechanics' Liens in Canada, 7th ed. (Toronto: Thomson Reuters, 2016) at para. 10.14.
5 2011 SCC 15, at para. 2.
6 2010 NLCA 64 ("Midnight Marine").
7 *Ibid.* at para. 55.
8 R.S.N.L. 1990, c. I-15.
9 *Midnight Marine,* supra note 6 at para. 59.
10 *Kaefer v. Vale*, supra note 1 at para. 63.
11 [2017] N.J. No. 129.
12 *Ibid.* at para. 2.

ADRIC Book Review – The Violence Vaccine

Ben Hoffman, The Violence Vaccine
Ottawa, CIIN, 2016
ISBN: 978-0-9864907-4-3



Reviewed by Colm Brannigan

This is a wonderful book. When I first sat down to read it I was expecting a more or less traditional treatment of negotiation, peacemaking and mediation from an experienced practitioner but it is far more than that. It is the memoir of a spiritual journey and should resonate with all who see themselves in the peacemaker role. It is an autobiography without pretension. In it, stories are woven into the fabric of the various personal and professional pathways the author has travelled.

Dr. Ben Hoffman has had an amazing career from working as a corrections officer and administrator to mental health practitioner, a consultant who drafted the first ever comprehensive curriculum on Conflict Management and Negotiation at Harvard and starting one of Canada's first mediation firms in Ottawa.

Read the full review

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