

# Canadian Arbitration and Mediation journal

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ADR Institute of Canada  
Institut d'arbitrage et de  
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**ARBITRATION. MEDIATION. RESOLUTION.**

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# MESSAGE FROM THE PRESIDENT

M. SCOTT SIEMENS, C.MED, B.COMM., FICB

## TWO EXTRAORDINARY EVENTS!

On October 13-15 in Toronto, ADRIC is holding our AGM and Annual National Conference: **ADRIC 2016: ADR Reflections and Innovations** at the luxurious Ritz-Carlton Hotel. Sessions will include an International Arbitration stream on October 13th (so those in town for the October 14 ICC conference may attend); as well as streams on: Family ADR; Workplace ADR; Commercial Arbitration; Mediation including Commercial Mediation; and Special Interest topics throughout the conference. We will also have exceptional keynote speakers, enhanced networking opportunities, and the return of "ADRIC Talks" - the TED Talks style presentations which were so popular last year. We anticipate almost 500 delegates at this year's Conference and hope you will be one! Register today at [ADRIC.ca](http://ADRIC.ca) to get the best rate and hold your spot!

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Immediately following our ADRIC Conference, ADRIC is hosting on October 15th Canada's only edition of the acclaimed **Global Pound Conference Series (GPC)**, where stakeholders from all aspects of ADR come together in a UN-style conference to consider core questions which will provoke debate on existing tools and techniques, stimulate new ideas and generate actionable data on what corporate and individual dispute resolution users actually need and want, both locally and globally. This is your opportunity to have a voice in shaping the future of ADR. Learn more at [ADRIC.ca](http://ADRIC.ca), and register today!

Also on October 15th, ADRIC is presenting: **Getting the Most Out of Arbitration: A Canadian Commercial Arbitration Workshop**, chaired by Bill

Horton with other prominent arbitrators leading each module over a full-day workshop. Commercial arbitration in Canada has many unique features that are often overlooked in programs that focus more heavily on international arbitration and arbitration institutions. The predominantly *ad hoc* nature of Canadian arbitration creates many opportunities for flexible and creative approaches to arbitration procedure. However, lawyers and arbitrators must be familiar with the available choices, tradeoffs and limitations in order to meet the expectation that arbitration will in fact provide more efficient and cost effective processes. No doubt this will be a draw for corporate counsel and retired judges; space is limited, so register soon.

## CONFERENCE RECORDINGS

Recordings of select sessions from last year's ADRIC Conference in Calgary are now available individually, or in packages, at [ADRIC.ca](http://ADRIC.ca), as well as free recordings from ADRIC 2013 and ADRIC 2014. Sample these sessions and find out why attending ADRIC 2016 is a must!

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Our new Arbitration Rules have been well-received by many major law firms. ADRIC also provides case administration under these rules. To ensure that ADRIC is offering a high level of service, a working group was appointed to review the service quality. This group engaged an outside organization to interview users of these services. Their report concludes that "ADRIC's Arb-Admin service is providing a good level of value for many of their clients" and 92% of respondents completely agree that "ADRIC was competent, professional, and easy to deal with throughout the process."

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PRESIDENT,  
ADR INSTITUTE OF CANADA, INC.

Scott is a Government of Canada accredited mediator with the Department of Justice's *Informal Conflict Management System* network. An experienced Labour Relations mediator and facilitator, Scott's background also includes international relief and development work and corporate finance. Scott is also President of the ADR Institute of Saskatchewan.

With the Arbitration Rules updated and evaluated, we are turning our minds to our Mediation Rules and are developing a committee to review, update and enhance them.

ADRIC is also embarking on creating new National Guidelines and Templates for Med-Arb processes. If you have an interest in contributing to either of these or any other projects, please let us know.

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In 2015, ADRIC launched its **National Introductory Courses** in Arbitration and Mediation. Many of our members and partners also provide excellent ADR

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# MESSAGE FROM THE EDITOR

WILLIAM G. HORTON, C.ARB, FCIARB

We are particularly honoured, in this edition of the *Journal* to bring to you an address by **Chief Justice Wittman of Alberta** on the much discussed subject of judicial mediation as well as an interview, which I was privileged to conduct, with **Marc Lalonde**, an outstanding figure in Canadian political history and an elite international arbitrator.

In my all too short conversation with Mr. Lalonde, we cover a lot of territory. He provides very personal glimpses into the early days of international arbitration as some of the organizations that dominate the field today were being formed and as he was beginning his career as an elite international arbitrator – right up to the present proliferation of arbitral organizations and practitioners around the world. His pointed insights into the dynamics of tribunal decision making and the future of arbitration (both commercial and investor/state) will be enjoyed by veteran arbitrators and newcomers alike. His views on the role of party appointed arbitrators and dissents from majority awards will be of particular interest to new arbitrators. It should be noted that this interview took place before the release of the text of the new Canada Europe Trade Agreement (CETA); however, the idea of a dedicated court for investor/state arbitrations which was incorporated in CETA is referenced (unfavourably) in one of Mr. Lalonde's comments.

**Chief Justice Wittman's** address on judicial mediation is a thorough and thoughtful marshalling of the arguments that favour the wider use of sitting judges as mediators in pending court cases. He openly confronts the concerns that judges participating in this form of dispute resolution may appear to act inconsistently with some fundamental values of the court system, such as openness to the public and the expression of judicial opinion based upon a consideration of all the evidence and

full due process. Clearly, in court litigation in which costs routinely exceed the amount in issue, some action is necessary to save the system from itself. Ultimately, as Chief Justice Wittman points out, only about 5% of all cases filed with the courts go to trial no matter what form of dispute resolution is used to settle the other 95%. The real issue is: how much time and money is spent by the parties before each of the cases which make up the 95% is resolved? Chief Justice Wittman argues in favour of judicial mediation as a way for the courts to play a role in addressing that issue.

In his article on *The Impact of Sattva on Judicial Review of Commercial Arbitration Decisions*, **Jim Robson** explores the important implications of the landmark decision of the Supreme Court of Canada in the *Sattva* case, particularly as it relates to the application of the administrative law standards of deference and reasonableness to appeals of arbitration awards, even when an award is reviewed on a question of law. Indeed, this is one of the most revolutionary aspects of *Sattva* – an aspect which has predictably generated some “push back” from legal traditionalists. On the other hand, the idea that even “the law” is often in the eye of the beholding arbitrator or judge, and even more so when it is applied to the facts, is so obvious that it is surprising that it has taken so long to acknowledge it as a reality. The transformative implications of this concept in the context of deferential review will take a long time to appreciate and absorb. Jim Robson's article contributes materially to the conversation.

Two articles in this edition of the *Journal*, examine the role of the neutral in matrimonial disputes. **Alyssa Lane** examines, in detail and with great insight, the part that mediation and mediators can play in facilitating the divorce process. **Craig Neville** explores and explains the growing field of



## EDITOR-IN-CHIEF

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.  
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parenting coordination in which expert neutrals facilitate the resolution of ongoing custody disputes. Both of these articles have a broader interest as they consider the role of mediators in ongoing disputes as opposed to isolated disputes which can be packaged into a mediation or arbitration “event”. The ongoing human dynamics become crucial to defining the services required and in shaping the value proposition of the ADR process for the disputing parties.

The editorial board of the *Journal* hopes you will enjoy this selection of readings and find some practical perspectives that are applicable to your own practice. As always we hope you will consider contributing your own thoughts and experiences to future editions. We are happy to work with prospective authors in a proactive way to evaluate and develop your submissions for possible publication. 🏠



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# CANADIAN ARBITRATION AND MEDIATION JOURNAL

## INTERVIEW WITH MARC LALONDE, PC OC QC

MARC LALONDE, PC OC QC

Marc Lalonde, is one of the most outstanding international arbitrators in the world today and one of only a handful of Canadian arbitrators to have achieved that distinction. Prior to his current work, Marc Lalonde had an extraordinary career in law, government and politics. Having started his career in public service in the Progressive Conservative government of John Diefenbaker, he went on to serve as an advisor to the Pearson government and one of the key members of the cabinet of Pierre Elliot Trudeau in a number of portfolios that were as critical then as they continue to be today: Energy Mines and Resources, Health and Welfare and the Status of Women, not to mention Justice, Finance and few others! His contributions in many, if not all, of these areas shaped Canada's history and political culture. Marc Lalonde spoke to *Journal* Editor-in Chief William G. Horton about his experiences and thoughts relating to international arbitration.

**WGH:** Marc, you are one of the two or three most recognized international arbitrators from Canada in the world today. This follows your remarkable career in government and politics beginning with the civil service in the Diefenbaker administration and culminating with almost every major Ministerial position in the Trudeau era, perhaps we should now say the *first* Trudeau era. Today I'd like to talk a bit about your career in international arbitration. I understand that your very first appointment as an arbitrator was actually at the recommendation of Pierre Trudeau after he himself had retired from politics.

**ML:** Actually the story began in 1986 with Larry Craig of Freshfields calling me about an ICC arbitration in a very big matter. It was a claim against Iran for over a billion dollars, which would be not unusual today. In those days it was real money. His client wanted someone who was internationally prominent and Larry wanted to know if I thought Trudeau would be interested. I said I did not know but I arranged a meeting for them to discuss the appointment. At the meeting, Trudeau said that he was not interested but that he thought that, as a former Minister of

Energy and Minister of Justice, I had the proper qualifications and that they should appoint me! Which they did.

**WGH:** Not a bad way to launch a new career.

**ML:** I was very fortunate. The president of the tribunal was Pieter Sanders who is considered the father of the New York Convention [on the Enforcement of Foreign Arbitration Awards] and was one of the founders of the International Council for Commercial Arbitration ("ICCA"). He was an outstanding individual in all respects. The case went its course under the ICC Rules and then, half way through the case, Larry Craig approached me again and said that a parallel case had been instituted by Iran against a French state company for a two billion dollar loan relating to the construction of a uranium enrichment plant. Larry asked me whether I would accept being appointed arbitrator by the respondent, which I did. This time the president of the tribunal was a famous retired Cour de cassation judge in France by the name of Pierre Bellet who was also a co-founder of ICCA. I could not have gotten a better initiation to international arbitration.



After 22 years as a partner and senior counsel at Stikeman Elliott LLP, Mr. Lalonde is now a sole practitioner acting exclusively as international arbitrator and mediator. He has participated in some 100 cases under the major international arbitration institutions as well in *ad hoc* cases.

**WGH:** A pretty good CV in international arbitration after just two appointments.

**ML:** So I suddenly had my first two cases, sitting with two of the most prominent international arbitrators of the day. These two cases went on for a while, and then, lo and behold, I got calls from other firms. This started the ball rolling, slowly at first, but gradually I was appointed to more and more tribunals; and somehow I became "a renowned arbitrator"!

**WGH:** Were all of the other famous arbitrators also members of ICCA? How did you get involved in that?

**ML:** Not too many Canadians were involved in international arbitration at the time. Very few as a matter of fact. One member of ICCA was a professor of law



at the University of Ottawa. When he passed away, I told Pieter Sanders, who was the president of ICCA, that, if they were looking for a successor, I would be happy to have my name put forward; and he said: "Ok, done deal!". ICCA was at that time a very small club of mainly European arbitrators, some 35 members who liked to be seen as the *crème de la crème*.

**WGH:** It sounds as if you started with arbitrations involving states, perhaps based on your background in government. Did you become more involved in commercial arbitration at some point?

**ML:** I started with commercial cases. My first, I would say, dozen cases were commercial arbitrations. Even if some of the parties were states or state entities, the cases were commercial in nature, involving commercial claims. The Iran cases were not state-to-state or investor-state arbitrations. In addition to the ICC, I became known to the American Arbitration Association and I started getting commercial cases under the AAA. I have difficulty remembering which was my first appointment in an investment treaty case, but I do recall that it was in the early 90s and that I was appointed by the same international law firms as in the commercial cases. That started my career in this field. It turns out that most of my cases over the last 20 years have been in investor-state arbitration.

**WGH:** You talked about the small club that ICCA, and perhaps international arbitration generally, was when you were first introduced to the field. Has that changed since then? How have you found it to have changed and what differences has it made to how commercial arbitration in particular is conducted.

**ML:** Initially, ICCA would hold conferences and produce a few publications, but it was a small organisation tightly run by a very small board and that was it. At the initiative of people like Jan Paulsson and Albert Jan van den Berg, who were elected as president over the last ten years, it was decided that ICCA

would become an open organization in which any interested person could become a member provided he/she had certain elementary qualifications. This was a radical change. Still, in practice ICCA is run by senior arbitrators in the field, but its conferences and meetings are now much larger than they used to be. I remember, when I became a member, we would be maybe 60 people. (Laugh-ter.) Today you get 1,200 easily.

**WGH:** Is it your impression then that commercial arbitration internationally continues to be channelled through organizations, like ICCA, or do you have the sense that it has actually opened up beyond that.

**ML:** Oh, it has opened up tremendously. ICCA is a forum, it does not administer arbitration cases. It is an education institution, fundamentally. But what you have seen has been a proliferation of arbitral institutions, organizations administer international arbitrations. I was distantly involved in the creation of the first ones in Canada, the Canadian Commercial Arbitration Centre in Quebec and the BCICAC in Vancouver in the late '80s. I am sure there are more than 100 commercial arbitration institutions in the world today. Everybody and his brother seems to want to establish an international arbitration institution. However, I suspect that, even today, 95% of those institutions have a docket of very few international cases. The ICC, ICSID, ICDR, LCIA, these are some of the institutions that have most of the international arbitration cases.

**WGH:** The Stockholm Chamber of Commerce.

**ML:** Yes. The Stockholm Chamber – and the Permanent Court of Arbitration at the Hague, for investment arbitration, are also key actors in the field. Sure, Singapore (SIAC) has some cases. Hong Kong (HKIAC), yes. China (CIETAC and SIETAC) also has some international arbitration cases. But, overall, in spite of the proliferation of arbitral institutions it still remains the purview of a very small number of rather

successful organizations like the ones I mentioned. Some of the newer ones, maybe, will build a reputation and become more frequently used, but I think that, for most of them, the future is in domestic rather than international arbitration.

In the field of investment arbitration, the number of cases is not extraordinary. The institution that has the most cases, you know, is the International Centre for the Settlement of Investor State Disputes ("ICSID"). In 2011 it had 38 cases, 2012 it had 50, 2013 it had 40 and up to the middle of last year it had 14 cases. So the number of cases in the investment field is, and will remain, rather small as compared to commercial cases.

**WGH:** What about the likely arbitration activity under the new treaties like CETA (Canada-Europe *Comprehensive Economic and Trade Agreement*) and TPP (12-state *Trans-Pacific Partnership*), where the geographic areas are broad but the liability of the states is supposedly more limited than under the older treaties?

**ML:** The creation of CETA and TPP, with their attempts at defining a more restricted liability for states will not, in my view, lead to a reduction in the number of investor-state cases; as a matter of fact, these instruments will likely lead to more investor-state arbitration cases than may currently be brought by investors under the bilateral or multilateral (like NAFTA) investment treaties to which the signatories of CETA or the TPP are already party. There are today over 3000 such treaties but I am pretty sure that, if you look at the states covered by CETA and TPP, they do not currently all have bilateral investment treaties between each and every one of them. Secondly, even if states modify the traditional wording of investment treaties, it is far from sure that such changes will lead investors to shy away from initiating claims if they feel that they have been improperly treated by a host country. None of the changes constitute, in my view, a radical departure from the traditional interpretation given to invest-

ment treaties by arbitral tribunals.

**WGH:** In the investment field specifically, which does seem to be quite institutionalized, it sometimes seems that there are even fewer arbitrators than there are institutions. I guess that is an exaggeration but, you know what I mean; if you go through the list of individuals who are arbitrating ICSID cases, as I did yesterday, it is the same people over and over again.

**ML** Yes. It is a fact. It is very much related to the fact that arbitrators are selected by the parties, and the same issue arises with respect to appointments made by private claimants and by respondent states. If a state has been satisfied with the work done by a person it has appointed, it will be inclined to reappoint that person. Other states subject to an investment claim will also look at who has been appointed in the last ten years by other states; they will discover a very limited number of people and they will tend to appoint the same persons. Moreover, there is also a relatively small number of law firms involved in the field and they will naturally be inclined to recommend to their clients an arbitrator with whom they have had some experience or who has already built up a reputation in the field I am told that, with electronic technology, law firms are doing searches in professional publications and in the increasing number of public arbitration cases in order to assess what views have been previously expressed by a potential arbitrator. A lawyer told me one day "the search we make before an appointment would make the former head of the FBI, Herbert Hoover, look timid". That's a scary thought.

**WGH:** There is a lot of research. These are big cases.

**ML:** They are going through all the decisions you have rendered in the past to assess what views you expressed on any number of subjects. So both sides tend to play it safe.

**WGH:** What about the fact that there seems to be some degree of special-

ization among arbitrators in investor-state cases, in the sense that people tend to be appointed by states or by investors; presumably there are some expectations, as you say, that they will perform well for the party that habitually appoints them or the side that habitually appoints them? Is that problematic?

**ML:** Ah, I am afraid it is part of human nature. And in a way it shows a lack of willingness to take chances, or risk anything, by counsel or parties, whether they are a state or claiming investor. But one should not exaggerate in this regard; for instance, I and several of my colleagues who have been party-appointed arbitrators find themselves appointed occasionally as presidents of a tribunal, which usually requires the consent of both sides. I recognize however that the pool of active international arbitrators is kept unnecessarily small. There is, for instance, very good argument to be made that more women arbitrators should be appointed. There is now an increasing number of appointments filled by women in the investment arbitration field, but in truth you end up with the same three or four women getting maybe 90% of the appointments.

**WGH:** Although I must say that my impression is that there are an awful lot of very qualified women in the field. Including younger, up-and-coming women.

**ML:** Right! And young men also! I like to say to younger people: "You know, the toughest appointment to get is the first one. If you get appointed and do a good job, then quickly you become a respected international arbitrator". This is the problem with the appointment process, and I must say that I have no better alternative to offer. A law firm is retained and sets about looking for a party-appointed arbitrator; it then selects a person and goes to its client and says: "I am thinking we should appoint so and so". The first question the client will ask is, "Has he or she got any experience". If the answer is no, well the client will most likely say: "No way. I am not going to take the risk."

**WGH:** Although everyone who does it has to have done it for a first time.

**ML:** Absolutely. But let's be frank. It's the same in any field: the toughest job to get is the first. You have to have excellent qualifications, a good CV to present, and you have to be a bit lucky. I think a good way to succeed in becoming an arbitrator is first to practice in the field as counsel. The law firm selecting you for your first appointment will at least be able to say to its client: "She has never been an arbitrator but she has pleaded 10 cases. And she has won several on the key points your case is based upon".

**WGH:** I would like to ask you about some of the dynamics, not necessarily specifically for investor state, but using that as an example, because it is a more transparent field of arbitration. The expectation that the parties have when they are appointing the same individuals who are typically appointed by their side – is there some expectation that they will bring that point of view when appointed? Do you think that it is okay for those appointees to represent the point of view of the party that appointed them in the arbitration or does that create a problem?

**ML:** This is something I keep repeating to young lawyers or other persons approached to be appointed arbitrator; I say the greatest disservice you can render to the party that appoints you is to think that you will be the secondary counsel or that you are appointed to fight for their case, for the simple reason that if you appear to be partisan you lose all credibility with your colleagues on the tribunal. Very quickly the president will discount your views. And the other arbitrator if he plays neutral, or as neutral as possible, will get the ear of the president more than the arbitrator who merely repeats the arguments of the party that appointed him or her. I must say that I have had very few cases where I had the feeling that party-appointed arbitrators were merely trying to fight for the party that appointed them. That said, some arbitrators are so frequently appointed by

states that you know where they are coming from, in the sense that they have been chosen because they have a legitimate point of view about certain issues that often come up: *force majeure* or the fair and equitable treatment standard, etc.

**ML:** So in that case are you accepting the fact that they do have a bias, or that they do have a known position, so therefore it becomes acceptable because everyone knows that that is what is happening? Or is it the case that they are actually striving to be neutral in that role.

**ML:** You know, one person's bias is another person's educated view. You find this as well in the courts, with judges. They have views. It is not necessarily a bias in the sense that they are pre-judging the case or ...

**WGH:** ... Hoping for a particular outcome.

**ML:** Sure. I do not see this as a significant problem in international investment arbitration. To the extent it may exist, I

would say it is probably more frequent in commercial arbitration. But in terms of investment arbitration, the argument that the system is biased in favour of either investors or states is hogwash as far as I am concerned. I have not seen it in operation in any case that I was involved in.

**WGH:** How do you deal with this issue when you are approached to take a party appointment?

**ML:** First of all, the approaches are quite professional. Lawyers who do this have generally been in the field for years. They know that it is not permissible to discuss the merits of the case with potential arbitrators. I have always had a standard answer to the person considering me for appointment. My approach is to let them know that "I will make sure that your arguments are fully considered". This is as far as I will go.

**WGH:** Shouldn't you be making sure that the arguments of both sides will be considered?

**ML:** Sure. If a tribunal ignores an im-

portant argument of any party, its award may be the subject of a request for annulment.

**WGH:** So what is the message to the party that is interviewing you if you say "I will make sure your arguments are understood"?

**ML:** The message is that the party's arguments will be considered, which is only fair. But of course in the discussions of the tribunal, you will also be involved in considering the arguments of the other party. But I don't have the occasion of telling the same thing to the other party.

**WGH:** But you would if you could?

**ML:** Sure! When I am proposed for appointment as president of a tribunal, I say the same thing to each side. In practice, the tribunal makes a list of the arguments raised by each side. We spend a lot of time writing them down in the first part of the award and it is very rare that you will see an annulment being based on the fact that arguments of a particular party have not been con-

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sidered. If it has happened, somebody has been asleep at the switch.

**WGH:** The president has that responsibility. But, you know, I must say in commercial arbitration, I don't think I would make the same representations as to the behaviour of party-appointed arbitrators based on my experience. You know, if each party-appointed arbitrator feels a special obligation to make sure the arguments of the party appointed them is considered, then it potentially sets up a kind of adversarial process within tribunal, does it not? Each party-appointed arbitrator is putting forward or emphasizing the arguments of the party that appointed them.

**ML:** No. When you say "I will make sure your argument is considered," you are not saying that you will fight for their argument. They may have this argument and you may come out saying this is hogwash. And I will say that occasionally. Although a party has appointed me, I have my own views. But I'll make sure that, even if I believe that the argument is lousy, at least it will be discussed. And that's really ensuring that the process works properly.

**WGH:** And most decisions I think are unanimous in any event. So somebody has gone against the position of the party that appointed them. But, on the other hand, virtually all dissents are in favour of the party that appointed the dissenter.

**ML:** That is true. But you don't dissent for everything. There are many awards where in the end a party-appointed arbitrator says: "Well, I don't agree but I won't make a dissent out of it". I think it is important for the credibility of the system. You don't see many dissents on the amount of damages, for instance, although, you know, awards may be in the hundreds of millions – even billions

– of dollars.

**WGH:** Have you ever dissented?

**ML:** Yes; I have done it on a few occasions. I have even dissented in a case where I got a phone call afterwards from the lawyer of the party that did not appoint me saying: "By the way, I agree with your dissent but I had to argue the case as I did." I thought it was a great compliment.

**WGH:** When you dissent, do you have in mind influencing other cases or other arbitrators in terms of the approach to the matter you are dissenting on? Is that one of your considerations? Or are you more motivated by making sure people don't associate you with a certain idea?

**ML:** Oh, I never cared about the latter. I have never asked myself that question. For instance, I have a case now where I am dissenting from the majority award on damages; it is a mining case and it involves the definition of resources versus the definition of reserves. The majority of the tribunal is of the view that we should only take into account the reserves and my view is that some value has to be given to resources. If a buyer purchases a mining property, he will pay for reserves but he will also be willing to pay a little more for resources. In this particular case it is not major issue, but I'd like it to be on record that, for future cases, this is a matter that will not be taken as unanimous, or that you should ignore resources, period. The matter will undoubtedly be raised before other tribunals; I put my foot down on this one, not because of that particular instance, but because the issue will surely arise in other cases and I would like future tribunals to have a different point of view to consider.

**WGH:** You would like your view to be

taken up in future tribunals.

**ML:** I tried to convince my co-arbitrators and I was not successful, and that's fine. But I decided to put it on record because I think it is a bad precedent. At least they will not be able to say that this was a unanimous view.

**WGH:** Does it have to have that quality about it, that it could be of interest to other arbitrators in other tribunals, before you will dissent? Would you dissent if it only has impact in the particular case?

**ML:** Sure. I would do so if I felt it was fundamental in my view or a wrong interpretation of the law. But again, you don't have too many dissents in investment cases because in many instances it is a judgment call on facts and, you know, the credibility of the system is important and you end up saying "Well, I still think that I would reach a different conclusion but I can see that reasonable people might come to the conclusion you have reached and it is a matter of a pure judgment call on factual matters." I don't think one should dissent in such a situation.

**WGH:** Do you think overall it is healthy to have dissents within the system?

**ML:** Once in a while. If you ended up having dissents right and left, I think the system would be damaged. Arbitrators would be generally dissenting in favour of issues that the party that appointed them has pushed forward. So it may end up leading to the view that arbitrators decide issues with prejudice or bias.

**WGH:** The conclusion might be that the party-appointed arbitrators are in fact biased and that it really comes down to the chair making the decision.



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**ML:** Yes.

**WGH:** Something you have spoken of on other occasions is the notion of the judicialization of arbitration. Can you talk a little bit about that – how you've observed that development and why you think it is happening?

**ML:** Well, if you remember that second case I had with Judge Bellet, who was a former judge of the Cour de Cassation. It was a two billion dollar case. The tribunal deliberated in his small apartment in Paris. He had written a draft award on paper smaller than legal size. The award was 14 pages; and, you know, big handwriting. Nowadays you get awards of 500 pages or more. And I think it is very much the influence of common law firms or arbitrators. They have introduced a lot of the American or British common law practise of throwing the whole book at you and more. Discovery, you know, is getting huge, taking a lot of time, procedural objections are more and more frequent. So are jurisdictional challenges, or challenges of arbitrators and so on. We have introduced in international arbitration some of the less attractive aspects of the judicial process in the United States. Our system has become, I think, very heavy and I think it has had the net effect of limiting recourse in particular to investment arbitration by claimants who would have legitimate claims; but for claims in the amount of less than twenty million dollars, it is simply not economical to initiate the process.

**WGH:** The costs are prohibitive.

**ML:** The cost for legal fees and experts in certain cases, which were not huge in terms of dollar value, have reached twenty million. You know, if you were a party who considers investment arbitration and you say: "I think I have a good case but who knows, I may lose.

If I lose, I may end up paying the arbitral institutions, the arbitrators, my lawyers and experts and then I may have to pay the other party's lawyers and experts." Are you going to risk, for ten million dollars, having to pay thirty-five? No way! So, the system has arrived at a situation where it is quite risky and it prevents, I think, legitimate claims from being submitted.

**WGH:** Is there a solution?

**ML:** There is the subject of third-party funding. Some people don't like it, but I think it is a market answer to a genuine problem. A Claimant may well go to a funder who looks at the case with his lawyers and then says: "Well I think it is a good case and I am going to risk my own money". So it may help a little. But, you know, some commercial arbitration institutions have developed techniques and systems whereby you can have a kind of short, limited process ...

**WGH:** ... Proportional.

**ML:** ... And fast.

**WGH:** What do you think about David Rivkin's recent article in the CIArb Journal and his proposal that, in international arbitration, the arbitrators should set the procedure regardless of the agreement of the parties?

**ML:** I think there are precedents of tribunals who are quite rigorous and push the parties. I think you should push the parties. The tribunal should not just sit there and take whatever the parties have agreed. But to substitute your own views for the will of the parties is an approach I am very reluctant to adopt. The basic element of the arbitral system is that it is a consensual system. Some may not like it. But it is something that the parties agreed to and so if two parties

agree on a process, an arbitrator should have a very good reason before pushing them around and saying: "I am the arbitrator and I will not accept this". A tribunal has a duty to make sure that the system is not just going to blow itself up. You also have to abide by the institutional rules, if any, governing the arbitration. I understand that occasions arise when you may have to push the parties. When you see that they are asking for a year to present a brief or they are asking for discovery of a million documents, then I think you do have to push back.

**WGH:** Marc, thank you so much for taking the time to share with us some of your experiences and views on international arbitration. Do you have any final words about the future of international arbitration for our readers?

**ML:** Churchill said that democracy is the worst form of government - except for all the others that have been tried. It is a little bit the same for international arbitration. It is something to aspire to, that aggrieved parties of all nationalities will be prepared to entrust their fate to the judicial system of countries other than their own. Or that states will be willing to consent to arbitration brought by investors of other states without insisting on reciprocal treatment for their own nationals. Whether in investor-state arbitration or purely commercial arbitration, I have not as yet seen anybody proposing a better widget. Adjustments to the system will no doubt be made as time goes on, but I am not overwhelmed by the wisdom of many of the current proposals such as those recently advanced by the European Union to create an international investment court system. Far from receding, I have the impression that international arbitration will continue growing throughout the world. 🏠

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# JUDICIAL DISPUTE RESOLUTION IN THE COURT OF QUEEN'S BENCH: MAKING RESOLUTION ACCESSIBLE

Remarks by:

The Honourable Neil C. Wittmann,  
Chief Justice Court of Queen's Bench of Alberta  
ADR Institute of Canada National Conference  
Big Sky; Big Ideas in ADR  
Calgary, October 29, 2015

## JUDICIAL DISPUTE RESOLUTION - JDR

Judicial Dispute Resolution in the Court of Queen's Bench of Alberta, otherwise known as JDR is not new. It has been practiced formally for over 20 years. Before discussing its origin in history with you, I begin with a true story which demonstrates its utility. After a day and a half of evidence in a trial, one of our judges called counsel into chambers because the issues had not been articulated clearly, if at all. After hearing what was really in issue, the trial judge strongly suggested that it bordered on lunacy to continue with the trial and suggested that the parties immediately go to a judicial dispute resolution in front of another judge. Counsel agreed.

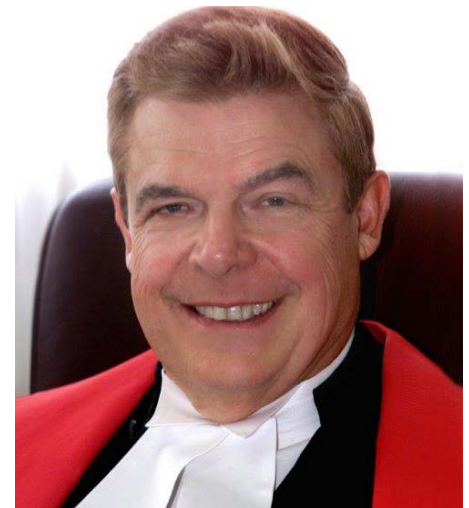
The report of the judicial dispute resolution judge was as follows: A housing development was marketed as a mini-gated community. Fifty large estate homes were sold to homeowners who agreed to belong to and pay fees to a homeowners association that had responsibility for lawn cutting, tree pruning and general esthetic maintenance of the area, presumably to keep it at an appropriate level. No one disputed that these were terms of the purchase and sale of the houses and that the association was in control of these matters, and the individual

homeowners had agreed to it.

The dispute was about the tree cutting. The defendants were husband and wife homeowners, one of 50, who did not want the trees cut around their home. The association refused their request because the association wanted to keep control of the esthetics by restricting the height of the trees so as to preserve views and replace certain others. The defendants refused to pay their assessed fees in the amount of \$100 in protest against this tree cutting program. The homeowners association then sued the defendants for \$100. The defendants barred the association's maintenance person who was going to cut their trees, from their property and hired their own maintenance person to do their work for a short period of time. They paid the other maintenance person \$350 and not only defended the claim for \$100 but counterclaimed for \$350, the amount they had paid for maintenance services.

Why was this action in the Court of Queen's Bench at all, you might ask? Pursuant to the agreement signed by all of the homeowners containing a term regarding non-payment of fees, the association had filed a caveat on the

THE HONOURABLE N. C. WITTMANN



Neil Wittmann was a lawyer in private practice in Alberta, mainly Calgary, for approximately 31 years prior to his appointment to the Court of Appeal of Alberta in 1999. Justice Wittmann was appointed Associate Chief Justice of the Court of Queen's Bench of Alberta in 2005 and Chief Justice in 2009.

defendant's land title and proceeded to foreclose on the property. Foreclosures, as you know, must be heard in the Court of Queen's Bench. Counsel agreed with the JDR judge that the most they could hope to achieve was a \$100 judgment for the plaintiff if the case were to be won by the plaintiff and a \$350 judgment and a dismissal of the plaintiff's claim if the judgment were to be won by the defendants and plaintiffs by counterclaim.

The case was under case management. The parties flatly refused to have the matter mediated or otherwise submitted to JDR, or any form of ADR. Second, the parties had engaged in 11 days of oral Examinations for Discovery. Third and most astonishing, the homeowners association's legal fees up to the trial date had climbed to



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\$150,000. The trial was set for two weeks. The defendants had expended \$30,000 in legal fees to the date of trial. Ironically, the homeowners association had assessed all of the homeowners, including the defendants, for the association's legal fees in the amount of \$3,000 each, and the defendants paid their assessment!

The JDR judge was able to get the parties to agree to a tree cutting protocol which was acceptable to all. He then had a private meeting with counsel, without clients and asked them what he called "the front page of the newspaper" question. That is, did they believe that the public's confidence in lawyers would be enhanced by reading about the amount of the legal fees charged in relation to the amount in issue and more fundamentally, how had this situation been allowed to happen? Counsel admitted that they had "let it get out of control but they somehow could not stop the train". Each blamed the other. Nevertheless, the defendants indicated they were going to seek indemnification for their costs.

At this point, the JDR judge indicated that he had a concern with the legal fees charged to the association. He suggested counsel for the association should consider refunding part of the amount they had been paid on the basis they had a responsibility to their client to ensure litigation is conducted in a sensible fashion and that there be some proportionality to the issues in the litigation and its costs. He suggested association counsel return one-third of the fee. That left the counsel with \$100,000. Counsel agreed. He also suggested that the defendants' counsel should refund part of what was charged and that they should give that amount to the plaintiffs on the basis that had the case been tried, the defendants would likely have lost the action. Defendants' counsel ultimately agreed to put \$20,000 towards a settlement. The result was total reduced fees of \$70,000 and a tree cutting protocol. A formal agreement was entered into which ended the matter.

I want to quote the report to me on this

matter from the JDR judge. I also want to make it clear that because JDRs are confidential, I do not know the names of the parties, nor do I know the identity of the counsel. Nor do I regularly receive any reports or any communications about JDRs conducted in our Court because they are confidential. But I specifically asked for this report after hearing an oral report as to why a two week trial had been aborted after a day and a half. The JDR judge reported as follows:

"Two matters to think about in terms of the role of Court. I believe on occasion we should step in when our gut feeling is 'this trial is ridiculous' and should not be going forward. Obviously, we must be very careful in this regard but surely that decision is ultimately part of the Court's authority to control its own process. The second is more problematic. In the final analysis, I did beat up on counsel to some degree. I did not do it in front of their clients. They did convey some of what I had said to them about their role to their clients as a contribution by them to become part of the settlement. I do not know how they put what I said to them to their clients. My concern is that we should not be seen as policing the Bar and that it is ultimately the responsibility of the Bar. However, I do believe if we have a little more flexibility in our arsenal in the JDR context then we can probably do things in this role we would not do in a courtroom."

So what lessons can we learn from this anecdote? First, some civil litigation is out of control even when under case management and JDR and ADR are available. Second, most of these problems cry out to be solved earlier rather than later. Third, proportionality of cost in relation to the value of the matter in dispute is a fundamentally worthy concept. Fourth, there may be some merit to limiting the availability of system resources depending on the kind of claim in issue.

## JDRS IN ALBERTA

I have chosen to speak to you about Judicial Dispute Resolution at our Court because I think this form of dispute resolution heralded a turning point in the administration of civil justice that began in the early 1990s.

## SHORT HISTORY OF JDR IN ALBERTA

The JDR program evolved out of attempts by the Court of Queen's Bench to reverse increasing lead times for trials. The causes of the increased lead times are several, and we are still grappling with them today. They include the hyper-legalization of society and the attendant increase in numbers of litigants without counsel, the increasing complexity and length of trials and therefore their cost, and the reluctance on the part of government to provide the courts with resources to keep up with burgeoning volume.

The Court of Queen's Bench has been conducting some form of Alternative Dispute Resolution since 1991.

In Alberta, the judicial mini-trial was an early form of ADR at which you could get a non-binding opinion on what the judge believed would happen at trial. It is a kind of moderated settlement conference. The first "private mini-trial", a term coined by the New York Times, appeared in the United States in 1977 in a very complex computer terminal patent infringement case.<sup>1</sup> The parties had spent \$500,000 each. Faced with the enormous costs of continued litigation and the potential futility of such a process to the loser, the parties decided to try a mini-trial. It took only two days to present their positions to the judge. At the end, senior management personnel took over negotiations and reached a settlement in 30 minutes. They saved millions of dollars.

Early settlement programs in our Court were implemented casually, but when chosen, were said to have induced settlement in 90% of the cases.<sup>2</sup> In 1994, we began to offer a modified form of mini-trials, judicial mediation. The Bar embraced our offer of JDRs with great enthusiasm. The program is now so deeply integrated into our court

schedule that it has become an essential part of our process. Most of our JDR's are mediations. But we still offer a mini-trial or a med-arb, sometimes referred to as a binding mediation.

Case Management continues to play an important part within the framework of the management of litigation, but in a different way from the JDR program. Case Management is used to help to identify the issues and procedures to be used at trial, while the aim of a JDR is to avert the need for a trial, in whole, or in part. On occasion, Case Management may result in a settlement, but it is not designed for that purpose.

In contrast, a JDR provides a party-initiated framework for a judge to facilitate a process in which the parties resolve all or part of a claim by agreement. It is an effective cost savings mechanism and well liked for outcomes which benefit everyone involved. It differs from private mediation programs chiefly because JDR is conducted by a judge. And the judge is free of charge. Also, it is done only after a proceeding is commenced in the Court of Queen's Bench. It usually involves a rights-based approach, that is an evaluation of the legal rights at issue.

#### ACCESSING THE JDR PROGRAM

It has been reported that when Abraham Lincoln was a practicing lawyer, the question was put to him "Would you rather try a case in front of a judge alone or a judge and jury?" His response was "Who is the judge?" The JDR program offered by the Court of Queen's Bench allows the parties by agreement to pick their judge. There are of course some limits to this. If one goes to the public website at [albertacourts.ca](http://albertacourts.ca) and then to the Court of Queen's Bench, there will be a section entitled "Assignments". Under "Assignments" for a given term of the Court, the JDR judges assigned for any particular week will be listed by date and by day. The parties can choose any day that has not already been booked for their JDR and then book it with the JDR Coordinator in Calgary and Edmonton. A similar process, not online, is offered in our other judicial centres.

The point is that it was always contemplated that the judicial mediator could be chosen, subject of course to the consent of the judge. Because the underlying premise is that it is a consensual process, the parties should be able to choose who is going to do it.

Alberta's *Rules of Court* promulgated in 1969, remained unchanged, but for amendments, until November 2010. At that time, new *Rules of Court* were created and for the first time, the judicial dispute resolution process was defined in the *Rules*. The purpose was stated to provide a party initiated framework for a judge to actively facilitate a process in which the parties resolve all or part of a claim by agreement. These words were chosen carefully. The platform, once set, supported a rule that the judicial dispute resolution process could be generally initiated only by the agreement of the participating parties, subject to the direction of the presiding judge and a number of things were directed to be agreed upon at a minimum, namely:

1. That every party necessary to participate in the process agreed to do so, barring a good reason not to agree completely.
2. That the guidelines would include a definition of the nature of the process; the matters to be dealt with during the process; and the manner in which it would be conducted; the date and location; and the role of the judge and any outcome expected of the judge's role.
3. Whether materials would be exchanged before the date; who would participate and an express proviso that participation must include persons who have authority to agree on a resolution, unless relieved from that obligation. There is also an express provision that the parties who agree on the process are entitled to participate and that the parties may request "a judge named by the parties".

Further provisions of the rules embody the obligation of confidentiality and use of information. For example, there are

specific provisions that statements made or documents generated for the process unless otherwise agreed upon are privileged and are made or generated without prejudice. Nothing is admissible in a subsequent application or proceeding in the same action and the only documents to arise from a judicial dispute resolution process are an agreement prepared by the parties and any other document necessary to implement it, and a Consent Order or Consent Judgment resulting from the process.

The *Rules of Court* also recognized dispute resolution options. After stating that it is the responsibility of the parties to manage their dispute, the *Rules* state that responsibility includes good faith participation in one or more of the following dispute resolution processes:

- a. A dispute resolution process in the private or government sector involving an impartial third person
- b. A court annexed dispute resolution process
- c. A judicial dispute resolution process, that is a JDR
- d. Any program where process designated by the Court for the purpose of the rule.

We have no desire to compete with private ADR. Many of our cases are resolved before private mediators or arbitrators.

Judges believe that people should have choices. Our objective, the same as all of us in the justice system, is to attain resolution — not just by trial but by any means that will allow litigants to get a fair outcome, and to preserve values that might be more important to them, not simply walking away with the most money. Sometimes an apology is all it takes.

#### THE SUCCESS OF JDR

From our perspective, the JDR program has been credited with playing a large part in the dramatic reduction of the Court's civil trial lead times, that is, the earliest date on which a trial can be booked. In one decade, we reduced our civil lead times by more than half. The





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settlement rate for JDRs in 2001 was 80%, settlement at the JDR. And more settle after the date. That has remained unchanged to today. This high rate may be because the parties to a JDR already have a trial date looming and know that a trial will ensue if the case doesn't settle. That is the same reason Martin Teplitsky, a prominent Ontario arbitrator, discovered that med/arb works better than mediation alone because "[o]nce the parties know that a binding decision is imminent, they prefer the certainty of settlement to the uncertainty of an adjudicated result."<sup>3</sup>

Still, it's impossible to tell whether those cases might have settled anyway. Because the choice of engaging in a JDR is voluntary, the parties come into it already pre-disposed to talking about their positions so that may play a part in its success.

That is not to say that JDR is always a good choice. For one thing, it is not likely to succeed where one of the parties is intransigent on a crucial issue, or where the case has gone on so long that the parties have become entrenched in their positions. Also, in situations where parties do not provide full disclosure, a judge may not be able to provide an evaluative opinion. It is not always a suitable process if credibility is an issue. It is difficult to conduct an effective JDR without counsel, since the enforceability of an agreement may depend on independent legal advice.

### THE DOWNSIDE OF JDR

I am puzzled by the fact that despite the plethora of alternatives – including arbitration, mediation or settlement conferencing, brief conflict intervention, collaborative law, restorative justice, and judicial dispute resolution – the legal profession is still thought of as adversarial. That was fine in a bygone time. The fact is, in common law jurisdictions around the world, fewer than 5% of civil cases actually reach trial. Some lawyers still prepare as though they were invariably going to trial. This is not to diminish the value of trials. Some disputes should only be settled by an impartial adjudicator. But, for many disputes, this is a very expen-

sive way of resolution, even if the litigants say that is what they want.

JDRs may also have inadvertently created a different problem. Some critics say we have shifted the burden of finding creative ways to resolve disputes from lawyers' shoulders to judges. Some lawyers forget they can be problem-solvers who have the ability to achieve positive solutions for their clients outside of court.

As a Court, we are not in competition with private industry. We already have more work than we can handle. But we believe that most people want a cheap, expeditious resolution. We know that some people choose JDR not just because of the cost advantage, but because of the imprimatur of a judge. Members of the Bar have flocked to the program from its inception.

In 1994, six JDRs were conducted in Calgary. A year later, we conducted 137 JDRs in Calgary and Edmonton. At the end of 1999, our Court became the first in Canada to incorporate dispute resolution weeks into the judges' sitting schedules. In 2008, we conducted 716 JDRs. As its popularity rose, the JDR program began to create scheduling difficulties. Over time we increased the number of judges assigned to JDR weeks from one to four in each of Calgary and Edmonton.

By 2013, we were conducting over 1,000 JDRs a year. We were becoming overwhelmed by the demand for the Court's services in all areas, including JDRs, and our lead times were getting worse. It became apparent that JDR had to some extent become a substitute for settlement discussions that should have taken place between the lawyers. In February 2013, we made a considered decision that the conduct of trials within a reasonable time was our core obligation and suspended the requirement in the *Rules of Court*<sup>4</sup> that parties requesting a trial must first have participated in a dispute resolution process, not necessarily a JDR, but one of the forms mentioned earlier. The result is that the number of JDRs we heard in 2014 went down to 726; in 2015,

528. In the Fall of 2014, we reduced our assignments to two JDR judges per week in Calgary and Edmonton, which remains the situation today.

### ETHICAL ISSUES

There are different kinds of JDR: besides mini-trials, you can get a traditional mediation, or, if that fails, med-arb.

Although the Bar may not see any ethical issues with JDRs, it is a far more controversial issue for judges. Former Chief Justice of Ontario, Warren Winkler, summarized the issue.

"Some judges consider that it is inappropriate for them to engage in any form of mediation. They maintain that the judiciary is trained to decide cases, not to broker deals. Mediation, they say, requires them to descend 'into an arena', a place antithetical to judging. In increasing numbers, I believe, other judges feel that judicial mediation is now part of the lifeblood of an ever-evolving system of civil justice; we must have it to keep up with the changing needs and expectations of litigants. According to this view, to best serve the public, mediation must be an integral component of any modern and effective civil justice system."<sup>5</sup>

Most jurisdictions in Canada have adopted alternate dispute resolution programs. But the shift away from judges presiding over matters in an adversarial system to their role as settlement facilitators has led to the emergence of new ethical issues over their role in the justice system.

For example, the use of caucusing by a judge is one such issue. The 2007 American Bar Association Code of Judicial Conduct has codified the ability of judges to caucus. It says "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge."<sup>6</sup> Some judges are concerned that conferring separately with the parties opens the appearance, if not the possibility, of coercion, which compromises the image of impartiality. Unlike the 1990 Code

which preceded it, the 2007 Model Code now addresses improper judicial coercion by setting out six factors that a judge should apply to assess the appropriateness of settlement practices. One of them is whether the parties and their counsel have consented or requested a certain level of participation by the judge. Participation in excess of that level would be problematic. Another is whether the counsel and their parties are relatively sophisticated in legal matters. A third factor is whether the trial will be by judge and jury. If the judge will be the trier of fact, aggressive pre-trial negotiation might lead to the perception that the judge will be less impartial at trial. This is not a factor under the *Alberta Rules*. Under the *Alberta Rules*, a JDR judge may not be the trial judge or involved in the case after a JDR unless the parties consent in writing.

In Canada, the first stop in finding out how to conduct a JDR or settlement conference ethically, is by reference to first principles. For judges, these are set out in the Canadian Judicial Council's guide *Ethical Principles for Judges*. The basic principles are independence, integrity, diligence, equality and impartiality. The value of these principles is grounded in a judge's key role in maintaining the integrity of the administration of justice and the rule of law. Some legal scholars argue that these principles do not provide adequate guidance in the context of settlement conferencing.<sup>7</sup>

The problem is: how do we talk about the ethics of, for instance, caucusing, in a different context from the one in the drafters' minds when they developed *Ethical Principles*?

One criticism is directed at the evaluative model of judicial settlement. The evaluative model is where a judge assesses the narrow legal rights of the parties and signals likely outcomes in litigation. The Quebec courts, who favour interest-based "Amicable Settlement Conferences", have adopted a clear position against judges providing their opinions on the merits of a case or the probable outcome of a dispute

should it go to trial. In Alberta the evaluative approach is the norm. So is caucusing. But always with the agreement of the parties.

Critics also say the judge's position and authority could make it difficult for the parties, unless they are sophisticated litigants, to distinguish between the judge as evaluating their chances as a mediator, and the judge as conveying the definitive position of the court. This reproach was first expressed twenty years ago, when the judicial ADR was still young. The argument has lost some favour because it may be too simplistic an analysis. In reality, both evaluative and facilitative techniques find expression in a range of practices. In the JDR room, neither of them exists in undiluted form.


Binding mini-trials, or binding JDRs, have also been controversial in our Court. Some judges say that much of their persuasive techniques to reach settlement are destroyed in a binding mini-trial. Others have trouble reconciling the fact that a non-binding opinion could lead to one quantum number, but for settlement, another number might be appropriate. The Alberta Law Research and Reform Institute questioned the authority of a judge to provide a binding decision which was not on the record.<sup>8</sup> They said the minute a judge gets involved in a binding mini-trial, she assumes an adjudicative position not a facilitative position, which is what a JDR should be.

Even though one of our basic rules is that a JDR judge may conduct a trial of the matter only if they have obtained the consent of the parties, that rules has not allayed concerns by some judges

that the merging of mediating and fact-finding roles is problematic. As a remedy, the judges in our Edmonton judicial district are required to conduct a pre-JDR conference to determine the procedures to which the parties will agree. In Calgary, the judges' approach is generally more pragmatic than process-driven and that practice is left to the discretion of the JDR judge.

These concerns are significant. As a Court, we continue to refine our practices as this field evolves. I would however echo what Teplitsky said about these problems: even if the gold standard of procedural perfection were achievable, we couldn't afford it.<sup>9</sup>

I mentioned earlier that I believe people should have choices. The JDR program has proven to be a significant addition to the methods of improving access to justice. If we want people to be able to access affordable and quick resolution, the Courts have no choice. We have discovered something that people and the Bar want, a method that solves problems fairly and effectively. We need to keep refining an ethical framework that allows judges to be both adjudicators and mediators in a way that preserves the highest standards of the administration of justice, but without sacrificing a valuable means of resolving disputes.

That said, I have asked our Rules Committee to expressly provide the Court with authority to compel the parties to participate in a private mediation. I am advised that this proposal is out for consultation now. When, how and under what circumstances a judge should order a private mediation will be the focus of the debate. 

.....

- 1 *Telecredit Inc. v. TRWV, Inc.*, No. CV 74-1127-RF (C.D. Cal. 1977).
- 2 The Honourable W. Kenneth Moore, *Judicial Mini-Trials in Alberta*, CCH Canadian Limited, August 1, 1995, p. 1256.
- 3 Martin Teplitsky, O.Ont., Q.C., LSM, LL.D., *Mediation/arbitration in commercial cases: A remedy for litigants who have run out of patience and cash*, The Advocates' Journal, Fall 2015, p. 14.
- 4 R 8.4(3)(a) and r 8.5(1)(a).
- 5 The Honourable Warren Winkler, "Some Reflections on Judicial Mediation: Reality or Fantasy?", Faculty of Law, Univ. of Western Ontario, Distinguished Speakers Series, March 24, 2010.
- 6 Rule 2.9(A)(4).
- 7 Michaela Keet and Brent Cotter (College of Law, Univ. of Saskatchewan), *Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking about Judicial Ethics*, (2013) 91 Canadian Bar Review 363, p. 377.
- 8 Alberta Law Research and Reform Institute, "Promoting Early Resolution of Disputes by Settlement", Consultation Memorandum No. 12.6, Rules of Court Project, July 2003, paras. 258-275.
- 9 Teplitsky, Note 3, p. 18.



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# THE IMPACT OF *SATTVA* ON THE JUDICIAL REVIEW OF COMMERCIAL ARBITRAL DECISIONS

## 1. INTRODUCTION

In *Sattva Capital Corp v Creston Moly Corp*, the Supreme Court of Canada (the “SCC”) established that contractual interpretation involves issues of mixed fact and law.<sup>1</sup> The decision, which arose out of an appeal from a commercial arbitrator’s resolution of a contractual dispute, will have an enormous impact on the future review of commercial arbitral decisions.

*Sattva*’s primary effect is clear. Since questions of mixed fact and law generally receive greater deference than questions of law alone, the decisions of commercial arbitrators, which so often consider issues of contractual interpretation, will now receive heightened deference from courts. However, the full extent of *Sattva*’s impact will also depend on how widely it opened the door to the application of administrative law analysis in the judicial review of commercial arbitrations. Prior to *Sattva*, courts reviewing arbitral awards proceeded under the assumption that, to some degree, administrative law principles applied; while *Sattva* has not entirely removed the ambiguity surrounding the relationship, its reasoning indicates that judicial oversight of commercial arbitrations will increasingly borrow from the principles of administrative law.

On the basis of *Sattva*, and with a focus on Ontario, this essay will attempt to predict the future of the relationship between administrative law and the judicial oversight of commercial arbitrations. This essay’s overall conclusion is that by re-characterizing issues of contractual interpretation and by encouraging the importation of administrative law concepts into the judicial oversight of commercial arbitration, *Sattva* has, through multiple and sometimes non-obvious mechanisms, greatly increased the deference that courts will show commercial arbitrators.<sup>2</sup>

## 2. PRE-SATTVA JUDICIAL REVIEW OF COMMERCIAL ARBITRAL DECISIONS

Judicial review of arbitral decisions by Ontario courts can occur on a substantive or procedural basis. Substantive oversight occurs when an arbitral decision is appealable on its merits; conversely, procedural reasons for a court’s intervention can include, among others, perceived bias in the arbitrator or the arbitrator’s overstepping of his or her jurisdiction.<sup>3</sup> This essay will examine both substantive and procedural oversight in the context of the primary statutes governing arbitration in Ontario: the *International Commercial Arbitration Act*<sup>4</sup> and the *Arbitration Act*.<sup>5</sup>

### 1. THE INTERNATIONAL COMMERCIAL ARBITRATION ACT

The *ICAA* incorporates into Ontario law the *Model Law on International Commercial Arbitration* (the “*Model Law*”) and applies to arbitrations where, *inter alia*, the parties had their places of business in different countries at the time of their arbitration agreement’s execution.<sup>6</sup>

Although the *ICAA* does not permit appeals of an arbitral decision on the decision’s merits, it does provide a number of procedural grounds under which a party can apply to a court for the setting aside of such a decision. For the purposes of this essay, the most significant procedural ground for judicial

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intervention is contained in article 34(2)(a)(iii) of the *ICAA*, which states that an arbitral award may be set aside if the party making the application furnishes proof that:

the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration [...].

The jurisprudence concerning article 34(2)(a)(iii) contains three important themes, and the case of *United Mexican States v Cargill Inc*<sup>7</sup> provides an excellent basis for discussion of all three. The facts of *Cargill ONCA* were as follows. An American company, Cargill, Incorporated, and its Mexican subsidiary initiated arbitral proceedings against Mexico for breaches of Chap-



ter 11 of the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States* ("NAFTA"). The arbitral panel, determining that Mexico had indeed violated Chapter 11, awarded substantial damages to Cargill, Incorporated for its loss of sales to the subsidiary.<sup>8</sup>

Mexico challenged the arbitral award under article 34(2)(a)(iii) of the *ICAA*, arguing that the tribunal did not have jurisdiction to award damages for Cargill, Incorporated's lost sales.<sup>9</sup> In adjudicating Mexico's challenge, the Ontario Superior Court of Justice (the "ONSC") cited *Desputeaux v Éditions Chouette (1987) Inc.*,<sup>10</sup> in which the SCC stated that:

The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement [...]

Therefore, to determine whether the award was within the tribunal's jurisdiction, the ONSC engaged in a detailed analysis of NAFTA's text. The ONSC, applying a standard of reasonableness, held that the tribunal had acted within its jurisdiction and dismissed Mexico's application.<sup>11</sup>

Mexico appealed the ONSC's decision to the Ontario Court of Appeal (the "ONCA"). The ONCA conducted a detailed discussion of the standard of review for arbitral tribunals generally, and concluded that with respect to article 34, "there is nothing that detracts from the normal rule that on questions of jurisdiction, the tribunal could not act beyond its jurisdiction." The ONCA, borrowing the phrase "true jurisdiction" from administrative law, applied a standard of review of correctness. Despite the stringent standard of review, the ONCA nevertheless concluded that the

tribunal had made no jurisdictional error and refused to set aside the award.<sup>12</sup>

One of the three notable themes in *Cargill ONCA* is the seamless application of principles of administrative law to international arbitrations. In determining that correctness was the appropriate standard of review, the ONCA repeatedly referenced the leading administrative law case of *Dunsmuir (Board of Management) v New Brunswick*.<sup>13</sup> The ONCA's only deviance from the *Dunsmuir* framework was simply to note that the majority's warning against the use of procedural grounds to overturn the substance of an arbitral decision applied even more forcefully in the international arbitration context.<sup>14</sup> Nor is the presumed applicability of administrative law a post-*Dunsmuir* phenomenon; in *United Mexican States v Karpa*,<sup>15</sup> the ONCA made even less of the distinction between administrative and international arbitration law. In determining the standard of review with which to examine an arbitrator's decision, the ONCA simply applied the standard of review analysis outlined in the earlier administrative law case *Pushpanathan v Canada (Minister of Citizenship and Immigration)*.<sup>16</sup>

Another notable theme within *Cargill ONCA* is the Court's treatment of *ICAA* article 34 as inviting judicial review of arbitral decisions on the basis of jurisdictional overreach. In the administrative law context, classifying an issue as one of jurisdiction is a powerful indication that the reviewing court should apply a standard of review of correctness. Given the lack of discussion surrounding the use of the term, the Court in *Cargill ONCA* seems to have assumed unquestioningly that the jurisdictional label was entirely applicable in the *ICAA* context. Such an assumption is surprising given the ONCA's frequent references to *Canada (Attorney General) v SD Myers, Inc.*,<sup>17</sup> which involved another arbitral review pursuant to article 34 of the *Model Law*.<sup>18</sup> The ONCA mistakenly described *Myers* as standing for the proposition that the standard of review on questions of jurisdiction was correctness,<sup>19</sup> when in fact, *Myers* was much less conclusive. The Federal

Court in *Myers* relied heavily on *Dynamex Canada Inc v Mamona*,<sup>20</sup> which established that "characterizing an issue as legal or jurisdictional does not mean that the standard of review must be correctness."<sup>21</sup> Thus, the *Cargill ONCA* decision shows simultaneously the power of jurisdictional language combined with the conceptual uncertainty surrounding its use.

The third and final theme to emerge from *Cargill ONCA* is the Court's awareness of the desirability of exhibiting deference towards the decisions of international arbitral tribunals. The ONCA stated that "[c]ourts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international tribunals," and that "[i]t is important [...] to remember that the fact that the standard of review on jurisdictional questions is correctness does not give the courts a broad scope for intervention in the decisions of international tribunals."<sup>22</sup> In the pre-*Dunsmuir* case of *Karpa*, the ONCA expressed the importance of deference in policy terms, stating that "[n]otions of international comity and the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly."<sup>23</sup>

All three themes – the applicability of administrative law concepts in the context of arbitral review, the use of jurisdictional reasoning, and deference towards arbitral tribunals – surfaced again in the *Sattva* judgment.

## II. THE ONTARIO ARBITRATION ACT

The second of Ontario's two primary arbitral statutes, the *OAA*, applies to all arbitrations conducted under an arbitration agreement unless those arbitrations are excluded by law or governed by the *International Commercial Arbitration Act*.<sup>24</sup>

In contrast to the *ICAA*, the *OAA* contains provisions for the appeal of arbitral decisions on questions of law. Unless parties make alternate arrangements in their arbitration agreements, appeals are only available if the appeal court grants leave. Leave to ap-



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peal is contingent on the importance to the parties of the matters at stake and the significance of the question of law to the rights of the parties.<sup>25</sup> A party also has the option of applying for the setting aside of an arbitral award on any of a variety of procedural grounds; in a provision similar to article 34(2)(a)(iii) of the ICAA, section 46(1)(3) of the OAA states that a court may set aside an award if “[t]he award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.”

The same three themes that arose in the international arbitration context are also present in that of domestic arbitrations. First, with respect to the relationship between administrative law and the judicial oversight of domestic arbitral tribunals, the OAA jurisprudence indicates that the law pre-*Sattva* was fully settled but without a strong conceptual basis. In the case of *Smyth v Perth and Smiths Falls District Hospital*, which arose following an appeal from an application under section 46(1)(3) of the OAA, the ONCA relied on the reasoning in *Dunsmuir* while determining the standard of review to apply to an arbitrator’s decision as to his jurisdiction. However, despite the usage of *Dunsmuir*, the ONCA gave no explanation as to why an administrative law case should provide guidance for other forms of arbitration.<sup>26</sup> Despite this foundational weakness, and despite its non-commercial substance, *Smyth* became a precedent for the judicial oversight of commercial arbitral decisions.<sup>27</sup> Ontario is not alone in assuming no distinction between administrative law and judicial oversight with respect to arbitrations; courts in other provinces performing judicial review of non-administrative arbitral decisions have similarly used *Dunsmuir* in establishing a standard of review.<sup>28</sup>

The second theme, the use of jurisdictional language as a basis for procedural review, has also emerged in case law under the domestic arbitral statute. In *Ford*, which was initiated as an application under section 46(1)(3) of the OAA, the ONSC relied on *Smyth* in

holding that an arbitrator’s decision with respect to his own jurisdiction should be reviewable on a standard of correctness.<sup>29</sup> Other provincial courts have come to the same conclusion in reviewing jurisdictional questions. With respect to section 30 of the British Columbia *Arbitration Act*,<sup>30</sup> which states that a court may “set aside” an arbitral award if “an arbitrator has committed an arbitral error,” the British Columbia Supreme Court commented that the section “deals with errors that go to the heart of the arbitrator’s jurisdiction. These matters are not such as to allow for judicial deference to the tribunal.”<sup>31</sup>

The final theme, curial deference to arbitral tribunals, is not as pronounced in domestic arbitrations as it is in the international context. The SCC in *Desputeaux* commented that “review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature,”<sup>32</sup> but the case law dealing with domestic arbitrations generally lacks the sweeping statements of deference towards arbitral tribunals so prevalent in the international context.

### 3. THE SUPREME COURT’S DECISION IN *SATTVA*

The ground breaking *Sattva* case concerned the interpretation of a contract between Creston Moly Corporation (“Creston”) and Sattva Capital Corporation (“Sattva”). According to the terms of the contract, Sattva was entitled to a payment of USD 1.5 million payable in shares, cash, or a combination thereof. However, the parties differed in their interpretation of the contract’s formula for pricing the shares, and unable to come to a resolution, the parties entered into arbitration. The arbitrator interpreted the contract in favour of Sattva.

### I. THE DECISIONS OF THE BRITISH COLUMBIA SUPREME COURT AND COURT OF APPEAL

Creston responded by applying to the British Columbia Supreme Court (the “BCSC”) for leave to appeal the arbitrator’s decision pursuant to section 31 of the BCAA, which allows a party, at the court’s discretion, to appeal ques-

tions of law arising from an arbitration. The BCSC denied leave to appeal on the basis that “the question posed by Creston is not a narrow question of law but, rather, involves a question of fact or a question of mixed fact and law.”<sup>33</sup> The Court of Appeal (the “BCCA”) then reversed the BCSC on the grounds that the interpretation of the contract raised an issue of law.<sup>34</sup> The case returned to the BCSC, which, reviewing the arbitral decision on its merits, concluded that the arbitrator had made no error of law in interpreting the contract.<sup>35</sup> Creston again appealed, and the BCCA allowed the appeal on the basis that the arbitrator had erred in law by failing to construe the contract as a whole.<sup>36</sup>

Pursuant to a final appeal by Sattva, the case finally reached the SCC, but it is important to pause here to address the standard of review analysis undertaken by the lower courts. Armstrong J of the BCSC set about determining the appropriate standard of review through a straightforward application of *Dunsmuir*. He first considered whether the case law examining the BCAA had established a standard of review for questions of law arising from arbitral disputes. After concluding that it did not, he then applied the portion of the *Dunsmuir* which specifically addressed questions of law. Since, among other factors relevant to the *Dunsmuir* analysis, Armstrong J found that the BCAA did not create an administrative regime in which the decision maker has special expertise and because the case concerned the application of general legal principles, he applied a standard of correctness.<sup>37</sup> When the case reached the BCCA, both parties agreed that the question of law at issue was reviewable on a correctness standard.<sup>38</sup> Thus, by reviewing the history of Sattva and Creston’s legal battle, it is clear that the BC courts covered much of the same ground as those of Ontario: an uncritical application of the *Dunsmuir* analysis to judicial oversight of non-administrative arbitrations.



## II. THE DECISION OF THE SUPREME COURT

Of the five issues on appeal at the SCC, two are relevant for the purposes of this essay. The first relevant issue hinged on whether the applicant had sought leave to appeal on an issue of law. The SCC stated that while courts had historically considered contractual interpretation a question of law, there had been a shift away from the historical approach in recent Canadian jurisprudence. The SCC identified two developments as catalysts for the shift. The first was the adoption of the factual matrix as the correct approach to contractual interpretation, which the court described as having regard for the surrounding circumstances when interpreting a written contract. The second was the recently-established explanation of the functional difference between questions of mixed fact and law and questions of law. As stated by recent SCC jurisprudence, questions of law “are questions about what the correct legal test is”, whereas questions of mixed fact and law are an exercise of “applying a legal standard to a set of facts”. The SCC explained that the purpose of the distinction between the two categories was to limit the intervention of appellate courts to cases with implications beyond the immediate parties, and that limiting questions of law to general matters had the added benefit of limiting the “number, length, and cost of appeals”. The SCC concluded that since the arbitrator had applied the correct legal principles, the issue raised by Creston’s application was simply a matter of contractual interpretation and therefore a question of mixed fact and law.<sup>39</sup>

Though the holding that there was no question of law was sufficient to decide the case, the SCC continued on to deal with the second issue of relevance for this essay, which concerned the standard of review an appeal court should grant arbitral decisions. The Court began by qualifying the relevance of *Dunsmuir*. The SCC noted that arbitrations initiated by mutually consenting parties were conceptually and practically distinct from arbitrations arising by operation of statute. However, the

Court went on to mention various similarities between administrative and commercial arbitrations, such as the presumed expertise of the decision-maker. On the basis of the preceding discussion, the SCC concluded that “aspects” of the *Dunsmuir* analysis are applicable to the determination of the standard of review regarding commercial arbitration awards. As *Dunsmuir* and post-*Dunsmuir* jurisprudence suggested that the nature of the question at issue could be determinative, the SCC stated that:

[i]n the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator’s expertise [...].

The SCC then concluded that the applicable standard of review in the case at hand was reasonableness.<sup>40</sup>

### 4. SATTVA’S IMPACT ON THE JUDICIAL REVIEW OF COMMERCIAL ARBITRAL DECISIONS

*Sattva* has several implications for future judicial oversight of arbitral decisions. The most straightforward implications, and those with which this essay will deal with first, arise from the relationship between contractual interpretation and substantive grounds for judicial review. The second group of implications are more subtle and concern the relationship between contractual interpretation and procedural grounds of review.

### I. SATTVA AND SUBSTANTIVE GROUNDS FOR JUDICIAL REVIEW OF COMMERCIAL ARBITRAL DECISIONS

There are several straightforward implications of *Sattva*. Since the statutory default contained in the *OAA* only allows for appeals on questions of law, as questions of mixed law and fact, purported errors of contractual interpretation will no longer constitute a basis for appeal. However, one significant

complicating factor is the right of parties to contract around the *OAA*’s provisions for substantive oversight. Will parties respond to *Sattva* by contracting to include issues of contractual interpretation as grounds for appealing arbitral awards? The answer is unclear. On one hand, parties have an interest in being able to challenge bad arbitral decisions. On the other, increasing the possible grounds of appeal jeopardizes the confidentiality, flexibility, speed, cost, and finality of arbitrations. On balance, given the premium contracting parties generally place on efficiency and finality, most are likely to rely on the statutory default of questions of law.<sup>41</sup>

One additional impact of *Sattva* on substantive review is that cases which do receive an appeal on their merits are now likelier to receive a less stringent standard of review. For cases appealed on a question of mixed fact and law, the standard of review is likely to be deferential. Consider, for example, the post-*Sattva* decision of *Martenfeld v Collins Barrow Toronto LLP*.<sup>42</sup> In *Martenfeld*, two members of a partnership disagreed over the correct interpretation of a provision in the partnership agreement calling for a withdrawing and competing partner to pay liquidated damages into the partnership. At first instance, the ONSC interpreted the partnership agreement in a manner heavily unfavourable to one party, which then appealed. The ONCA, in reviewing the decision, began its analysis by referencing *Sattva*’s framework for the standard of review analysis on questions of mixed fact and law. Heeding the warning in *Sattva* that courts should be wary of “identifying extricable questions of law in disputes over contractual interpretation”, the court applied a standard of palpable and overriding error, and eventually upheld the decision of the ONSC.<sup>43</sup> Although not an appeal from an arbitration under the *OAA*, *Martenfeld* demonstrates the ONCA’s adherence to *Sattva* and that it will now tend to defer when, in the past, such a determination by a reviewing court would likely have resulted in a standard of correctness.<sup>44</sup>

*Ottawa (City) v The Coliseum Inc*<sup>45</sup> may cast some doubt on *Sattva*'s impact on both the leave to appeal stage in actions under the *OAA* and on standards of review. In *Ottawa*, in which the ONSC considered whether to grant leave to appeal an arbitral decision pursuant to section 45(1), the Court had little difficulty in identifying extricable errors of law.<sup>46</sup> Additionally, the ONSC overturned the arbitrator's decision even while applying a standard of reasonableness, leading one commentator to suggest that "[t]he reasoning employed by the [ONSC] suggests the application of something closer to a 'correctness' standard."<sup>47</sup>

In summary, by heightening the requirements for leave to appeal and by lowering the standard of review on those cases which do reach the appeal stage, *Sattva* will generally result in fewer successful appeals of arbitral decisions. Nevertheless, the ability of parties to contract around the *OAA*, as well as the recent *Ottawa* decision, give rise to the possibility that *Sattva*'s impact on appeals may be slightly less extensive than it first appeared.

## II. *SATTVA* AND PROCEDURAL GROUNDS FOR JUDICIAL REVIEW OF COMMERCIAL ARBITRAL DECISIONS

While *Sattva*, on its surface, says little regarding procedural grounds for judicial review, the concepts proposed by the SCC have the potential to fundamentally reshape the ways in which courts set aside decisions under the *ICAA* and the *OAA*.

As noted above, procedural oversight of arbitral decisions generally takes the form of a jurisdictional inquiry to determine whether the arbitrator or arbitral tribunal exceeded its authority. Pre-*Sattva*, once a court labelled a procedural challenge one of jurisdiction, as occurred in both *Cargill ONCA* and *Myers*, a correctness standard of review followed almost automatically.<sup>48</sup> However, *Sattva*'s introduction of the idea that contractual interpretation is a question of mixed fact and law should militate against the correctness standard in such cases.

Furthermore, the SCC in *Sattva* succeeded, to a large extent, in maturing the three themes that emerged in the pre-*Sattva* case law on procedural review. The interrelated themes of administrative law applicability and the use of jurisdictional language in the oversight of arbitral awards have changed significantly. Most notably, the courts' habit of using jurisdictional analysis to set aside awards should end with *Sattva*. To begin with, whether the Court in *Cargill ONCA* should have used a jurisdictional analysis at all, even pre-*Sattva*, is doubtful. There are two reasons to question the ONCA's methodology. First, in *Dunsmuir*, the SCC warned courts against labelling issues "jurisdictional" too freely.<sup>49</sup> Pre-*Dunsmuir*, Canadian courts had been quick to do so, which had resulted in many decisions overturning those of arbitrators on standards of correctness. The SCC in *Dunsmuir* pointed out that jurisdictional language undermined the general trend in Canadian law towards deference to administrative tribunals.

Post-*Sattva*, the argument against using jurisdictional language in the context of judicial review of arbitral decisions is even stronger. As mentioned above, *Sattva* explicitly incorporated many aspects of the reasoning in *Dunsmuir* into the arbitration context, including the reasoning relating to the standard of review applicable to questions of law. The SCC accepted that a standard of correctness should apply rarely and only to certain types of questions of law, such as those "of central importance to the legal system as a whole and outside the adjudicator's expertise".<sup>50</sup> Nowhere in *Sattva* did the SCC incorporate *Dunsmuir*'s analysis of "true questions of jurisdiction".<sup>51</sup> Given that the SCC mentioned that differences between the commercial and statutory tribunal contexts "mean that the judicial review framework developed in *Dunsmuir* [...] is not entirely applicable to the commercial arbitration context,"<sup>52</sup> it is unclear whether the SCC intended "true questions of jurisdiction" to constitute a basis for applying a correctness standard to a question of law.

To summarize, *Dunsmuir*'s warning to avoid jurisdictional analysis, combined with *Sattva*'s approval of the *Dunsmuir* presumption that the standard of review for questions of law should be reasonableness, indicate that courts should rarely resort to such analysis in order to give effect to the procedural review provisions of the *ICAA* and *OAA*. Rather, review pursuant to both statutes should generally be conducted on a standard of reasonableness and without resorting to the limited concept of jurisdiction.

The second reason to question the application of the correctness standard of review, and one which reinforces the theme of curial deference to arbitrators in the pre-*Sattva* jurisprudence, is that relative expertise in the commercial arbitration setting is strongly on the side of the arbitrators. Prior to *Dunsmuir*, the relative expertise of an administrative tribunal was a critical factor in evaluating whether or not the tribunal should receive deference.<sup>53</sup> Deference, in the context of administrative law, was fundamentally tied to the idea that administrative tribunals have expertise in the interpretation of their enabling statute. *Dunsmuir* has retained the prominence of relative expertise in the standard of review analysis. Commenting on past jurisprudence, the SCC in *Dunsmuir* stated that "deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."<sup>54</sup>

*Sattva* explicitly incorporated the *Dunsmuir* emphasis on expertise into consensual arbitrations. In discussing the similarities between judicial review of administrative tribunal decisions and appeals of arbitration awards, the SCC stated that:

[...] as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties.<sup>55</sup>

By doing so, the SCC laid the groundwork for the resolution of the third theme raised by the pre-*Sattva* jurisprudence: the uneasy relationship between the concepts of deference in the commercial arbitration and administrative law concepts.

Although the SCC in *Sattva* did not make the point clearly, the determination that contractual interpretation is a question of mixed fact and law should also prove the relative expertise of arbitrators over reviewing courts. Pre-*Sattva*, when many courts considered contractual interpretation a question of law, proving the judiciary's relative expertise in the area would have been straightforward. As in the human rights context, a court could claim relative expertise over an arbitrator or arbitral tribunal in the interpretation of laws.<sup>56</sup> Arbitrators would be unlikely to have claim to relative expertise in any one contract or on principles of contractual interpretation.

Post-*Sattva*, courts should assume that commercial arbitrators have relative expertise in their ability to interpret arbitration agreements. Since contractual interpretation is a question of fact and law, the argument that courts have relative expertise in the law and therefore should not defer in matters of contractual interpretation has lost its authority. As decision-makers of first instance, arbitrators are responsible for making findings of fact. Furthermore, arbitrators generally have excellent credentials for making such findings. Parties to arbitration agreements are likely to choose commercially sophisticated arbitrators to resolve their disputes: as an example, one commentator remarked that the arbitrator in *Sattva* was "a seasoned commercial arbitrator and retired professor of corporate law".<sup>57</sup> Such arbitrators should be expected to have expertise relative to courts in their ability to uncover and interpret relevant commercial facts. Again, a comparison to human rights tribunals is instructive; in *Mossop*, LaForest J commented that "[t]he superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context."<sup>58</sup> LaForest J's reasoning applies

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easily to the expertise of commercial arbitrators. Thus, by classifying questions of contractual interpretation as falling more squarely within the expertise of arbitrators, *Sattva* has almost assured that arbitrators will have their interpretations reviewed on a standard of reasonableness.

## 5. CONCLUSION

*Sattva* will have far-reaching effects on the commercial arbitration regime in Ontario, changing the deference shown during both substantive and procedural judicial oversight.

Reversal of arbitral awards on substantive grounds, which parties to an arbitration can obtain either through appeals on questions of law through the OAA or by inserting appeal clauses into their arbitration agreements, is likely to be less common than it was pre-*Sattva*. Parties wishing to overturn an arbitral decision will have more difficulty extracting valid grounds of appeal, and even if the ONSC agrees to hear the case on its merits, *Sattva* has encouraged appeal courts to exhibit heightened deference to arbitrators. Given the unlikelihood that many parties will seek to insert additional grounds of appeal into contracts involving arbitration, *Sattva* is likely to decrease both the number and success of arbitral appeals.

Although the implications are less straightforward than those to do with substantive oversight, *Sattva* has also changed the conceptual underpinnings of procedural review. Prior to *Sattva*, courts had used the procedural oversight provisions of the OAA and ICAA to aggressively overturn arbitral decisions on the basis of jurisdictional errors. Through its integration of *Dunsmuir* reasoning into arbitral review and its pronouncements on the relative expertise of arbitrators in interpreting contractual agreements, *Sattva* has encouraged a more deferential approach to questions which courts formerly classified as jurisdictional.

*Sattva* is likely only the first step in reconciling administrative law and the law surrounding judicial oversight of arbitral

decisions. More cases are needed, for example, to establish the extent to which the principles of *Dunsmuir* apply to arbitral review. Nevertheless, *Sattva* indicates that deference to the relative expertise of arbitrators will be the probable basis for future developments. 🏠

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43 *Sattva*, *supra* note 1 at paras 49, 52, 63-66.  
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45 Michael A Marion, "The Sattva Case and Its Importance To Domestic Arbitration  
46 In The Canadian Energy Industry" (19 November 2014), CanLII, online: <<http://canliiconnects.org/en/commentaries/31335>>.  
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49 See, for example, the decision in *Sattva BCSC*, *supra* note 35, in which the  
50 BCSC did not characterize a question of law as jurisdictional yet still applied a  
51 correctness standard of review.  
52 2014 ONSC 3838, 245 ACWS (3d) 268 [*Ottawa*].  
53 *Ibid* at paras 38-39.  
54 Brian Kolenda, "The first (tentative) steps toward the application of Sattva in  
55 Ontario" (16 September 2014), Lenczner Slaght LLP, online: <[www.litigate.com/the-first-tentative-steps-toward-the-application-of-sattva-in-ontario](http://www.litigate.com/the-first-tentative-steps-toward-the-application-of-sattva-in-ontario)>.  
56 As mentioned earlier, in *Myers*, the Federal Court applied two standards of re-  
57 view. For the purposes of this portion of the essay, it is important to note that the  
58 Court applied the correctness standard to the arbitrator's definitions of words in  
59 the contract at issue: see *supra* note 17 at para 60.  
60 *Dunsmuir*, *supra* note 13 at para 35, quoting *CUPE, Local 963 v New Brunswick*  
61 *Liquor Corp*, [1979] 2 SCR 227 at p 233, [1979] SCJ No 45.  
62 *Sattva*, *supra* note 1 at para 106.  
63 For *Dunsmuir*'s discussion of "true questions of jurisdiction", see *supra* note 13  
64 at para 59.  
65 *Sattva*, *supra* note 1 at para 104.  
66 *Pushpanathan*, *supra* note 16 at para 32.  
67 *Dunsmuir*, *supra* note 13 at para 55.  
68 *Sattva*, *supra* note 1 at para 105.  
69 See, for example, LaForest J's concurring opinion in *Canada (Attorney General)*  
70 *v Mossop*, [1993] 1 SCR 554 at para 46, 100 DLR (4th) 658 [*Mossop*].  
71 Kenneth J Glasner and William G Horton, "Judicial Review of Commercial Arbi-  
72 tration Awards North of the 49th Parallel" (2014) 32:10 Alternatives 151 at 151.  
73 *Mossop*, *supra* note 56 at para 46.

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# DIVORCE MEDIATION AND WELLBEING:

## Exploring the Impact of Divorce Mediation Compared to Traditional Adversarial Processes on Satisfaction and Psychological Wellbeing of Parents and Children

The family justice system in Ontario is in a crisis,<sup>1</sup> as too many families are spending too much time and money in the adversarial system.<sup>2</sup> The courts are congested, and the needs of family members going through divorce are not being met. In response to the call for widespread changes, in 2011, the Ontario Ministry of the Attorney General chose to fund court-connected family mediation throughout the province.<sup>3</sup>

Given the high rates of divorce, particularly those involving conflict, and high costs of time and money, creating more family-friendly intervention programs, including mediation and other forms of alternative dispute resolution (ADR), has been of pivotal importance. However, little research has been conducted to determine how parents and children in post-separation family relationships are psychologically affected by mediation<sup>4</sup> versus traditional adversarial settlement procedures.<sup>5</sup> Given that government funded family mediation services are now available in family courts in Ontario,<sup>6</sup> this paper explores the impact of mediation on satisfaction and psychological wellbeing of parents and children compared to traditional adversarial methods.

### BACKGROUND

Over the past several years, there has been a growing consensus that the family justice system is in need of a change. As stated by the Ministry of the Attorney General:

*The judiciary, members of the bar and the mediation and mental health communities from across the province have increasingly voiced concerns about a justice system that too many believed to be too confusing and too confrontational.<sup>7</sup>*

In order to improve the experience and outcomes of families going through divorce,<sup>8</sup> in 2011, Ontario began offering a “comprehensive suite of mediation and information services”.<sup>9</sup> The features of this program include the completion of a mandatory information program, which provides general information about separation and divorce and process options including court-connected mediation services (both on and off site) available throughout the province, as well as informational materials and referral services.<sup>10</sup>

The introduction of this program has many positive benefits for families pursuing the process of divorce. First, it expands program choices for divorcing families.<sup>11</sup> Prior to this, only some Ontario communities had access to private family mediation services. Next, it provides a more cost-effective and efficient alternative.<sup>12</sup> In particular, the program offers voluntary family mediation at a substantially discounted rate for private providers, as well as a no charge option for on-site court connected mediation services.<sup>13</sup> Families now have the option to have family legal issues settled through the family mediation program and filed with the courts within a shorter period of time,

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which otherwise may have been inaccessible.

There are some concerns with the program, most notable of which include limitations of the issues being mediated, limitations of staff resources, and the mediator's symbiotic relationship with the court system.<sup>14</sup> There are also some budgetary concerns including retaining the most qualified mediators, as well as ensuring consistency throughout the province.<sup>15</sup> Additional concerns relate to screening for cases of domestic violence and power imbalances in an appropriate manner and ensuring equal access of the program throughout the province.<sup>16</sup> Nevertheless, the Ontario Family Mediation Program offers the potential to reduce the financial cost of separation and serve important family goals.

## **IMPACT OF MEDIATION VERSUS LITIGATION ON DIVORCING PARENTS AND THEIR CHILDREN**

### **A. IMPACT ON DIVORCING PARENTS**

There are several clear benefits of mediation for all parties involved; namely, mediation decreases the likelihood of couples pursuing litigation, lowers the cost of divorce and increases spousal satisfaction with settlement outcomes.<sup>17</sup> As will be discussed below, there are also potential psychological benefits that may arise from mediation as compared to adversarial methods.

When evaluating satisfaction and psychological outcomes post-divorce, comparing parties who underwent mediation versus adversarial methods may be fraught with confounding factors. The intrinsic personalities and attributes of parties choosing to pursue mediation versus adversarial methods may greatly impact the predicted satisfaction and psychological outcomes.<sup>18</sup> Emery, Sbarra & Grover (2005) conducted a randomized trial, randomly assigning couples to mediation and non-mediation groups to negate these potential confounding factors and see the true effect that mediation may have on satisfaction over the long term (followed for 10 years).<sup>19</sup> The researchers found that a brief intervention of only five hours of mediation greatly increased satisfaction with the divorce settlement, improved communication between ex-spouses and decreased post-divorce conflict between parties.<sup>20</sup> As well, mediation generated higher levels of contact between non-resident fathers and their children.<sup>21</sup>

Given that ongoing conflict between ex-spouses after divorce has a negative impact on both men and women's mental health, as shown by Symoens et al (2013),<sup>22</sup> it may be expected that the decreased level of conflict associated with mediation may have a positive effect on mental health post-divorce. In another study focused on the psychological outcomes of divorce, Walton et al (1999) found decreased levels of anxiety, insomnia, social dysfunction and overall ratings of distress in couples pursuing mediation versus

adversarial methods.<sup>23</sup> Interestingly, however, no changes in depression or somatic (physical manifestation of emotional pain) complaints were noted. While no changes in depressive symptoms were found by this study, Emery, Sbarra & Grover (2005) suggested that mediation might actually improve mental health outcomes if combined with other interventions targeting psychological well being of the parents and children involved.<sup>24</sup> Of interest, they found that parties were still satisfied six weeks, a year and a half and twelve years following the initial mediation settlement.<sup>25</sup> Based on this, it appears that mediation can have incredible benefits on individuals' psychological health, wellbeing and satisfaction over the long-term.

Taken together, mediation appears to improve party satisfaction and communication, and decrease conflict and psychological distress of divorcing parties, and is associated with long-term satisfaction.

### **B. GENDER DIFFERENCES**

Both parties in mediation have been shown to have greater satisfaction and psychological wellbeing when utilizing mediation services as opposed to traditional adversarial processes.<sup>26</sup> Interestingly, however there are large experiential differences between the genders.<sup>27</sup>

Results are highly variable when studying gender differences in mediation;<sup>28</sup> however, certain themes have emerged throughout various studies. Emery, Sbarra & Grover (2004) found that there is greater improvement in satisfaction for men compared to women when utilizing mediation services.<sup>29</sup> That is to say, the difference between levels of satisfaction for men comparing mediation to no mediation is larger than the difference found for women. They suggest that this difference is seeded in the improved outcomes for fathers with mediation.<sup>30</sup> Specifically, during litigation, fathers are likely to have no physical or legal custody.<sup>31</sup> Conversely, with mediation, fathers may have legal (but not physical) custody.<sup>32</sup> For women, regardless of me-

diation involvement, they were likely to have both physical and legal custody.<sup>33</sup> This difference may explain the noted gender difference in satisfaction with mediation compared to traditional adversarial processes.

Another interesting gender difference is the relative 'voice' given to men and women in mediation compared to traditional adversarial processes, such as litigation. In litigation, men reported feeling that they understood the women's point of view more as the women were given a greater opportunity to express their perspective. Conversely, in mediation, men felt that they were given more of a voice and women began to understand the ex-husband's perspective more.<sup>34</sup> The effect of this relative voice on party satisfaction is unclear but is still worth noting.

Overall, some studies have found significant gender differences in satisfaction with divorce mediation.<sup>35</sup> Yet these findings do not show consistent trends. Thus more research is needed to understand these gender differences and their implications for improving the practice of divorce mediation.<sup>36</sup>

### **C. IMPACT ON CHILDREN OF DIVORCING PARENTS**

Several studies have shown that children of divorce, on average, do not experience higher rates of serious psychological, emotional or behavioural problems.<sup>37</sup> However, as will be discussed below, numerous modifiable factors may help or hurt a child's ability to adjust during the divorce process.<sup>38</sup> Furthermore, several studies have shown that early childhood adversity may have long lasting effects on a child's mental health.<sup>39</sup> Therefore, the milieu of divorce may serve to have lasting positive (or negative) effects on the children involved.

Choosing mediation over traditional adversarial methods may provide a pivotal protective factor that may have positive lasting effects. This is supported by several studies involving children of divorce. Beck & Beck (1985) found that a child's adjustment during divorce is improved by the presence of

cooperative spouses.<sup>40</sup> Given that mediation facilitates an environment of cooperation, mediation may promote such positive adjustment. Beck & Beck (1985) also found that mediation improved the long-term welfare of divorcing spouses, another potentially protective factor for children's adjustment.<sup>41</sup> Benjamin & Irving (1995) corroborated their results showing that mediation improved co-parental relations, decreased spousal conflict and improves spousal communication.<sup>42</sup> Kelly (2004) also supports the positive effects of mediation as evidenced through her research conducted in several US states and the Family Mediation Canadian Pilot Project,<sup>43</sup> concluding:

*When contrasted to parents in adversarial processes, parents using a more extended mediation process experience a decrease in conflict during divorce, and in the first year or two following divorce, they are more cooperative and supportive of each other as parents and communicate more regarding their children, after controlling for any pre-intervention group differences.*<sup>44</sup>

Taken together, mediation may serve to benefit children of divorce through their adjustment process and beyond. More specifically, given that mediation may promote spousal cooperation and communication and decrease spousal conflict, this may lead to improved psychological outcomes of children.

Overall, given that the divorce process may have lasting positive (or negative) outcomes on children's physical and mental health,<sup>45</sup> the impetus for improving the experience of the divorce process is of paramount importance.

#### **PROPOSED MECHANISM UNDERLYING INCREASED SATISFACTION WITH MEDIATION AS OPPOSED TO LITIGATION**

Both mediation and traditional adversarial processes have the same goal in mind, namely, settlement.<sup>46</sup> However, the means by which they achieve this endpoint varies drastically.<sup>47</sup> Mediation facilitates a cooperative process whereas adversarial pro-

cesses foster a combative process. This difference in process may explain why parties are more satisfied with mediation versus traditional adversarial processes. In particular, several key points of the process have been identified in the literature, which may account for improved satisfaction with mediation.

The first key difference, as described by Emery et al (1991), is the promoted mindset of working towards a 'win-win' settlement with mediation versus a 'win-lose' settlement with litigation.<sup>48</sup> With litigation, parties have separate representation, with each litigator arguing and competing for the best result for their client. This mindset implies that at the end there will be a winner and a loser. Conversely, mediation fosters a mindset of working on mutual cooperative terms towards a settlement where both parties are 'winning'.<sup>49</sup> This mindset may allow for the greatest satisfaction of both parties.

Next, the communication process in mediation differs significantly from litigation. As opposed to litigation where lawyers discourage communication between clients, mediation requires such communication. The mediator makes sure that each party has an opportunity to express his or her feelings and to be heard, while avoiding nonproductive arguments and active blaming. Parties feel that their voices are heard and their needs are being considered in the settlement process.<sup>50</sup>

Mediation creates a safe place for open communication in a private setting, thus avoiding despair of airing grievances publicly.<sup>51</sup> Mediation also promotes spouses taking an active, rather than passive role.<sup>52</sup> Taking this active role during the mediation process may promote long lasting improved communication skill between the ex-spouses, emphasizing problem solving instead of active blaming. Perhaps, most notably, these communication skills may be utilized to improve communication around issues with their children, by focusing on shared interests.

Next, these processes produce differ-

ent kinds of agreements.<sup>53</sup> Given that mediation encourages active communication, it is able to create unique settlement agreements that fit the specific needs of the parties. Conversely, the courts are often limited by time constraints. As a result, they tend to use a set of procedures that produce very similar outcomes. Although both processes may create just outcomes, mediation may allow for better satisfaction of parties involved through the creation of personalized settlements.<sup>54</sup>

Emery, Sbarra & Groves (2005) propose four other 'active' ingredients in the structure of mediation that may contribute to increased satisfaction of parties: 1) taking the long view; 2) education about emotions; 3) business like boundaries; and 4) avoiding becoming adversaries.<sup>55</sup>

First, mediation may promote taking the long view by helping parents to see the vital importance of cooperation over their children in the long run. Second, mediation promotes the acknowledgement of emotion and healthy redirection of attention rather than remove emotions from the discussion as promoted in litigation. Third, promoting the development of business like boundaries may greatly facilitate the ongoing relationship in co-raising their children. Creating business like boundaries may allow for healthy problem solving methods rather than catastrophizing every problem taking an 'I'll see you in court' type approach to all problems. Lastly, mediation may minimize continued battling in and outside the courtroom.<sup>56</sup>

Therefore, unlike the conventional adversary system, mediation provides an explicit model for adaptive behavior. Mediation promotes collaboration, continued communication, personalized decision-making and the acquisition tools for long term use by ex-spouses for when new problems will undoubtedly arise. These key features of the mediation process promote increased satisfaction and psychological wellbeing of all parties involved, including the children of the ex-spouses.



### IMPACT OF MEDIATOR AND THE MEDIATOR'S APPROACH ON EFFECTIVENESS OF MEDIATION

While mediation overall appears to improve party satisfaction, variability between mediators may affect the relative level of satisfaction experienced by the parties involved. Indeed, there is a high degree of variability between mediators and a heterogeneous pool of over one hundred mediation techniques from which to choose.<sup>57</sup> Certain key features of a 'good' mediator may be applicable to all cases while other features may be variable with the 'goodness of fit' between the mediator and parties involved. Both of these categories

will be discussed in turn.

A key feature for mediators to increase long-term satisfaction is focused on maintaining an amicable relationship between ex-spouses. Preserving the relationship of the ex-spouses to allow for functional communication in the future should be a top priority above efficiency of mediation and other hidden agendas. While placing the focus on the relationship may require more time and delay to reaching an agreement, Wall & Dunne (2012) suggest that the long-term benefits undoubtedly outweigh the short-term cost.<sup>58</sup>

The selection of the right techniques for the right family is also crucial to a successful mediation.<sup>59</sup> The recognition that no one technique is 'best' for all families is vital to this process. Cultural and individual variability of both the mediator and the family should be recognized and the mediation process should be tailored accordingly.<sup>60</sup> A breadth of knowledge of various mediation techniques and which may be best suited for certain situations and certain personalities may aid in maximizing satisfaction and minimizing unneeded conflicts.

Also of note is a discussion of the per-

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sonalities of families who decide to pursue mediation rather than litigation.<sup>61</sup> While the previously discussed study randomized couples to mediation versus no mediation, showing a positive effect on satisfaction,<sup>62</sup> the real world setting is not randomized and therefore pre-divorce characteristics may greatly impact the satisfaction yielded. While there is no strong evidence to support significant differences between families choosing mediation versus litigation route, there may be differences that have not been measured. Intuitively, couples pursuing mediation may already hold their relationship and long-term communication as priorities during their divorce, therefore, increasing the likelihood of satisfaction. Higher conflict divorces may likely go towards litigation where hostile ex-spouses may be left unsatisfied and angry regardless of the outcome.

The other variable pre-divorce factors may include the choice to pursue public versus private mediation. In particular, the program offers voluntary family mediation at a substantially discounted rate for private providers as well as a no charge option for on-site mediation services.<sup>63</sup> The differences between populations who choose to pursue public versus private mediation may impact post-divorce satisfaction, as there may be variability in socioeconomic status and expected outcomes when fees have been paid. As well, mindfulness of the characteristics of families' cultures and individual personalities and adjusting techniques used accordingly may also be important, however this is beyond the scope of this article.

Taken together, certain key features of a mediators approach may work to help or hinder a satisfactory outcome.

## RECOMMENDATIONS

Current data suggests that mediation has many positive effects on satisfaction and psychological wellbeing of families involved. However, several key recommendations have been identified which may help to further improve family satisfaction and wellbeing during and after the divorce process.

Firstly, more research is needed in the area of divorce mediation. The discussed data is minimal and outdated. Therefore, the discussed studies might not accurately capture the reality of divorce in today's society. New studies to revisit the effect of litigation versus mediation may be helpful to have more generalizable results to the current setting. Specifically, there is limited data available, which identifies the psychological impact of mediation on families (parents and children included). Understanding the psychological impact may also provide support for the promotion of mediation in divorce proceedings.

This data may also provide an incentive for the government to increase resources and spending priorities to allow the mediation program to reach its full potential and to responsibly serve clients of Ontario's Family Justice system.<sup>64</sup> Indeed, continued and increasing funds and resources available for mediation may be an important future goal. The data may also be disseminated to the public to better inform them of the benefits of mediation and the presence of more options for an amicable divorce.

In addition, future research should identify more specific features of mediation, which may be helpful or harmful to guide future divorce mediation proceedings in the best way possible. These results may subsequently be disseminated to the public to inform all mediators in Ontario to aid in the best practice principles for mediation. This knowledge and use of evidence based best practice principles may further impact sat-

isfaction and psychological wellbeing of families involved.

The development of a holistic approach to be coupled with the mediation process may also greatly improve psychological outcomes for families involved. This may be particularly advantageous for men of divorce given that they are more likely to suffer from depression after divorce<sup>65</sup> and less likely to seek professional help.<sup>66</sup> Psychological outcomes should be a priority as this factor may determine the trajectory of parties involved during this major life change (i.e. divorce). An improved psychological state may allow parties to still be contributing members of society post-divorce rather than being impaired by the stress of the divorce. Of note, these psychological outcomes of interest include outcomes for both parents and children of divorce.

In addition, the psychological impact of mediation for same-sex dissolutions requires further study.

The holistic approach may include the partnership of the mediation process with services for support of family psychological needs (post-divorce stress, depression and decreased ability for self-care), social needs (post-divorce financial planning, relocation assistance), support for reconfiguring the family (decoupling to co-parenting) and support for parenting (parenting skills, healthy communication techniques, knowledge of effect of divorce on children). These services may come in the form of individual counseling, psycho-educational support groups and use of

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online resources. Coupling these services with the mediation process may greatly improve party satisfaction and long-term post-divorce physical and mental health of parents and children involved.

In summary, more research is needed to prove or refute that mediation is helpful to families undergoing divorce in the present day. These results may provide merit for increased funding of provincial divorce mediation programs in

Ontario. Increased knowledge of the particular characteristics of effective mediation may also allow for improved evidence based best practices of mediators of divorce. Additionally, the mediation process may be further enhanced by the incorporation of a holistic approach, which may include collaborating with psychosocial services to aid in the transition of divorce. These future directions may become increasingly important as the rate of divorcing couples in Ontario remains high and the

sustainability of the current system remains unsatisfactory.

As our world becomes more complex, the need for services like mediation to help deal with conflicts in a less adversarial, and formalistic way increases.<sup>67</sup> Ontario's court connected divorce mediation program offers great potential for improving the satisfaction and psychological wellbeing of parents and children over traditional adversarial methods. 🏠

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- 61 Emery, "Divorce", *supra* note 18 at 25.
- 62 Emery, "Child Custody", *supra* note 31.
- 63 Madsen, "Part I", *supra* note 11.
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- 65 Michelle Rotermann, "Marital Breakdown" (2007) 18:2 Health Rep 33.
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# MED/ARB IN THE PARENTING COORDINATION PROCESS:

## THE CHALLENGE OF ARBITRATION IN CONTINUING RELATIONSHIPS

CRAIG NEVILLE

We now have over five years of experience with parenting coordination in British Columbia and have acquired some hard earned insights along the way. Mediating and arbitrating parenting issues with the same parties over and over again (during one year renewable contracts) has been educational from both practical and legal perspectives.

### WHAT IS PARENTING COORDINATION?

The *Guidelines for the Practice of Parenting Coordination* (approved as APA policy by the American Psychological Association Council of Representatives in February of 2011) describe PC practice as follows:

Parenting Coordination is a non-adversarial dispute resolution process that is court ordered or agreed upon by divorced and separated parents who have an ongoing pattern of high conflict and/or litigation about their children. The underlying principle of the parenting coordination intervention is a continuous focus on children's best interests by the Parenting Coordinator in working with high conflict parents and in decision-making. Parenting Coordination is designed to help parents implement and comply with court orders or parenting plans, to make timely decisions in a manner consistent with children's developmental and psychological needs, to reduce the amount of damaging conflict between caretaking adults to which children are exposed, and to diminish the pattern of unnecessary re-litigation about child-related issues.

Another perspective comes from Dr. Allan E. Barsky (who might be described

as a skeptic of PC work) from an article published in the *Negotiation Journal*, January 2011 entitled "Parenting Coordination: The Risks of a Hybrid Conflict Resolution Process," in which he noted:

Parenting Coordination is a conflict resolution process that blends the roles of mediator, decision maker, monitor, assessor, educator, counselor, and enforcer for families involved in high conflict divorces.

Essentially, using mediation and arbitration skills, (which we as Parenting Coordinators refer to as "**consensus building**" and "**determination making**") we manage the implementation of parenting plans for parents who have separated and "settled" their parenting issues. Settled is in quotation marks because we are most often involved where conflict remains high notwithstanding the creation of a parenting plan either pursuant to a separation agreement or through the court. Dr. Barsky focused on the multiple roles which it could be assumed were being worn by parenting coordinators in addressing parenting issues. In reality the practice has evolved in British Columbia more narrowly. We appreciate the limited capacity we have to adjudicate civility or assess any parent's psychological state. We monitor and implement, we educate, we mediate, and we make decisions. We rely on other professionals for parent counselling, education about child development issues, and rely on the court for enforcement of our determinations.

### HOW ARE WE RETAINED?

Parents, or more often their lawyers or the courts, typically contact our roster members directly or visit our [website](#)



Craig Neville is a partner at the Vancouver Law Firm of Watson Goepel LLP. His practice is focused exclusively on family law including: collaborative law, mediation, arbitration, and parenting coordination. He is a member of BCAMI, ADRIC, and AFCC, and is past President of the BC Parenting Coordinators Roster Association.

to retain one of the 30 plus members on our roster. The parties enter into a PC Agreement for between six months and two years to have us assist with implementation of their parenting plans.

The standard form parenting coordination agreement used by roster members in BC is a binding contract amongst the parents and the PC [parenting coordinator] and details all aspects of the professional relationship including provisions relating to:

- Duration of the agreement
- Details with respect to the PC's role and function
- A commitment not to attempt to return to court on issues within the jurisdiction of the PC
- Details of the scope of work which can be done through mediation (consensus building) or arbitration

- (determination making)
- Working directly with the children involved
- Accessing relevant outside resources like child specialists, and
- Details of the financial retainer.

The **scope of parenting coordination work** comes from the parenting coordination agreement itself and includes terms that the PC will work with the parties to:

- assist with the implementation, maintenance and monitoring of an agreement, order or written decision concerning children (“Parenting Plan”);
- settle anticipated or actual conflicts in children’s scheduling;
- clarify and resolve different interpretations of or ambiguities in a Parenting Plan, and develop new provisions to address situations that were not anticipated;
- monitor children’s adjustment to a Parenting Plan;
- facilitate children’s relationship with each Parent;
- assist the Parents in communicating more effectively with one another;
- facilitate the exchange of information about child(ren) and their routines;
- assist the Parents in developing provisions for the transport of clothing, equipment, toys and personal possessions between the Parents’ households;
- assist the Parents in resolving disputes between them respecting parenting responsibilities;
- subject to paragraph 3.2, these additional services: and here is where parents can agree to expand the scope of our work to include such matters as addressing child support changes and contributions to special expenses of the children.

So the ambit of the work is broad but not without its limits. Paragraph 3.2 of our agreements sets out what PCs **cannot** do which is make binding decisions on the following issues:

- a change to the guardianship of a child;
- a change in the allocation of paren-

- tal responsibilities;
- giving parenting time or contact with a child to a person who does not have parenting time or contact with the child;
- a substantial change to the parenting time or contact with a child;
- the relocation of a child;
- any matters excluded by this agreement, or by court order; or
- that which would affect the division or possession of property, or the division of family assets.

Of fundamental importance to the work PCs perform are two points. Firstly, once parents have agreed to the term of the appointment they cannot cancel the agreement or withdraw from it except by consent of both parents or, where the PC is appointed by court order, by applying to the court for cancellation of the retainer. The PC can terminate the agreement at his or her discretion.

Secondly, the **parties are bound by determinations** written by PCs that, with passage of the new *Family Law Act* in British Columbia in 2013, are **enforceable as court orders** when filed with the court.

The *Family Law Act* includes provision at s.19 for review applications to set aside or vary determinations made by a PC if the court is satisfied that the PC:

- acted outside his or her authority, or
- made an error of law or mixed law and fact.

It should be noted that while the work is synonymous with mediation and arbitration, those words are not used, for good reason. **In summary, it’s not called “arbitration” so the BC Arbitration Act with its attendant obligations doesn’t apply and there is no confidentiality so the work is not designated as “mediation”.** The Family Law Act addresses the legal position of PCs in BC and the scope of our work. The Family Law Regulation in BC then addresses the limits of our

jurisdiction and who can do the work.

There are currently no issues relating to jurisdiction where parents agree to retain us or where one party opposes continued use of a PC when an initial voluntary agreement to retain a PC was by agreement.

The BC Court of Appeal, however, has recently opined on whether or not there is jurisdiction for the court to order the appointment of a PC where the appointment is not by consent. In *Fleetwood v. Percival* BCCA 2014 502. Madam Justice Saunders commented in part:

(27) These are early days in the application of the parenting coordinator provisions of the *Act*. I recognize that the legislation reflects a shift in approach to disputes concerning the parenting of children, giving legislative approval to several forms of dispute resolution and facilitation that offer the prospect of reduced conflict or a moderated litigation climate in disputes affecting children. It is to be hoped that the legislative encouragement will have beneficial effects generally for the community of children impacted by family breakdown.

(28) The legislation, however, has some highly unusual features when considered from the principles of freedom to contract, freedom of association, and enforcement of court orders.

(29) The provisions invoked appear to contemplate what is akin to a mandatory injunction, as to which courts have been cautious in application. I compare this to a mandatory injunction because the provisions would sanction the court order set out in paragraph 10 requiring Ms. Fleetwood to provide a list of names to do that which she does not agree to, and to execute documents, by which I take it to mean a written agreement without which the parenting coordinator cannot act (s. 6 of the Regulation). Yet that parenting coordinator would be outside the judicial umbrella, in an arrangement that gives that person in the private realm considerable authority to make demands on the par-

ties and to make decisions ostensibly binding on the parties. As part of that arrangement, the court would effectively spend the parties' money on private services, the need for which is not agreed by the parties and which, for example, may be better directed to family expenses. But I respectfully ask under what organizing principle may the court require a party to pay moneys to a private person, except as may be necessary within the court processes for ultimate determination of an issue, or as a remedy to right a wrong, or as required by an existing legal obligation such as child support, or as a sanction? Although s. 224 gives the court authority to order the fees incurred to be paid by one party alone, it does not seem to me that it expects such an order to be made simply because one party is unwilling to have the appointment made. (33) By posing these questions, I do not detract from the advantage that may be achieved in many circumstances by agreed parenting coordination and application of the spirit that animates the legislation, nor denigrate the skills such a parenting coordinator may have. There may be good answers to the questions I have posed, and trial judges grappling with the new provisions may craft orders that are sensitive to the aspects of the legislative framework that trouble me.

The decision raises important questions but ones which have not infrequently arisen in the past. The courts in family matters routinely order parties (over their objections) to jointly engage experts for numerous reasons relating to business valuations, custody reports, and real estate appraisals. The suggested distinction that the expense of a PC is not occurring "within the court processes" is, with respect, perhaps a distinction without a difference when considered in the context of the courts' continuing jurisdiction over children notwithstanding the end of litigation. And, in the case of the Family Law Act, the courts are given continued jurisdiction over the work of PCs with the wording of s.19 of the Act and the right to

apply for review of a decision if the PC acted outside his or her authority or committed an error of law or mixed fact and law.

It remains to be seen how this will unfold but the lower courts have continued to order the retaining of PCs even where one or both of the parents oppose such an appointment.

It is also interesting that the court speaks to the fact that the financial resources required to retain a PC might be better spent on "family expenses". While that is undoubtedly true if the choice were that simple, but it ignores how high conflict family matters continue to clog the courts and the costs of litigation overwhelm parents without enhancing access to justice.

#### **WHO IN THEIR RIGHT MIND WOULD DO THIS WORK?**

Our roster in BC includes both specially trained mental health professionals and family lawyers. Criteria to be on the BC roster and do this work are significant and include:

- Membership in a professional body with regulatory (disciplinary) powers
- 10 years of experience practicing family law or working in family related practice as a mental health professional
- Mediation training
- Arbitration training
- Family violence training
- Knowledge of child development issues, and
- Training in family systems and attachment theory.

The parenting challenges we address are varied but not necessarily complex. We often deal with issues relating to schools to be attended, support to be paid, foreign travel, activities to be chosen, and medical and dental issues. The complexity of the role arises because of the high conflict the parents often bring to the table. Accompanying the high conflict, not coincidentally, are a higher than average numbers of parents with several traits associated with Borderline, Narcissistic, Antisocial, or Histrionic personality disorders.

As a consequence, the professional experience sought from people who wish to do this work is extensive and involves a wide range of skills.

#### **OUR MODEL OF MED/ARB**

As noted, the consensus building phase of dealing with an issue is not confidential so all input relevant to the issue is considered and must be shared with both parents. In my practice when a parent raises an issue for me to consider, the chronology of events typically goes as follows:

1. I immediately ask for both parents to make submissions to me by email with a copy to the other parent or, where the parents are capable of working together, I will call for either a conference call or a three way meeting to assess the possibilities for a consensus driven agreement being reached.
2. The parties make their email submissions on clearly defined issues and then respond in writing to what the other parent has submitted on those issues.
3. Each parent then has a right of reply on issues raised anew in the response from the other parent.
4. Occasionally it will be relevant to obtain third party input from teachers, coaches, doctors, or travel specialists and if such input is sought by me, I will typically talk on the phone to the resource, then send him or her an email summarizing what I understand they said. When they concur, I send the input to the parents and invite their input.
5. There is then an exchange of emails to assess common ground or address misconceptions or look for other potential solutions. If this is taking place in a three way meeting or on a conference call, the process can be quite abbreviated.
6. If consensus is reached, a short written agreement will be drafted and signed by the parents.
7. If no consensus can be reached, my job as PC is to announce that we are going to have to "arbitrate" a resolution of the issue.
8. I ask if there is any information received during the consensus building phase which one of the parents



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considers inadmissible in the determination writing phase or will make comments on that issue myself since the parents may not have much insight into what is or is not admissible. I will then inquire about whether either of them seeks to provide additional evidence for consideration in the determination making phase. If so, that is addressed. If required, from time to time I will indicate that in my view additional third party input should be introduced and will seek that as PC. (Typically though this input will have been sought at the consensus building phase.)

9. If the parents have no further input, I will confirm that I am prepared to make a determination and will reserve to:
  - consider the issues,
  - assess whether I have jurisdiction to make a determination,
  - consider the evidence received and the principles of natural justice, and
  - write a determination.
10. Our written determinations use a format which includes relevant background, the issues to be determined, our jurisdiction to address the issues, a discussion of the relevant facts, the decision itself, and then the reasons for the determination.
11. The determination is then sent, typically by email, to the parents.

What makes this process somewhat unique from a med/arb or arbitration perspective is that we retain a continuing relationship with the parents which may be ongoing for two to four years or more. The implications of that continuing relationship for our decision making are not insignificant. We seek to encourage the continued involvement of both parents. It does not promote the best interests of the children if one of the parents becomes disengaged because of a belief he or she is not being heard or a perception of bias has evolved. Respecting the views of a parent who “loses” on a particular determination by empathizing, in the Reasons, with his or her position, is often very helpful. Carefully elaborat-

ing on the rationale for a decision or reaffirming the important role of both parents serves to mitigate some of the emotional consequences of a negative determination.

#### **BALANCING NATURAL JUSTICE AND KEEPING PARTIES ENGAGED IN THE PROCESS**

Many of our clients come from high conflict litigation spanning multiple years. They have acquired advocacy skills which are second to none and are keenly aware of injustice. Strict compliance with the principles of natural justice is paramount.

Prior to hearing all of the relevant input it is problematic for me to opine on the solution to a particular issue confronting my parenting coordination clients because each problem may need to be resolved in a binding determination if agreement is not reached. To have one of the parents left with the impression I have prejudged the outcome on an issue can undermine my longer term relationship with them. At the same time I want to ensure that the cost of our work is minimized and the input we receive from the parents is focused and relevant. One of the expected outcomes of this work is that, over the initial one or two years of our involvement, the parents have acquired some perspective, put some distance between them and the emotional litigation process, and learned to communicate with a focus on the best interests of the children. We have seen that as one of the important by products of our work when it is successful. If nothing else, the cost of our work encourages parents to try harder at collaborating! In my role as a PC, the issues I frequently address will likely have come to my attention in an email (copied to the other parent) in which often the real underlying issues are well hidden amongst allegations of historical injustices, parental neglect, or general parental misconduct. In my experience it is most helpful to parents (and ultimately their children) to take steps to immediately focus the parents on the issues I have extricated from the email. It is also important to reiterate for them that our work is focused on

the future and improving the parenting relationship they share going forward. If the tendency to focus on past perceived wrongs is not handled with tact and diplomacy, the email exchanges can deteriorate quickly which is not helpful for anyone.

Framing the issue for them is a useful way to narrow the discussion early on. I am also careful to reassure parents that I will only be considering relevant input and this does not include unsubstantiated allegations or unrelated past injustices to which one or the other of them has been subject.

A second effective tool in keeping the process fair for both parties is to remind them that I will not consider hearsay input from them save and except for input which may come from their children. Explaining “hearsay” to those parents who haven’t been enmeshed in the legal system can be an amusing exercise. Family lawyers will not be surprised to learn that seldom in parenting coordination work do the children share the same message with both parents. Rules to help shape the process are critical (both evidentiary and procedural) and the rule against hearsay is of considerable import both legally and in terms of saving time. A separate paper could be done on educating the mental health professionals doing this work on evidentiary and procedural rules including admission of evidence on the views of children. I make sure in my determinations to underscore that I have not considered hearsay and will often point out “evidence” which I have declined to consider for that or any other reason.

Managing the input when considering an issue requires ensuring that each parent has had a full opportunity to be heard. This sometimes requires that tangentially relevant information be addressed by each parent. The goal is to avoid claims, after a determination is made, that a key issue was never discussed and therefore should not be included in the determination.

Sometimes in my practice a full hear-

ing on an issue necessitates that I consider expert evidence on a point or at least input from a third party who is well informed on an issue. A recent example involved parents arguing about whether their teenaged daughters should get the immunization for human papilloma virus. They both began by sending in dozens of pieces of YouTube “research” and quoting from “experts” who supported their respective positions. Having pointed out the shortcomings associated with this type of “evidence” (and gotten permission from both to read the whole of their submissions including hearsay) they agreed to have me consult with the girls’ doctor. Such third party input in my practice, whether from doctors, dentists, teachers, counsellors, hockey coaches, or neighbours, all follows a pattern. I make contact over the phone, tell the person who I am and what I am doing, confirm their input will be shared with the parents, obtain their input and then send them an email re-

peating what they have told me. If they confirm the email is accurate I send it off to the parents and seek their comments before proceeding further. (If the third party needs to edit the email, he or she is permitted to do so before it is sent out).

This process is often abridged from a time perspective if a three way meeting is taking place in my office or we are having a conference call, but the email approach is much easier to manage from an organisational perspective because the pace of the discussion can be hard to manage on a conference call.

All our determinations are in writing unless time is of the essence, in which case we offer to reduce them to writing at a later date if the parents request. There is nothing magic about the format. A determination includes: Background, Issues, Discussion of the evidence, Determination in clear language like that of a court order, and then the Reasons for the determination.

I find it important to the ongoing professional relationship and to my desire to respect the input of both parents, to comment in the determination on the merits of their positions (which sometimes takes some creative writing). That may involve noting what a difficult decision it was and how respectful parents can disagree on what is best for their children. The discussion of the evidence needs to capture the high points of what each has had to say so they know I heard them and the Reasons must clearly address my rationale for the decision. All of this philosophy about decision making has woven through it the need to respect the input of both parents and not leave either of them feeling undermined as a parent.

Lawyers or former lawyers for the parents are rarely involved in this work once we are retained, so the responsibility for assessing compliance with the principles of natural justice is almost always left to the PC. While the prin-

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ciples of natural justice are critical to our work, the day to day issues addressed by PCs rarely require detailed examination of a significant volume of evidence. These are some of the practical solutions which have evolved in our practices as PCs to ensure the principles of natural justice are honoured while we attempt to provide relatively prompt and cost effective access to justice using the med/arb model. It has its moments.

#### AND THE COST OF ALL OF THIS?

It depends! Our PCs who are lawyers charge between \$300 and \$400 per hour and the mental health professionals generally charge from \$175 to \$300 per hour. Many of us charge less than our regular hourly rate for these services. The real cost for parents tends to be a combination of two overriding factors. The first of these factors is the level of continuing conflict which the parents bring to the process and it can be extreme. Most of the parents in this category either cannot meet together based on "no contact" orders or decline to be in the same room....just because. The time therefore involved in problem solving can be significantly higher depending on the level of conflict the parents are bringing with them.

The second factor is the amount of detail in the parenting plan (whether it is in the form of a court order or included in a separation agreement). The less detailed the parenting plan, the more scope there is for conflict between the parents. At the very least, the PC can end up spending a considerable amount

of time filling in the gaps and essentially helping the parents craft the details of a parenting plan.

It is not unusual for me to see court orders which provide for "joint custody and shared parenting" based on a "week on week off" schedule with "all holidays to be shared equally". "In the event the parties cannot agree, the PC shall resolve the dispute." Parents do not in such circumstances need to be particularly innovative to create conflict if they are so motivated. And while more detail in the parenting plan is preferable, it is no guarantee of a tranquil retainer.

I have parents with whom I work and have contact on a weekly basis. Conversely, I have parents who may only contact me once or twice a year to address challenging issues they have simply not been able to resolve despite their best efforts.

For resolution of issues within our jurisdiction the process is more timely than court. We are an email away. The parents are dealing with a professional who has come to know them and, to a certain extent, their children. Without lawyers involved, the process is generally more cost effective than court, notwithstanding parents are "paying for the judge". No issue is too small to be resolved in this process. The parents generally are paying the fees of the PC based on their respective incomes so there is less likelihood of a power imbalance based on economic capacity. For example if one parent earns \$100,000 per year and the other parent

earns \$50,000 per year, the parent with the higher income would pay two thirds of the cost and the other parent would pay one third. There are savings in sharing the cost of one decision maker as opposed to paying for two lawyers and the attendant costs of their services for addressing the same problems. All of these considerations contribute to making the parenting coordination process an attractive "Access to Justice" option despite the potential costs.

Our parenting coordination agreements provide for both retainers and security deposits. The retainers for ongoing work and are topped off from time to time during the year. The security deposit is to address the final account at the end of the term of the appointment or in the event someone attempts to thwart the process by declining to pay. Where accounts are disputed or unpaid in British Columbia, the current requirement is small claims court.

So, the cost? It depends.

The roster feels parenting coordination is one of the most significant innovations in family law in many years. The PC becomes more familiar with the family as time goes on, enhancing his or her ability to identify what is in the best interests of both the children and the parents. It is not necessarily inexpensive but it provides expedited access to justice and a more level playing field when costs are shared based on the income of the parents. 🏠

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# LIONEL J. MCGOWAN AWARDS OF EXCELLENCE IN DISPUTE RESOLUTION — CALL FOR NOMINATIONS FOR 2016

The ADR Institute of Canada, Inc. is calling for nominees for the Lionel J. McGowan Awards of Excellence in Dispute Resolution.

The awards are named in recognition and honour of Lionel J. McGowan, the first Executive Director of the Arbitrators' Institute of Canada. The presentation of the McGowan Awards will take place at the Institute's Annual General Meeting to be held in *Toronto, Ontario October 13-15, 2016*. There are two awards: one which recognizes outstanding contribution to the support, development and success of the ADR Institute of Canada, Inc. and/or development of alternative dispute resolution nationally and one which recognizes contribution to a Regional Affiliate and within a Region.



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contributions to the Institute through development of the Institute's structure, National-Regional relationships, national programs or materials, funding, or other significant Institute initiatives.

## DEADLINE

**Nominations will be accepted until Friday, September 2, 2016.** You are encouraged to submit nominations at any time prior to this date. Please send nominations **in the form of a letter explaining why you feel your nominee should be recognized**, to the McGowan Nomination Committee at the ADR Institute's national office, by fax or e-mail.

## MCGOWAN NOMINATIONS COMMITTEE

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