

Canadian Arbitration and Mediation journal

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ADR Institute of Canada
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AUTHOR: "THE WISDOM OF THE QUEBEC
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This broad membership base allows for diverse skills and experience and contributes to the development of the field of dispute resolution in Canada.

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MESSAGE FROM THE PRESIDENT

ADRIC has undergone a number of developments already this calendar year: in March it moved its offices to independent facilities, hired an enthusiastic, skilled bookkeeper, a first-rate designations and professional development coordinator, and has engaged an expert system admin to continue the development of iMIS member management software.

We are delighted the incomparable Brenda remains committed as does our remarkable Executive Director, Janet McKay. With this outstanding team in place, ADRIC is poised to reach even greater levels.

ADRIC will develop even further via its involvement in an exciting project with affiliates to develop new Memorandums of Understanding for our collaborative relationships and activities. Created by the Presidents' Roundtable, the MoU Taskforce has been working to review, renew, and recreate the relationships between ADRIC and the Affiliates, and between the affiliates themselves. The proposed model is more peer-to-peer in something of a federation model. It is a monumental task to meet with, consider, and discuss each participant's needs for the future, difficult work but exceptionally well-led by Wendy Hassen (ADRIA representative on ADRIC Board) and Kathryn Munn (ADRIO Past President). The MoU Task Force is comprised of members from across the country representing the varied interests of our many practitioners. The Task Force hopes to present a draft at the October ADRIC AGM and conference.

ADRIC's Advocacy work is on the verge of some major accomplishments: ADRIC has had a conversation with the Prime Minister's Office with plans to meet again. The Advocacy subcommittees have been working on opportunities to promote ADR, ADRIC and the Affiliates by developing an Advocacy Toolkit for use by members across Canada to help increase awareness of ADR and assist in their advocating for increased use of ADR; planning and implementing activities for the October "Conflict Resolution Day" October 19th

(which happens to be the opening day of the ADRIC Conference!); an awareness campaign (liaising with the Marketing & Membership Committee); working with governments; issuing more press releases, etc.

On the subject of national Committees, ADRIC has many opportunities for involvement. We encourage you to share your experience and talent on our numerous and varied committees. Some of ADRIC's committees require official affiliate representation, others require the voice and perspective of a diverse national composition. All require energetic participants seeking to advance the cause of ADR in Canada. One such committee is the Arbitration Designations Standards Committee for which we are currently seeking a Chartered Arbitrator to Chair. Have a look at the chart on our website to see where there are vacancies and contact your Affiliate or our office to learn how you can become involved.

ADRIC is finalising the work on a Roster for the National Energy Board. They have chosen, based on specific criteria including experience and location, a total of 37 member practitioners from across the country. The Roster Development committee continues to identify and reach out to industries to create more of these kind of work opportunities for member practitioners.

The ADRIC Conference committee is organizing an engaging program with the theme of Access to Justice. It promises to deliver timely information and practical skills for members, government and all interested parties.

ADRIC 2017: ADR & Access to Justice will be held in St John's NL this



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.

year, October 18th to 20th. We are delighted that, among other prominent individuals, the Honourable Justice Thomas A. Cromwell will be in attendance. Justice Cromwell Chairs the Action Committee on Access to Justice in Civil and Family Matters. He will host a session you will not want to miss.

Do plan to attend and take some vacation time around the conference dates: in addition to an exceptional program, we will have tours and social events for spouses and families to make the most of an incredible part of the world! We have negotiated the accommodation rates for before and after the conference and flights are much lower than you may think! More information is available on ADRIC's website.

ADRIC continues to seek out opportunities and benefits for members across the country. You will have seen the re-

cent communiqué from ADRI's Insurance committee on how it is succeeding in acquiring greater coverage at lower premiums for members. ADRI is now working to arrange a members' health, vision and dental plan, which will be especially helpful to independent practitioners.

Please let us know how you believe ADRI can be of even greater service; we would love to hear from you! 🏠



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MESSAGE FROM THE EDITOR

It is timely and appropriate to note in this edition the recent enactment in Ontario of the new *International Commercial Arbitration Act S.O. 2017* (the “new ICAA”) based on the 2006 revisions to the UNCITRAL Model Law on International Arbitration. This update to the Act also affirms the applicability in Ontario of the 1958 *United Nations Convention on the Recognition and Enforcement of Arbitration Agreements and Awards* (more commonly referred to as the “New York Convention”). Although the prior applicability of the New York Convention in Ontario had been the subject of occasional (and, in my view, unfounded) speculation and doubt, it is good to have this issue put to rest once and for all.

The new ICAA is also important in that it creates a 10 year limitation period for the enforcement of awards (or longer in some older cases to which the transitional rule applies). A similar amendment was also made at the same time to the *Arbitration Act S.O. 1991* which covers non-international arbitrations. Thus, the new limitation period in Ontario for the enforcement of all arbitration awards is 10 years.

Those drafting arbitration agreements should also be aware of the new provisions regarding interim relief which allow for *ex parte* applications to be made to a tribunal for interim relief. This was one of the most controversial provisions in the 2006 Model Law and has not been universally adopted legislatively in other countries (e.g. Australia). Parties may wish to consider excluding this provision in their arbitration agreements.

One of the ongoing issues which will need to be addressed is the overall structure of arbitration legislation. Commercial arbitration in Ontario, and some other provinces, is divided between two statutes, one for international and one for non-international (or, as it is often termed, “domestic”) arbitration. This is

a source of frequent confusion to the bar and the bench, the more so because there is rarely any actual distinction made by practitioners when the arbitration clause is drafted or when the arbitration takes place. When an issue arises in which the distinction does matter, the difference is often overlooked. Such was the case recently in *Novatrax International Inc. v Hagele Landtechnik GmbH et al* 2016 ONCA 771. In this edition of the *CAMJ*, we include an excellent discussion of that case by **John Kelly**.

A further issue is that the domestic Arbitration Act, applies to all manner of arbitrations in Ontario, including family law, labour and statutory arbitrations. Whereas commercial arbitration operates on the same contractual basis as the law of contract, this context is absent for some other forms of arbitration. The result is that judges often feel that principles, especially with respect to judicial intervention and review, need to be applied differently in less consensual forms of arbitration. However, taking this approach can lead the courts into apparent inconsistency. See for example, the decision of the Ontario Court of Appeal in *Intact Insurance Com-*



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.
<http://wghlaw.com/>

pany v Allstate Insurance Company of Canada 2016 ONCA 609. In this edition of *CAMJ* we include a case comment by **David Campbell** which provides an excellent discussion of the issue as it presents itself in that case.

Possibly, when the Supreme Court of Canada hands down its decision in *British Columbia v. Teal Cedar Products Ltd.* 2013 BCCA 326 (CA), we will have further guidance as to whether, and if so how, the standard of review differs between commercial arbitration and arbitration mandated by statute. However, in the meantime, in this season of legislative reform, it might be well for those involved in the process to consider whether it might not be appropriate to have a single Act that deals exclusively with commercial arbitration, both international and non-international.

A third article in this edition of *CAMJ* deals with the subject of third party funding in arbitration. **Rachel Howie** and

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Jessica Gill provide a concise and comprehensive introduction to this new phenomenon. I hope that future articles we publish will report on the issues that

arise as third party funding continues to be integrated into the arbitration landscape. One topic of particular interest will be how the professional networking

of third party funders, arbitration counsel and arbitrators will factor into conflict and disclosure issues.

In this edition we also feature two articles on mediation.

ADR Perspectives


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Steve Lorteau writes about mediation in the context of Quebec's new Code of Civil Procedure and its ground-breaking mandate that private means of resolving disputes should be considered before public processes are engaged. His article highlights the public utility of this approach from the perspective of game theory and economic optimality.

Stephen Richard Morrison has written a practical guide to complex, multi-party mediation in which he generously shares some techniques he has found particularly helpful.

I hope you will enjoy this edition of the *Canadian Arbitration and Mediation Journal*. Please keep us in mind for anything you might wish to write about in the field of alternative dispute resolution. We are happy to work with authors and prospective authors at all stages of their projects in order to produce material and resources to assist and enrich the Canadian dispute resolution community. 

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THE NOVATRAX DECISION: COURT OF APPEAL CONFUSES AN INTERNATIONAL ARBITRATION CLAUSE WITH A FORUM SELECTION CLAUSE AND INCORRECTLY STAYS AN ONTARIO ACTION

The decision by the majority of the Ontario Court of Appeal in *Novatrax International Inc v. Hagele Landtechnik GmbH, Karl Hagele, Benjamin Hagele and Cleanfix North America Ltd.* 2016 ONCA 771 (CanLII) (“*Novatrax*”) illustrates the difficult issues faced by a Court on an application to stay litigation commenced by one of the parties to a contract which contains an arbitration clause requiring the parties to submit all disputes to binding arbitration in Germany in circumstances where the plaintiff also sues defendants who were not parties to the agreement and did not agree to participate in arbitration in Germany.

FACTS

In July 2006, the Appellant, Novatrax, renewed an Exclusive Sales Agreement (ESA) with Hagele in which Hagele would continue to distribute industrial fans in Canada and the United States. The agreement could be terminated by either party on 12 months’ notice or without notice in certain circumstances.

On November 24, 2009, Hagele notified Novatrax that it was terminating the ESA for cause immediately.

In January 2010, Novatrax commenced an action in Ontario for wrongful termination of the ESA and tortious misconduct against Hagele and its principals Karl Hagele and Benjamin Hagele as well as Cleanfix North America Ltd. (Cleanfix), a company set up by Hagele to market its products in Canada and the United States.

Karl Hagele, Benjamin Hagele and Cleanfix were **not** parties to the ESA.

The ESA contained what the Court described as a “forum selection clause” in which the parties agreed that German law was binding and that any disputes would be settled by binding arbitration in Germany.

All of the Defendants (Respondents) moved to stay the action relying on this clause. The motion judge granted a stay and Novatrax appealed.

The Court’s failure to properly identify this clause which was, in fact, an arbitration clause and not a forum selection clause is the subject of a concise, helpful article by William Horton (“Incorrect principles of law applied in arbitration case: The Lawyers Weekly, December 9, 2016”).

This article will not address those portions of the judgement of the Court which in my view, correctly deal with the enforcement of what was actually an arbitration clause in an international



John is an arbitrator and mediator of domestic and international corporate commercial disputes. He is a Fellow of the Chartered Institute of Arbitrators and a Certified Specialist in Civil Litigation. Prior to opening his current practice, he was lead counsel in complex disputes in arbitrations and litigation at all levels of courts including the Supreme Court of Canada.

arbitration agreement **as between the parties to the agreement** or the Court’s ruling that the language of the clause (“to settle any disputes by a binding arbitration”) was broad enough to capture the contract and tort claims pleaded by Novatrax and that the “strong cause” exception to enforcement did not apply in the circumstances. (see paras. 5-15)

The issue for discussion here is whether the majority of the Court was correct in staying the action against the individual defendants Karl Hagele, Benjamin Hagele and Cleanfix who were not parties to the ESA and requiring that the claims subject to arbitration in Germany be decided first, with any remaining claims against the individual defendants who were not parties to the ESA also to be decided in Germany.

THE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS AND CLEANFIX

Novatrax pleaded that it allowed one of the individual defendants, Benjamin Hagele, to utilize its office space and, that as a result, he gained access to confidential information and acted in concert with the other defendants in utilizing that information to terminate the ESA, damage its reputation with its bank and employees and allow Cleanfix to gain a competitive advantage against it in the marketplace. [para. 17]

The Judge hearing the motion to stay the Ontario action found that the allegations against the defendants, who were not parties to the ESA containing what he described as a forum selection clause, were so intertwined with the claims against Hagele that they should be heard and decided together. In coming to this conclusion, he relied upon the decision of the Ontario Court of Appeal in *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.* 103 O.R. (3d) 467 at para. 53, *aff'd* [2012] 1 S.C.R. 359 (*Momentous*).

Momentous was a case in which a professional baseball team sued the League which drew on a letter of credit when the team ceased operations. It also sued the City of Ottawa and the principals of the League including the defendant Wolff.

The agreement between the league and the team contained a clause which required all disputes to be resolved by arbitration in North Carolina.

The Court of Appeal in *Momentous* agreed with the motions judge in that case that the allegations in the claim against the City and the principals were so factually intertwined with the claims against the league that the Plaintiffs could not maintain that they should be allowed to proceed separately in Ottawa against the City of Ottawa and Wolff. The Court held that the choice of forum clause agreed to by the plaintiffs governed where the claims must be heard and that, even though the City of Ottawa and Wolff were not parties to the

arbitration agreement, the claims against them must be dealt with in North Carolina. [para. 21]

The judge hearing the motion for a stay in the *Novatrax* case noted that *Novatrax* itself had pleaded that the conduct of the individual defendants and *Cleanfix* was so intertwined with the claims asserted against Hagele that they should be tried together and ruled that, where the allegations all relate to and arise out of the dealings with the parties to the agreement, the choice of forum clause agreed to by the plaintiff should govern. [para. 18]

On appeal, the majority of the Court of Appeal in *Novatrax* upheld the decision of the motions judge and in particular, his statement that the comments made by the Court of Appeal in *Momentous* were equally applicable to the *Novatrax* case. [para. 22]

The majority of the Court in *Novatrax* held that the factually-intertwined nature of the claims pleaded by *Novatrax* against all defendants required that the forum selection clause drive the stay analysis. [para. 22]

The majority referenced the dissenting judgement of Justice Feldman and agreed with her that the Court does **not have jurisdiction to force defendants who are not parties to an arbitration agreement to submit their claims to arbitration.** (emphasis added)

They held that the claims by *Novatrax* against all defendants were factually intertwined and turned on the determination of the threshold issue of whether Hagele wrongfully terminated the ESA and that that issue should be decided first in an arbitration. The majority were also of the opinion that it was doubtful that the claims against the individual defendants, as pleaded, were sustainable. [paras. 23-26]

The result is that, although the majority of the Court agreed with the motions judge that all the claims against all defendants should be "heard and decided together" in Germany [para.18], they also agreed with Justice Feldman that

the defendants who were not parties to the ESA could not be forced to participate in an arbitration in Germany. Although the Court didn't specifically make a ruling on the issue, the conclusion I draw is that the Majority intended that, once the threshold issue of whether Hagele wrongfully terminated the ESA was decided in the arbitration, any remaining claims against the defendants who were not parties to the ESA would be decided in litigation in Germany. It should be noted however, that Justice Feldman was of the opinion that the effect of the Majority decision was that claims against non-parties to the ESA **would be stayed and referred to arbitration in Germany.** (emphasis added). [para. 30]

JUSTICE FELDMAN'S DISSENT

In a well-reasoned and, in my view, compelling dissent, Justice Feldman took issue with the result and held that the claims against the individual defendants and *Cleanfix* should be allowed to proceed in an action in Ontario and not have to await the outcome of the arbitration.

She repeated the proposition, apparently accepted by the majority, that an arbitration agreement only gives the arbitrator jurisdiction over the parties to the agreement and that a defendant who is not a party to the agreement cannot be forced to arbitrate the claims against it because an arbitrator cannot make an arbitral award that disposes of the rights between a party to the agreement and a non-party.

The real disagreement between the majority and Justice Feldman lay in the interpretation of the decision of the Court of Appeal in *Momentous*.

On the stay application in *Momentous*, the motions judge held the plaintiffs had not shown "strong cause" why the choice of law, choice of forum and arbitration clause should not govern, and went on to reject the argument that the claim against Wolff and the City of Ottawa was not subject to the forum selection clause and should proceed in Ontario.

Justice Feldman very effectively distinguished *Momentous* from *Novatrax*. She observed that, in the Statement of Claim in *Momentous*, the plaintiffs alleged that all defendants had conspired to enforce the letter of credit in order to force *Momentous* out of the league and cause it financial loss.

The plaintiffs in *Momentous* asserted that all parties were properly joined as the claims for relief arose out of the same transactions, there were common questions of fact and law and that joinder of all claims would promote the convenient administration of justice. [para. 37]

Justice Feldman reviewed the reasons of Justice Laskin in *Momentous* on the issue of whether the claims against Wolff and the City of Ottawa could proceed separately in the Ontario action. Justice Laskin held that the submission of *Momentous* that the claims against defendants who were not parties to the choice of forum and arbitration clauses should be allowed to proceed in Ontario might have some validity except for the way the plaintiffs had pleaded the claim. The plaintiffs had alleged that all defendants were necessary parties to the same action, that they conspired together against the plaintiffs, that the claims raised common questions of fact and law, that they arose out of the same occurrences and that their joinder would promote the convenient administration of justice. It was his view that, having pleaded in that manner, the Plaintiffs could not now assert a right to proceed separately in Ontario and that the matters should be dealt with in North Carolina.

Most importantly however, Laskin J.A. went on to say that the severable claims against Wolff and the City **could be re-drafted and asserted in a new action in Ontario**. This position was accepted by the Supreme Court of Canada (see [2012] 1 S.C.R. 359 at p.11.). [Novatrax paras. 39-40]

Justice Feldman concluded that the Court in *Momentous* was not suggesting that the Plaintiffs could be forced to enter arbitration out of the jurisdiction with parties who had not consented to arbitration as that would constitute a

fundamental change in the law of arbitration. [para. 42]

She found that the facts of *Momentous* were wholly distinguishable from *Novatrax*. She did not accept the position taken by the motions judge in *Novatrax* and approved by the majority of the Court of Appeal that the claims against the individual defendants were inextricably intertwined with the claims against Hagele. She reviewed the statement of claim and found that it dealt separately with the claims against the corporate respondent Hagele for breach of contract and wrongful termination of the Exclusive Sales Agreement and then asserted distinct claims against all of the respondents for other conduct.

Justice Feldman reviewed the claims against Hagele and Hagele and noted that they were for negligence, unfair competition, misrepresentation, bad faith and interference with economic relations. The claim against Cleanfix was that it engaged in unfair competition and sought an accounting of profits and a prohibition order.

Justice Feldman also observed that, unlike the pleading in *Momentous*, there was no claim by *Novatrax* that its claims had to be dealt with together. She concluded that the claims against the individual respondents were not so intertwined that the claims against the individual respondents and Cleanfix could not be heard separately from the claims against Hagele. [paras. 43, 47]. The motions Judge in *Novatrax* did, in fact, note that the facts in *Momentous* were not on all fours with those in *Novatrax*. He found that there was no express allegation of civil conspiracy in *Novatrax* and, more importantly, he found that there was no express allegation that the individual defendants and Cleanfix were necessary parties to the action. He simply found that joinder of all claims was implicit in the pleading.

[*Novatrax v Hagele*, 2013 ONSC 8045(CanLII)]

Justice Feldman concluded that, in the absence of consent by the appellant to have all claims decided in arbitration in Germany, the claims against the individual defendants and Cleanfix could not be forced into the arbitral process in Germany.

STAY OF LITIGATION PENDING ARBITRATION

One of the obvious remedies available to the Court as an alternative to forcing non-parties to the ESA to have claims resolved in Germany was to stay the claims against the non-parties in Ontario pending the completion of the arbitration.

In determining whether a stay was appropriate, Justice Feldman adopted the approach taken by the Alberta Court of Appeal in *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992) 120 A.R. 346, at paras. 13-15 and 19-21, leave to appeal refused [1992] S.C.C.A No. 117, *UCANU Manufacturing Corp. v. Calgary (City of)* [2015] A.J. No. 58 and *Toyota Tsusho Wheatland Inc. v. Encana Corp.* 84 C.P.C. (7th) 360.

The Alberta courts considered three factors:

1. whether the issues in the arbitration were substantially the same as the issues in the action;
2. whether the defendant had satisfied the court that continuing the action would work an injustice on him or her; and
3. whether the defendant had satisfied the court that staying the action would not cause injustice to the plaintiff. [para. 55]

In applying the above factors in *Novatrax*, Justice Feldman concluded that:

1. the claims against the individual respondents and Cleanfix were largely,

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with one exception, separate from the claims against the parties to the ESA and the Plaintiff might choose not to advance the claims against the non-parties to the ESA in the arbitration and pursue them in the Ontario action; [paras. 55-56]

2. with respect to injustice to the individual respondents and Cleanfix if the action were allowed to continue, depending on the matters raised in the arbitration as well as the timing of the arbitration and the action, there could be some duplication, but that was one possible consequence of the parties drafting a wide-ranging arbitration clause in a contract between two parties **where disputes may arise that involve others.** (emphasis added.) The respondents had not demonstrated prejudice as most of what occurred was in Ontario and the witnesses would not be unnecessarily inconvenienced by having to testify in an action in Ontario. In addition, a concession had been


made by the Respondents that, but for the clause dealing with forum, Ontario was, in fact, the more convenient forum; and

3. considering whether the respondents had demonstrated that a stay would not cause the appellant injustice, the appellant alleged that its business was ruined, that the respondents were carrying on the business through Cleanfix and that, while the claims against the non-parties to the ESA were claims recognized in Ontario, it was unknown if such claims were recognized in Germany. The fact that German law would apply if the claims were arbitrated in Germany was prima facie prejudicial to the appellants. [paras. 59-61]

For all of the above reasons Justice Feldman would have allowed the appeal and set aside the stay.

A LESSON IN DRAFTING ARBITRATION AND FORUM CLAUSES

It is, of course, easy in hindsight to suggest that, in order to avoid the problems which arose in this case, to the extent possible, every effort should be made to get all relevant corporate subsidiaries, any key shareholders and any other identifiable potential defendants who, based on the facts leading up to the agreement, could reasonably be parties to a subsequent dispute, to sign the agreement containing an agreement to arbitrate. In many cases, however, it will not be possible to identify all potential parties to a future arbitration, particularly if the claims finally asserted against them are truly independent from the claims asserted against the parties to the agreement.

From the point of view of the Plaintiff, it is crucial that the pleading against those who didn't sign the agreement to arbitrate be seen to be an assertion of independent causes of action in order to avoid the expense and uncertainty of litigation in a foreign jurisdiction. 

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THE EFFECT OF *INTACT* ON COMMERCIAL ARBITRATION

The Supreme Court of Canada's decision in *Sattva*¹ is one of the most important cases about commercial arbitration decided in years.

There is some trepidation amongst the commercial arbitration bar that the Ontario Court of Appeal's subsequent decision in *Intact Insurance Company v. Allstate Insurance Company of Canada (Intact)*² has undermined *Sattva* by introducing an administrative law analysis from *Dunsmuir*.³

When understood within its context, the analysis used in *Intact* has a narrow application, and is unlikely to have broader implications for domestic commercial arbitration.

Intact arose out of a type of case peculiar to the automobile insurance industry—priority disputes. To understand *Intact* and its limited role in arbitration, it is necessary to understand what priority disputes are, how they differ from consensual domestic commercial arbitrations, and why the Court needed to address the standard of review in priority dispute appeals. As will be seen, much depends on the arbitration agreements auto insurers use and why they use them.

UNDERSTANDING WHAT PRIORITY DISPUTES ARE

As *Intact*'s title suggests, it was a dispute between insurers—specifically, automobile insurers. An overview of Ontario's automobile insurance scheme is needed to understand how *Intact* emerged from this “distinct regime”. In Ontario, there are two types of claims that can be made against an insurer as a result of an injury suffered in a motor vehicle accident (MVA)—tort and no-fault. Tort focuses on general damages

for pain and suffering along with economic losses. Liability affects tort. In 1990, Ontario stopped being a pure-tort jurisdiction. Turning to no-fault benefits, people injured in MVA's may be entitled to Accident Benefits (AB's or SABs). AB entitlement varies with the impairment and other factors. At one end of the spectrum there's the Minor Injury Guidelines,⁴ while Catastrophic Impairment (CAT)⁵ is at the other. The benefits available to a claimant who is deemed CAT can be over \$1 million, covering things like private nursing, home modifications, and physiotherapy.

There are two main pieces of legislation that cover AB's: Ontario's *Insurance Act*,⁶ and the *Statutory Accident Benefits Schedule (SABS)*.⁷

Sometimes, it's unclear which auto insurer should pay AB's. Section 268 of the *Insurance Act* sets out how insurers are supposed to determine which company “takes priority” for paying the claimant's benefits. If the companies can't agree, then the Legislature passed a regulation to control these cases, the *Disputes Between Insurers Regulation*⁸ (*DBI Reg.*). This regulation requires insurers to arbitrate under the *Arbitration Act, 1991*.⁹

One of the recent cases that applies *Intact* explains what has been called a “sophisticated and complex statutory regime”¹⁰:

Sometimes disputes arise between insurers regarding who is responsible to pay SABs. So that the injured party will



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not suffer and be prejudiced by the potential nonpayment of benefits while the insurers sort out their dispute, Ontario's car insurance regime contains a provision for the interim payment of benefits by one party pending the outcome of the dispute, as well as a mechanism for the determination of such issues. This regime is governed by s. 268(2) of the *Insurance Act*, and the *DBI Reg.*

In simple terms, the regime requires the first insurer who receives a claim for SABs to “pay first and dispute later” except where the claim was randomly or arbitrarily sent to that insurer (i.e. in a situation where there is no nexus between the claimant and the insurer). Thus, generally speaking, where there is a nexus, the first insurer who receives an application for SABs is responsible for paying them pending the resolution of any dispute as to which the insurer is

ultimately liable to pay them under s. 268: see s. 2.1 of the *DBI Reg.*¹¹

This scheme reflects insurance being a form of consumer protection.

As mentioned in *Intact*: “Courts and arbitrators do not share jurisdiction over priority disputes at the first instance; under the Regulation, an arbitrator must hear those disputes before they are potentially appealed to a court.”¹² The distinct regime that auto insurers must use contrasts with the Ontario Court of Appeal’s recent ruling about an international arbitration: “The parties’ selection of their forum implies both a preference for the outcome arrived in that forum and a limited role for judicial oversight of the award made in the arbitral forum.”¹³ The Legislature regulated priority disputes out of court and into arbitration; the parties are not using arbitration “as an alternative and to the exclusion of the courts”.¹⁴

Presumably, the Legislature created this arbitration for auto insurers rather than setting up an administrative tribunal to shift the cost of these cases to insurance companies away from taxpayers. By contrast, claimants who dispute their AB entitlement may arbitrate in Ontario’s Licences Appeals Tribunal. This is a recent change. Until April 1, 2016, claimants disputing AB entitlement could either commence a court action or arbitrate the case with the Financial Services Commission of Ontario. Regardless, the point is that claimants have a publically-funded system available.

This “distinct regime”¹⁵ leaves priority dispute arbitration in a strange position: it’s not administrative law, but it’s not consensual arbitration.

HOW REGULATED ARBITRATION AFFECTS APPEALS

Deciding a priority dispute tends to be a zero-sum analysis with one winner and one loser. Moreover, priority disputes involve repeat players, which in turn creates a Hobbesian dilemma. No insurance company would want to assume exposure to a seven-figure CAT


case, unless there is binding authority that justifies doing so. So unlike the mainstream of consensual commercial arbitration, there is a demand for case law. Arbitration’s benefit of confidentiality is a detriment in this scenario, since confidentiality does not assist in predictability.

The desire for case law is reflected in the *broad* appeal rights that auto insurers set out in their arbitration agreements. These appeal rights are foreign—if not antithetical—to consensual commercial arbitration, and are unlikely to be found outside of regime that man-

dates arbitration as a first step. Here are a few examples:

- “The parties expressly reserve the right of an automatic appeal to a single Judge of the Superior Court of Justice on issues of law or mixed fact and law.”¹⁶
- “In this case, Allstate and Intact agreed that either could ‘appeal the Arbitrator’s decision on a point or points of law or mixed fact and law’ to a judge of the Superior Court of Justice.”¹⁷
- “The parties reserve the right of appeal of any interim or final Awards of the Arbitrator in this proceeding

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without leave to a single Judge of the Ontario Superior Court of Justice on issues of fact, law or mixed fact and law within thirty (30) days of the release of the Arbitrator's written decision. ..."¹⁸

These appeal rights make sense in context, because binding court decisions give repeat participants in the auto insurance industry some predictability about the interpretation of the *Insurance Act* and the *SABs*. These appeal rights also reflect a distinct regime that is somewhere in between administrative law and private consensual arbitration.

As the Court states in *Intact* at para. 43: "I note that the parties' arbitration agreement provides that they can appeal on both points of law and mixed fact and law. Unlike in *Sattva*, the parties are not restricted to appealing on questions of law only."¹⁹

INTACT IN CONTEXT OF PRIORITY DISPUTE CASE LAW

Before *Intact* the case law on the standard of review in priority dispute appeals was in flux. This is seen in a Superior Court case from a few months earlier, *Intact Insurance Company v. Old Republic Insurance Company*,²⁰ which summarizes the debate at length. In 2014, Ontario's Court of Appeal had enunciated the standard of review in *Zurich Insurance Co. v. Chubb Insurance Co.*²¹ But in 2015, the Supreme Court of Canada overturned the Court of Appeal. The *complete* text of the Supreme Court of Canada's decision

states: "The Court—We are of the view that the appeal should be allowed with costs for the reasons of Juriansz J.A."²² This refers to Justice Juriansz's dissenting reasons in the lower court. Unfortunately, Justice Juriansz didn't analyze the standard of review. Consequently, there was a gap in priority dispute case law that the Court of Appeal needed to address, especially since these cases are frequently appealed.


INTACT'S IMPACT

This leaves the mainstream of commercial arbitration grappling with nettlesome questions about why review of non-judicial decision makers should fall under the administrative law analysis, and applying *Dunsmuir's* analysis rather than *Housen v. Nikolaisen* in arbitration appeals.²³ According to the Court, the *Dunsmuir* administrative law analysis is the only conclusion that can be drawn from the Supreme Court of Canada's analysis in *Mouvement laïque québécois v. Saguenay (City)*.²⁴

And yet the standards of review should not cause disquietude to the mainstream of commercial arbitration, precisely because they are so peculiar to Ontario's priority dispute regime. It should be noted that the Court refers to "insurance arbitration" and "insurance arbitrators" thirteen times throughout its reasons.

These two forms of dispute use arbitration differently and to different ends, as reflected in the broad appeal rights that insurers preserve in these cases. The standard of review issues raised in *Intact* are only of consequence to parties who include equally broad appeal rights in their arbitration agreements. But of course the default appeal provisions in s. 45 of the *Arbitration Act, 1991* only allow for appeals on extricable questions of law, *with leave*.²⁵ Parties involved in consensual commercial arbitration are unlikely to use the broad appeal rights found in priority disputes, and using them in consensual arbitration agreements might be ill-founded unwisdom.

So far, *Intact* has been cited in six cases. One of those cases was the Supreme Court of Canada's denial of leave to appeal. The other five cases are priority disputes heard by the Ontario Superior Court of Justice.²⁶

Had the Court of Appeal intended this to apply to domestic commercial arbitrations more broadly, *Intact* would not have cited the Court's 2016 case of *Ottawa (City) v. Coliseum Inc.*²⁷ that "arbitrations governed by the *Arbitrations Act, 1991* occur against the background of a tightly defined regime under which *judicial intervention is generally unwarranted*."²⁸ 



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- 1 *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.
- 2 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609.
- 3 *Dunsmuir v. New Brunswick*, 2008 SCC 9.
- 4 *Statutory Accident Benefits Schedule*, O. Reg. 34/10, s. 40.
- 5 *Statutory Accident Benefits Schedule*, O. Reg. 34/10, s. 3.1.
- 6 *Insurance Act*, R.S.O. 1990, c. I.8.
- 7 *Statutory Accident Benefits Schedule*, O. Reg. 34/10.
- 8 *Disputes Between Insurers*, O. Reg. 283/95.
- 9 *Arbitration Act, 1991*, S.O. 1991, c. 17.
- 10 *Unifund Assurance Company v. Security National Insurance Company*, 2016 ONSC 6798.
- 11 *State Farm Mutual Automobile Insurance Company v. TD Home & Auto Insurance Company*, 2016 ONSC 6229 at paras. 11–12.
- 12 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at para. 52.
- 13 *Popack v. Lipszyc*, 2016 ONCA 135 at para. 26.
- 14 *Pupuke Service Station Ltd. v. Caltex Oil (NZ) Ltd* PC 63/94, 16 November 1995 at 1, per Lord Mustill.
- 15 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at para. 30.
- 16 *Intact Insurance Company v. Old Republic Insurance Company*, 2016 ONSC 3110 at para. 18.
- 17 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at para. 19.
- 18 *Allstate Insurance Company of Canada v. Intact Insurance Company*, 2016 ONSC 5443 at para. 18.
- 19 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at para. 43.
- 20 *Intact Insurance Company v. Old Republic Insurance Company*, 2016 ONSC 3110 at paras. 15–33.
- 21 *Zurich Insurance Co. v. Chubb Insurance Co.*, 2014 ONCA 400.
- 22 *Zurich Insurance Co. v. Chubb Insurance Co.*, 2015 SCC 19 at para. 1.
- 23 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at paras. 24–25.
- 24 *Ibid* at para. 26; *Mouvement laïque québécois v. Sagueny (City)*, 2015 SCC 16.
- 25 *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 45(1).
- 26 *Allstate Insurance Company of Canada v. Intact Insurance Company*, 2016 ONSC 5443; *State Farm Mutual Automobile Insurance Company v. TD Home & Auto Insurance Company*, 2016 ONSC 6798; *Belairdirect Insurance v. Dominion of Canada General Insurance Company*, 2017 ONSC 367; *Farmers' Mutual Insurance Company (Lindsay) v. Ontario (Finance)*, 2017 ONSC 1192.
- 27 See *Ottawa (City) v. Coliseum Inc.*, 2016 ONCA 363 at paras. 32–33.
- 28 *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 at para. 31 [emphasis added]

THIRD PARTY FUNDING IN ARBITRATION

Third party funding (“TPF”) of legal costs has seen extensive growth in Australia and the United Kingdom since shortly after the turn of the century.¹

It has continued to grow in popularity around the world, in particular in international arbitration,² and is beginning to make advances in Canada.³ While TPF itself is not strictly a “new” development, what is new is the increasing availability of TPF from professional funding firms and the range of ways in which these firms are working with claimants in international and domestic arbitration.

This increasing scope and jurisdictional reach of TPF is not without criticism. The notion of an outside entity taking a financial interest in an arbitration (and perhaps being the sole reason that a claim proceeds) can raise concerns on various fronts including: legal prohibitions against maintenance and champerty, potential conflicts of interest for the Tribunal with the addition of an entity interested in the dispute’s outcome and confidentiality of discussions between claimant and funder. This article will provide a high-level overview of the nature of TPF, and then discuss a few of the practical and legal points to consider with respect to TPF of domestic and international arbitration in Canada.

I. WHAT IS THIRD PARTY FUNDING?

In broad terms, TPF refers to an arrangement whereby an entity, with no direct interest in a dispute, provides funding to a claimant in a legal dispute.⁴ The terms of the arrangement, memorialized in a contract between the funder and the claimant, detail exactly how this funding will be provided and how the funder will recover what is effectively their investment as a result of the dispute. A common arrangement is one where the funder provides payment for all or part of the claimant’s legal fees

and disbursements, either upfront or on an as-needed basis, and at the end of the dispute is reimbursed for these payments and provided with a pre-determined percentage of the amount recovered by the claimant.⁵ A funder may also agree to provide an indemnity to the claimant against any adverse costs award and/or provide security for the respondent’s costs.⁶

TPF can offer an attractive solution to claimants for a number of reasons. For

a claimant that has a meritorious claim but lacks the means to pursue it (either on its own accord or because of a relative financial disparity between it and the responding party), TPF can provide the capital needed to initiate and pursue a claim. This is the colloquial “David and Goliath” scenario, and perhaps the most well-known situation where a claimant would historically look for funding to assist with a dispute. Modern TPF is a sophisticated industry with, in addition to the “David and Goliath” scenario, multiple reasons for why claimants would pursue funding and several options for the exact funding arrangement. Claimants with sufficient funds to pursue their claims may look to TPF to offload some of the financial risk going forward and/or control their financial exposure in pursuing a dispute. A claimant may also have a lucrative opportunity or other business imperative to pursue, and a funder’s participation in the claim will make available capital that could be put to those opportuni-

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ties.⁷ As a result TPF can, in some situations, secure capital unrelated to legal fees⁸ and has been referred to as a form of “specialty corporate finance that is focused on arbitration claims as assets.”⁹ This can include complex arrangements such as:

- A financing arrangement over a portfolio of cases, held by a claimant or by a law firm, as a way of distributing risk;
- A means to obtain an immediate payment, at a discount, on an award that is in the collections/enforcement process; and
- Funding to pay insurance premiums on policies to guard against risks of enforcement.¹⁰

TPF practices are in large part shaped by the variances in domestic legal systems.¹¹ Against this background, we consider TPF in arbitration in Canada.

II. MAINTENANCE & CHAMPERTY

Maintenance and champerty are two historic common law doctrines that can impact the ability of those without a legitimate interest in a dispute from participating in the dispute. Maintenance prohibits individuals from supporting litigation in which they have no legitimate concern without just cause or excuse.¹² Champerty is considered an aggravated form of maintenance which involves the further element that the party providing the support will receive a share of the proceeds of the action.¹³ Notwithstanding the elimination of maintenance and champerty as crimes, they remain torts under the common law of Canada.¹⁴ Canadian courts have looked to whether the third party is “stirring up strife”¹⁵ or otherwise acting for an “improper motive” to define the line between champertous conduct and otherwise proper third party intervention.

There is no direct jurisprudence from a Canadian court relating to TPF in arbitration. However, some lessons may be drawn from the context of commercial or contingency fee arrangements in litigation. Access to justice has always been a factor in courts’ considerations on whether TPF unnecessarily “stirred up” the litigation.¹⁶ Courts have recognized certain benefits of TPF such as

providing access to justice for cash-strapped plaintiffs, mitigating risks and allowing a defendant to know its costs could be recovered.¹⁷ As such, TPF is not subject to maintenance and champerty *per se*, rather the question turns upon the specific terms of the funding agreement.¹⁸ In particular, courts may consider the potential quantum of the funder’s recovery and the claimant or counsel’s control of the litigation, as indications of an improper motive.¹⁹

In *Schenk v Valeant Pharmaceuticals International Inc.*,²⁰ the Court commented on the terms of recovery in a TPF agreement in the commercial litigation context. The plaintiff, who was of limited means, contracted with a UK funder who had agreed to pay for all the legal fees and disbursements in exchange for a portion of the amount recovered. The agreement was subject to court approval and was opposed by the defendant on a number of grounds, including the potential for the funder to recover more than 50% of the proceeds.²¹ While the Court found that the agreement was not champertous *per se*, it did raise issue with two specific provisions of the funding agreement. First, there was a concern that the plaintiff could not appreciate the ultimate cost as a result of what was found to be open-ended recovery for the funder at the conclusion of the proceedings.²² Second, the agreement allowed the funder to receive a lion’s share, or potentially the entirety of, the amount recovered. The Judge subsequently approved an amended funding agreement, which capped the funders’ maximum recovery at 50% of the proceeds.²³

To the extent this case law applies to an arbitration subject to Canadian law it demonstrates that maintenance and champerty, while still a part of the law, are not necessarily a bar to TPF arrangements. What is important for arbitration subject to Canadian laws is that any financing arrangement be closely scrutinized against the applicable governing law.

III. CONSIDERATIONS FOR THIRD PARTY FUNDING IN AN ARBITRATION

Assuming there are no issues with re-

spect to the law on maintenance and champerty, there are a number of other considerations for counsel and clients if they are thinking of funding. The following sub-sections will look briefly at two such areas: conflicts of interest and confidentiality.

A. CONFLICTS OF INTEREST

A frequent concern in arbitration is the potential for conflicts of interest by adding another entity – the funder – who could be impacted by the outcome of the dispute. One such area is the potential for a conflict between a funder and the claimant or claimant’s counsel. In *Stanway v Wyeth Canada Inc.*,²⁴ the Court found that in the context of TPF for a class action it could review whether the “funding agreement appropriately manages the risks to the plaintiff’s control of the litigation [and] the independent professional judgment of counsel.”²⁵ In a series of cases before the Ontario courts, funders provided the class action plaintiffs with an indemnity against an adverse costs award in exchange for a portion of any recovery in the lawsuit and sought court approval of the agreements.²⁶ Provisions permitting the funder to terminate its obligations without cause²⁷ or requirement to invite the third-party to participate in settlement negotiations²⁸ were struck as potentially allowing the funder to engage in officious intermeddling and interfere with the claimant and counsel’s independence in the litigation. In the event of a conflict between the claimant/its counsel and the funder, there should be a process in the funding agreement for how to resolve the dispute.²⁹

An agreement with a funder also raises the potential for conflicts of interest between the funder/claimant and Tribunal³⁰ and ultimately whether a claimant is required to or ought to disclose the funding arrangement to the Tribunal and respondent. A funding arrangement that is disclosed or learned of late in the process could result in lengthy delays due to disputes over potential conflicts of interest, a risk of removal of part or potentially all of the Tribunal, and ultimately perhaps a challenge to an award or enforcement proceedings.

There is no requirement in Canadian domestic arbitration legislation requiring a claimant to disclose the presence of a funder.³¹ When approaching an arbitrator on their willingness to accept an appointment, counsel will typically disclose the names of the firms and lead counsel involved, identities of the claimant and respondent (along with perhaps key directors, officers or shareholders of the parties if warranted), so that the arbitrator can perform a conflict search. If a funder is in place before the appointment of the Tribunal, counsel will likely need to discuss with the funder whether there is any potential conflict with the proposed Tribunal. A similar conversation would likely need to occur if funding is sought after a Tribunal is constituted. This, however, does not answer the question on whether a claimant should disclose the existence of a funding arrangement to the Tribunal.

Canadian legislation on international arbitration, which largely adopts the 1985 UNCITRAL Model Law, also does not require a party to disclose the presence of a funder³² but there are relatively recent guidelines that attempt to put some parameters around the issue. The 2014 IBA Guidelines on Conflicts of Interest in International Arbitration through a combination of provisions at General Standards 6(b) and 7(a) direct the disclosure of a funder in some circumstances.³³ Where a funder has a “direct economic interest in the award”³⁴ the identity of that funder may require disclosure. The IBA Guidelines are also, however, clear in noting that each situation is to be considered individually; based on the language in the IBA Guidelines there are several possible funding arrangements that would not trigger a disclosure requirement. More recently, on February 12, 2016, the ICC adopted its Guidance Note for the Disclosure of Conflicts by Arbitrators, which is incorporated into the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration.³⁵ This contains language similar to section 7(a) of the IBA Guidelines albeit in the context of disclosure by the Tribunal. Specifically, any relationship between an arbitrator and “any entity having a direct economic interest in the dispute or an obligation to in-

demnify a party for the award” should be considered as something that an arbitrator, if aware of that entity’s involvement, may need to disclose depending upon the circumstances.³⁶

While this language in the IBA Guidelines and ICC Guidance Note could require the disclosure of some funding arrangements, it falls short of the mandatory disclosure seen in the text of the Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”).³⁷ While final ratification is still pending from the parties, the agreement states the following with respect to TPF in investor-state disputes at article 8.26:

1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.
2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made.


As of October, 2016, it was reported that there were no documented cases of arbitral awards being successfully challenged on the basis of a failure to disclose external interests, such as TPF.³⁸ With the outright requirement to disclose TPF under CETA, there may be further international developments favouring obligatory disclosure.³⁹ The risks in terms of time, cost and enforcement of failing to disclose TPF involvement if there is a conflict of interest are potentially extreme. Absent any provisions in the funding agreement to the contrary, and possibly pending a discussion with the funder, parties may want to consider early disclosure to avoid the potential impacts of late disclosure if there is a perceived conflict.⁴⁰ Alternately, parties could seek a direction from the Tribunal that the IBA Guidelines shall apply or that the parties shall disclose whether they have obtained funding with respect to that dispute, or perhaps a more bold measure of draft-

ing into arbitration agreements that in the event of a dispute there is an ongoing requirement for a party to disclose the identity of a funder if funding is obtained in relation to that dispute.⁴¹

B. PRIVILEGE AND CONFIDENTIALITY

Outside of the terms of any confidentiality agreement between the funder and claimant, Canadian laws on litigation privilege and common interest privilege (preferably with an executed common interest privilege agreement) have the potential to cover communications between a funder and claimant/claimant’s counsel, along with any opinions, summaries or briefings prepared in accordance with the funding arrangement.⁴² Parties to international arbitrations may also want to look to the IBA Rules on the Taking of Evidence in International Arbitration, which contemplate the exclusion from evidence, on the motion of a party or the Tribunal’s own motion, any document subject to “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.”⁴³ This includes (depending upon the applicable legal and ethical rules) consideration as to whether communications were for the giving or receiving of legal advice along with whether there was a potential waiver of privilege.⁴⁴ An assessment of the extent to which communications with and information provided to a funder would be covered by laws on privilege and/or any applicable rules should be one of the first assessments made by counsel where a client wants to pursue funding.⁴⁵

To the extent Canadian jurisprudence with respect to funding agreements in the class action sphere applies, it is discordant. In *Stanway v Wyeth Canada Inc.*, the Court determined that certain aspects of the funding agreement were privileged (such as those portions relating to litigation strategy and litigation budget) but the remaining terms could be disclosed.⁴⁶ More recently, in *Hayes v The City of Saint John et al*, the Court sealed the funding agreement provided for its own review and refused to provide a copy to the defendants.⁴⁷ A similar decision was reached in *Schneider v Royal Crown Gold Reserve Inc.* as

A portrait of Julie Kuras, a woman with long, wavy, light brown hair, looking directly at the camera with a slight smile. She is wearing a dark top. The background is a dark, textured blue.

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the funding agreement contained “confidential and sensitive information” and “part of the plaintiff’s litigation strategy” along with the funder’s “implied valuation of the claim.”⁴⁸

Confidentiality obligations imposed through an arbitration agreement could present larger challenges, depending on the restrictiveness of the terms, as could the provisions of any confidentiality orders from the Tribunal. The particular arbitral rules that may apply also require scrutiny. Disclosure of confidential arbitral materials⁴⁹ to a funder under the ADRIC Arbitration Rules is unlikely to be an issue, depending on the circumstances, provided the funder agrees to keep such information confidential and to use it only for the purposes of the arbitration as a party is permitted to disclose materials to any “other advisor” or “other person with a direct financial interest in the arbitration.”⁵⁰ By contrast, both the ICDR Canada Arbitration Rules and the ICC Arbitration Rules have no specific disclosure provisions, but do provide that the Tribunal can make orders with respect to confidentiality.⁵¹ Parties arbitrating under these regimes may want to ensure that any early confidentiality orders are drafted in a way to permit disclosure to a funder, even if funding is not in place but may be pursued in the future.

IV. FINAL COMMENTS

There are a number of situations where

a claimant may wish to look to TPF. With the increasing number of funders and funding models, it would be incorrect to presume in all situations that funding is only for the insolvent or almost-insolvent claimant⁵² and, by doing so, counsel may not be recognizing opportunities for already well-capitalized companies to take advantage of funding arrangements. Other benefits in TPF arrangements can include having the benefit of an additional perspective on a claim and the experience brought by the funder, usually a lawyer with extensive disputes experience.⁵³

There are also many unsettled and developing legal issues with respect to TPF that will undoubtedly continue to garner attention in the future. The above discussion only briefly touches on a few of these areas with respect to arbitration in Canada. Another subject that on its own could substantiate an entire article is the practical matter of costs; both what, if anything, a claimant’s funding arrangement means for a respondent’s ability to obtain security for costs⁵⁴ and whether TPF impacts any final costs award. The inconsistencies across the provinces in Canadian jurisprudence on the recovery of various types of funding costs (such as interest on loaned amounts)⁵⁵ and a recent decision from the United Kingdom, albeit one that turns largely on its specific facts in awarding the claimant the cost of the funder’s “success fee”,⁵⁶

raise interesting questions about where the law might develop if funding remains a present and growing industry.

As with any financial transaction a fair amount of due diligence should occur in advance of pursuing a funder and finalizing a funding arrangement. Different funding firms will have different areas of focus or types of claims for which they are more prepared to consider funding along with nuances in funding structures.⁵⁷ It is important to conduct an initial review at the outset, as once a funder is approached they will generally require the claimant to enter into an initial confidentiality and exclusivity agreement to permit the funder to undertake its due diligence with respect to the claim.⁵⁸ Because this exclusivity period could be a matter of weeks, or perhaps months, depending on the stage and complexity of the claim, it can pose a lengthy wait for a claimant anxious for financing, especially if their claim is not accepted for funding and the process needs to begin again.⁵⁹ Whether used as a vehicle to afford a claimant access to justice where the claimant’s finances would otherwise preclude pursuing arbitration, or as a means for a sophisticated company to manage risk over a portfolio of disputes or single claim, there are many potential benefits to TPF provided counsel are aware of the practical and legal issues to navigate. 🏠

1 In Australia, IMF Bentham Limited became the first publicly listed litigation funder in 2001.
“This article and citations are current as at January 2017, the time of writing.”
2 The International Council for Commercial Arbitration – Queen Mary University of London Task Force on Third Party Funding refers to one funder’s statistics that “at least 60% of all ICSID cases enquired about (but not necessarily sought or obtained) third-party funding before their cases were lodged” (see <http://www.arbitration-icca.org/projects/Third_Party_Funding.html>) [ICCA-QMUL Draft Report].
3 As exemplified by IMF Bentham Limited opening a Canadian branch in Toronto last year, signalling increased interest by funders in Canada.
4 While this article focuses on funding for a claimant in arbitration, this is not to suggest that funding is not or could not be available for a responding party. A respondent may want to secure funding as a means to work with insurers in protecting itself against worst-case-scenario outcomes. See, for example Christopher P. Bogart, “Third-Party Financing of International Arbitration”, *Global Arbitration Review: The European Arbitration Review* (14 October 2016), online: <<http://globalarbitrationreview.com/insight/the-european-arbitration-review-2017/1069316/third-party-financing-of-international-arbitration>>.
5 Susanna Khouri, Kate Hurford and Clive Bowman, “Third party funding in international commercial and treaty arbitration – a panacea or a plague? A discussion of the risks and benefits of third party funding”, (2011) 4 Transnational Dispute Management at 3 (available online from Bentham IMF: <https://www.benthamimf.com/docs/default-source/default-document-library/573330_1.pdf?sfvrsn=2>).
6 *Ibid*.

7 Bogart, *supra* note 4.
8 See for example *ibid* which discusses a funding arrangement with Rurelec PLC, where funds were provided to allow the company to invest in its business because the funder could “monetize the value of the [existing arbitration] claim”.
9 *Ibid*.
10 *Ibid*.
11 A clear example of this is in the White Paper released by Bentham IMF Canada which discusses how funding models are reflective of different costs-recovery systems. Tania Sulan and Naomi Loewith, “Litigation Funding Roundtable: The Canadian Perspective”, *Bentham IMF* (September 2016), online: <https://www.benthamimf.ca/docs/default-source/default-document-library/roundtable_nov2016.pdf?sfvrsn=4>.
12 HG Beale, ed, *Chitty on Contracts*, 32nd ed (London: Sweet & Maxwell, 2015) at para 16-059.
13 *Ibid* at para 16-063.
14 Both were regarded as common law crimes in Canada until the Canadian Parliament abolished all such crimes in 1953 with the consolidation of the *Criminal Code* (Can) Ch 51. Notably, champertous agreements remain statutorily invalid in Ontario (see *Act Respecting Champerty*, RSO 1897, c 327).
15 *McIntyre Estate v Ontario (Attorney General)*, (2002), 61 OR (3d) 257 at para 34, 218 DLR (4th) 193 (Ont CA) [McIntyre].
16 *Weigand v Huberman et al* (1979), 18 BCLR 102 at 104, 108 DLR (3d) 450 (SC). See also the finding in *Buday v Locator of Missing Heirs Inc* (1993), 16 OR (3d) 257 at para 31, 108 DLR (4th) 424 (Ont CA) that a *bona fide* commercial business arrangement to assist in recovering an interest considered to be a valid claim did not “stir up” litigation and was not champertous.

- 17 *Metzler Investment GmbH v Gildan Activewear*, [2009] OJ No 3315 at para 67, 179 ACWS (3d) 765 (SCJ) [Metzler]; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785 at paras 27, 28, 33, [2011] OJ No 1239 [Dugal]; *Labourers' Pension Fund v Sino-Forest*, 2012 ONSC 2937 at para 15, 216 ACWS (3d) 834 (Sino-Forest); and *Bayens v Kinross Gold*, 2013 ONSC 4974 at para 34, 117 OR (3d) 150 [Bayens].
- 18 *Metzler*, *ibid* at para 63.
- 19 *Metzler*, *ibid* at paras 71-73.
- 20 *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 255 ACWS (3d) 306 [Schenk].
- 21 *Ibid* at para 11.
- 22 *Ibid* at para 17. The initial agreement in this case (which as a term required court approval) allowed the funder to recover more than 50% of the proceeds, with no maximum limit of recovery.
- 23 Redress Solutions PLC, "Redress Makes Breakthrough for Litigation Funding in Canada", Press Release, 2015 July 2 (online: <<http://www.redressolutions.co.uk/wp-content/uploads/2015/09/Redress-makes-breakthrough-for-litigation-funding-in-Canada.pdf>>).
- 24 2013 BCSC 1585, [2014] 3 WWR 808 [Stanway].
- 25 *Ibid* at para 42.
- 26 *Metzler*, *Dugal*, *Sino-Forest*, and *Bayens*, *supra* note 17.
- 27 See eg: *Metzler*, *ibid* at para 60.
- 28 *Metzler*, *ibid* at para 58.
- 29 For further reference see: Sulan & Loewith, *supra* note 11 at 6 and Khouri, Hurford and Bowman, *supra* note 5 at 7.
- 30 It is plausible that there could be a conflict between a funder, once an arrangement is finalized with a claimant, and the respondent or that a conflict of interest could arise between a funder and the claimant or claimant's counsel. A fulsome discussion of these possibilities is outside of the scope of this article. Note, however, that in *Stanway*, *supra* note 24, the Court found that in the context of TPF for a class action it could review whether the "funding agreement appropriately manages the risks to the plaintiff's control of the litigation [and] the independent professional judgment of counsel" (at para 42). See also: Sulan & Loewith, *supra* note 11 at 6 and Khouri, Hurford and Bowman, *supra* note 5 at 7-8.
- 31 See *Arbitration Act*, RSA 2000, c A-43; *Arbitration Act*, 1991, SO 1991, c 17; *Arbitration Act*, RSBC 1991, c 55. See also: Canada, ADR Institute of Canada, *ADRIC Arbitration Rules* [ADRIC Arbitration Rules] and Canada, International Centre for Dispute Resolution, *Canadian Dispute Resolution Procedures* [ICDR Canada Arbitration Rules].
- 32 See eg: *International Commercial Arbitration Act*, RSA 2000, c I-5; *International Commercial Arbitration Act*, RSO 1990, c I.9.
- 33 International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, Adopted by Resolution of the IBA Council 23 October 2014, ss 6(b), 7(a) and Explanation to General Standards 6(b) and 7(a) [IBA Guidelines].
- 34 *Ibid* at General Standard 7(a).
- 35 International Court of Arbitration, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, Adopted by the ICC Bureau of the Court on 12 February 2016 [ICC Guidance Note].
- 36 *Ibid* at para 24.
- 37 *Comprehensive Economic and Trade Agreement*, Canada and European Union, 30 October 2016, pending ratification and other national Parliamentary approvals, as the case may be, at the time of writing [CETA].
- 38 Bogart, *supra* note 4.
- 39 See eg: The Law Reform Commission of Hong Kong released a report in October 2016, recommending the abolishment of maintenance and champerty as applied to funding agreements in arbitration, setting out disclosure requirements on funding and detailing funders' rights to be heard in proceedings and costs consequences. (see: Hong Kong, Law Reform Commission, Report on *Third Party Funding for Arbitration*, (Hong Kong: Printing Department, October 2016) (online: <<http://www.hkreform.gov.hk/en/publications/rtpf.htm>>)). At the time of publication, the Hong Kong Government has proposed legislation largely reflecting the recommendations of the Commission (*Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016*, LS23/16-17. The legislation is currently the subject of consideration by a Bills Committee, following its first reading in Parliament. The Ministry of Law in Singapore proposed legislation in June 2016, including *The Civil Law (Amendment) Bill 2016* [Bill No 38/2016] and the *Civil Law (Third Party Funding) Regulations 2016*. Key changes with these legislative amendments, which were approved by Parliament on 11 January 2017 (see Global Arbitration Review, "Key bills passed in Singapore, as Hong Kong moves towards funding" (11 January 2017), online: <<http://globalarbitrationreview.com/article/1079959/key-bills-passed-in-singapore-as-hong-kong-moves-towards-funding>>), include the elimination of the tortious liability for the common law doctrines of maintenance and champerty. Specifically, TPF is no longer contrary to public policy or otherwise illegal under these doctrines. Also, the amendments provide rules for the circumstances under which a solicitor may refer a client to a funder and disclosure.
- 40 Some practitioners have also raised the question of whether failing to disclose a funder's participation in an arbitration proceeding breaches a procedural good faith duty that may be implied in the arbitration agreement (see: Khouri, Hurford and Bowman, *supra* note 5 at 10).
- 41 There are a few examples of Tribunals directing the disclosure of whether there is a third party funder involved in the investor-state arbitral context. See eg: *Muhammet Çap & Sehil İn_aat Endüstri ve Ticaret Ltd. Sti. v Turkmenistan* (2015), ICSID Case No ARB/12/6, Procedural Order No 3, 12 June 2015 (International Centre for Settlement of Investment Disputes); *South American Silver v Bolivia* (2016), PCA Case No 2013-15, Procedural Order No 10, 11 January, 2016 (Permanent Court of Arbitration), where the respondent requested (upon knowing that there was a funder because the claimant made this fact public) that such funder be identified.
- 42 See generally: *Blank v Canada (Department of Justice)*, 2006 SCC 39, [2006] 2 SCR 319 (especially for discussion of litigation privilege); *Canmore Mountain Villas v Alberta*, 2009 ABQB 348, [2009] AJ No 606; *Barclays Bank PLC v Metcalfe & Mansfield Alternative Investments VII Corp (Trustee of)*, 2010 ONSC 5519, [2010] OJ No 4234.
- 43 International Bar Association, *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, adopted 29 May 2010, at article 9.2(b).
- 44 *Ibid* at article 9.3.
- 45 For a detailed review on privilege where a party has or is seeking funding in the international arbitral context, see: Meriam N Al-Rashid, Jane Wessel and John Laird, "Impact of Third Party funding on Privilege in Litigation and International Arbitration" (2012) 6 *Dispute Resolution International* 101.
- 46 *Supra* note 24 at para 43.
- 47 *Hayes v The City of Saint John et al*, 2016 NBQB 125 at para 2, 268 ACWS (3d) 287.
- 48 *Schneider v Royal Crown Gold Reserve Inc.*, 2016 SKQB 278 at para 10, 270 ACWS (3d) 494.
- 49 *ADRIC Arbitration Rules*, *supra* note 32, r 1.2, definition of "Confidential Information".
- 50 *Ibid* at r 4.18.4.
- 51 *ICDR Canada Arbitration Rules*, *supra* note 32, article 37(2); International Chamber of Commerce, *Rules of Arbitration*, article 22(3).
- 52 This was also recognized in the ICCA-QMUL Draft Report, *supra* note 1 at 17.
- 53 Khouri, Hurford and Bowman, *supra* note 5 at 5.
- 54 See eg: ICCA-QMUL Draft Report, *supra* note 1 at 12-18.
- 55 See for example the differences between *Bourgoin v Ouellette*, [2009] NBJ No 164 at para 59, 343 NBR (2d) 58 (NBQB), *LeBlanc v Doucet*, 2012 NBCA 88, 357 DLR (4th) 304 and *Park Avenue Flooring Inc. v EllisDon Construction Services Inc.*, 2016 ABQB 332 at para 145, 267 ACWS (3d) 295 citing *Hunt v R.M. Douglas (Roofing)*, [1988] 3 All ER 823 (UKHL) and *Davidson v Patten*, 2005 ABQB 519, 381 AR 1.
- 56 *Essar Oilfields v Norscot Rig Management*, [2016] EWHC 2361 (Comm).
- 57 See: Khouri, Hurford and Bowman at 6-7 on potentially unfair terms and conducting due diligence on the funder's ability to pay.
- 58 See eg: Bentham IMF, "Funding Overview", online: <<https://www.benthamimf.com/docs/default-source/default-document-library/bentham-funding-overview.pdf?sfvrsn=4>>. See also: Mick Smith, "Mechanics of Third-Party Funding Agreements: A Funder's Perspective" in Lisa Bench Nieuwveld & Victoria Shannon, eds, *Third-Party Funding in International Arbitration* (Netherlands: Kluwer Law International, 2012) at Ch 2.
- 59 Some reports state that on average only 1 out of every 10 cases obtains funding. See Marius Nicolae Iliescu, "A Trend Towards Mandatory Disclosure of Third Party Funding? Recent Developments and Positive Impact" (May 2, 2016) Kluwer Arbitration Blog, online: <<http://kluwerarbitrationblog.com/2016/05/02/a-trend-towards-mandatory-disclosure-of-third-party-funding-recent-developments-and-positive-impact/>>. This is similar to other comments that "funders turn down the majority of cases they're asked to finance." (see: Global Arbitration Review, "Mistakes to avoid when approaching third party funders" (15 April 2014), online: <<http://globalarbitrationreview.com/article/1033321/mistakes-to-avoid-when-approaching-third-party-funders>>).

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THE WISDOM OF THE QUEBEC LAWMAKER AND MEDIATION: HOW GAME THEORY PROVIDES A NUDGE IN THE RIGHT DIRECTION

INTRODUCTION

In the new *Code of Civil Procedure*, Quebec's lawmakers have shown a strong resolve in favour of private processes for preventing and resolving disputes.¹ This resolve is manifested not only in the preliminary provision², but also by the fact that considering private means is now a mandatory step prior to litigation.³ As it is so recent, early assessments of the new Code are based on anecdotal evidence rather than a systematic analysis of private processes. Taking an approach rooted in mathematical economics⁴ demonstrates the lawmakers' (somewhat unintentional⁵) wisdom in advocating for these private processes—particularly in the case of mediation—as they favour more optimal dispute resolution for the parties involved than litigation. In this context, optimality refers to a strategy that maximizes utility for the parties. This approach reveals the mechanisms that make mediation optimal in many cases where parties are involved in a dispute.

AN APPROACH BASED ON MATHEMATICAL ECONOMICS

According to parliamentary proceedings, lawmakers primarily sought to recognize these private processes in order to reduce the burden⁶ on the court system and to foster a spirit of consensus in dispute resolution.⁷ However, the obligation to systematically consider these private processes⁸ has raised debate with respect to the priority granted to such processes versus public ones.⁹ In particular, Sylvette Guillemard, a professor at Laval University, is concerned that mediation may produce dissatisfaction in the long term as agreement is achieved through concession.¹⁰ On the other hand, Jean-François Roberge, director of Sherbrooke University's dispute prevention and resolution program, believes that the new code makes justice more accessible and efficient.¹¹

Despite these commentators' expertise, science has the advantage of being able to confirm or refute personal experience in a more objective way. This theory is in line with the law and economics movement (or economic analysis of law), a multidisciplinary intellectual ap-

proach that uses economic tools to study legal phenomena.¹² An important branch of this movement is normative law and economics, which analyzes legal phenomena from an economic standpoint in terms of their efficiency or optimality. In a conflict situation, a result is considered optimal when there is no other alternative in which all parties would be in a better position.¹³ While some criticize this approach as being somewhat simplistic,¹⁴ it does allow us to deepen our understanding of the mechanisms involved in legal phenomena.

Applying this reasoning, game theory confirms that mediation is more efficient than litigation and favours more optimal results for the parties involved in the conflict. Game theory uses mathematical economics to analyze the strategic behaviours of rational actors. According to the theory, a game is a context within which humans are in conflict or must cooperate in order to produce a result that is in their interests.¹⁵ The definition of a game is broader than a board game or a sport; it includes any



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human interaction governed by rules where those involved must adopt strategic behaviours. As seen through the prism of game theory, mediation is a game of both conflict and cooperation insofar as there are two parties seeking to come to an agreement that maximizes their individual interests.¹⁶

THE RULES OF THE GAME OF MEDIATION

Given the various models of mediation and various approaches taken by mediators, it can be difficult to isolate the unique characteristics of mediation.¹⁷ Each model of mediation requires different actions by the mediator and alters the optimal behaviours that each party should adopt. There are three main models of mediation: evaluative, facilitative and transformative.¹⁸ Evaluative mediation is an interventionist model in which the mediator advises the parties while aiming for a resolution he

or she considers fair. It is important to present the mediator with good arguments, as cooperation between the parties plays less of a role and the outcome depends on the mediator's neutral assessment.¹⁹ In facilitative mediation, the mediator is involved on a procedural level so as to ensure that the environment is favourable to negotiation. This model allows the parties leeway to negotiate between themselves. Meanwhile, the transformative mediation model is centred on a process seeking to rectify the breakdown of communication between the parties and favour more lasting interaction. The parties involved in transformative mediation must consequently adopt more cooperative behaviours, even outside the context of conflict.²⁰ Although somewhat succinct, these descriptions testify to the complexity of defining parameters that apply to all mediation models.

Mediation consists, first of all, of a confidential process that is without prejudice to the parties and takes place in the presence of a mediator. This process encourages the parties to express themselves freely. The mediator's role is to facilitate discussion between the parties so they can agree on a mutually satisfactory solution.²¹ According to Jean-Yves Brière, one of the mediator's principal tasks is to "make the parties understand that their position may not be as solid and perfect as they thought and that it would be in their interest to look at the opposing point of view."²² With this objective in mind, the mediator must begin by listening to the parties, sometimes proceeding in an interrogative manner so as to clarify their positions and differences. Aside from the mediator's presence and general attitude, mediation is relatively flexible in terms of form and encourages the parties' free expression.²³

THE THREE MECHANISMS OF MEDIATION

Game theory reveals several mechanisms that allow mediation to produce results that are more optimal than litigation, including: i) the ease of exchanging information, ii) the lower cost of mediation, and iii) the long-term transformation of the lawyer's profession.

I) THE EASE OF EXCHANGING INFORMATION

Like other means of dispute resolution, mediation is characterized by an absence of information and intentions. In contrast to games with complete information (such as chess or tic-tac-toe), mediation is a "game" with incomplete information.²⁴ In this sense, it is similar to poker, as the parties start off with little information, but more is revealed as the game goes on. In other words, the "players" know their own cards or relevant facts, but not those of the opposition. From a game theory standpoint, this information limits the players' range of strategic behaviours. The range of possible strategic behaviours becomes more restricted as more information is shared by the parties—just as the options in a game of chess are limited by the position of the pieces on the board. When a player does not have all the information, the most strategic behaviour is to prepare for all eventualities, which multiplies the possible strategic behaviours while attenuating the conflict.

Throughout mediation, the mediator plays a crucial role in the exchange of information. According to the economic model proposed by Goltsman et al, the exchange of information is a decisive factor in the success of mediation.²⁵ When a mediator is present, the parties feel more comfortable talking, allowing them to learn information from one another that was previously private.²⁶ In mediation, the relevant information includes not only the facts directly related to the dispute, but also the parties' preferences and positions with respect to the issues at hand. For example, in the case of mediation dealing with the splitting of an estate, relevant information may take the form of a preference to receive long-term liabilities rather than short-term. The other party may then orient their strategic behaviours taking this expressed preference into account. According to another model, when the information gap is reduced, the offer gap is also reduced, which speeds up the conflict resolution process.²⁷

The mediator controls the exchange of information so it is available to all par-


ties,²⁸ using means such as summaries and verification questions.²⁹ These behaviours make it possible to filter and verify information during mediation, ensuring a certain level of information sharing between the parties.³⁰ According to game theory, such filtering by the mediator is optimal conflict resolution behaviour, as it reduces the parties' range of possible strategic behaviours in this game of incomplete information.³¹ This has the effect of funnelling the information, thus reducing the number of contested issues and clarifying the real issues at stake in the conflict.

II) THE LOWER COST OF MEDIATION

From an economic standpoint, an amicable agreement is efficient when the explicit and implicit transaction costs are minimal. In a legal context, the explicit costs mainly include legal fees for lawyers and witnesses, as well as the costs or benefits associated with the settlement. The implicit costs primarily consist of missed opportunities for more favourable resolutions. In an ideal world, an optimal result would not entail any transaction costs for the parties.³² In reality, any transaction comes with costs—it is therefore a matter of determining how to minimize them.

The costs associated with mediation is a factor that motivates the parties to resolve their conflicts. According to a model designed by Cooter, Marks and Mnookin, increasing the cost of resolution speeds up the mediation and negotiation process.³³ Private processes

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have a marked psychological impact on the parties' expectations for the final outcome as well as the strategic behaviours they accordingly adopt.³⁴ Placed in a mediation context, the parties feel psychological pressure to make offers in order to get the process started and to come out with the best result. At the beginning, the parties are less flexible and less keen to compromise. As the mediation process goes on, the psychological barriers to reaching a resolution become less important in determining the parties' behaviours. These barriers often arise due to lack of information, meaning the parties are unable to understand the other side's rationale.

Consequently, the more information is exchanged, the more barriers to agreement are likely to fall. This psychological pressure explains, in part, the reduced explicit costs of mediation in comparison to other means of resolution.³⁵ According to this same model, the parties should do everything they can to avoid trial by favouring mediation.³⁶ If an agreement on the subject of the dispute is possible, it is preferable to resolve the conflict through mediation as the transaction costs are lower.

III) THE LONG-TERM TRANSFORMATION OF THE LAWYER'S PROFESSION

Professional ethics dictate that lawyers act in their client's interests.³⁷ However, the way in which a lawyer defends the client's interests can vary depending on the context. In other words, the lawyer's strategy is altered by the structure of the game. During a trial, the parties are aiming for a specific goal: to win. In contrast, private processes (mediation in particular) are often seen as a way of avoiding the "total war" of litigation and finding more creative solutions to legal problems.³⁸ This war imagery is fitting insofar as litigation is a zero-sum game between parties seeking the same objective: a winning verdict.³⁹ The lawyers' strategies will be focused more on achieving victory at the other party's expense than on reaching a mutually satisfactory agreement through cooperation.

By practising mediation, lawyers de-

velop skills and attitudes that are better adapted to mediation, such as empathy, understanding and good judgement.⁴⁰ Placed in a mediation context, lawyers—like mediators—are in a position to facilitate communication between the party they represent and the other.⁴¹

Furthermore, lawyers are able to develop conflict resolution techniques in a context that is less constrained by legal considerations.⁴² The law as such is the product of numerous considerations distilled into the form of rules. These considerations include public order interests, the various interests of the stakeholders in society and government interests.⁴³ During a trial, conflict is a zero-sum game between parties hoping to achieve the same goal: a winning verdict by virtue of the law. Mediation is less constrained by legal considerations and allows for resolutions based on the parties' interests.⁴⁴ Given this latitude, lawyers are able to suggest more creative, non-judicial solutions to their clients. Clients are therefore well advised to retain the services of a lawyer with more mediation experience. In other words, experience in mediation transforms a lawyer's job from "fighter" to "cooperator," which is an approach better suited to mediation.⁴⁵

CONCLUSION: THE WISDOM OF THE LIBERTARIAN PATERNALISM OF THE QUEBEC LAWMAKER

Quebec's lawmakers show a certain libertarian paternalism in the fact that private means of dispute resolution are

favoured rather than imposed. In *Nudge*, Richard Thaler and Cass Sunstein defend libertarian paternalism—a theory based on the idea that, most of the time, we are not completely rational agents capable of maximizing our own interests.⁴⁶ They argue for active techniques to build choice architectures that demonstrate a benevolent intention to favour the interests of the stakeholders while preserving their freedom of choice.

Through economic analysis based on global optimality, the wisdom of this libertarian paternalism can be confirmed. Thanks to the three mechanisms describe above, mediation can be used to achieve results that are more optimal for the parties involved. While the concept of optimality makes it possible to identify the best result for *all* parties, it does not allow the best result for *one* party to be achieved.⁴⁷ In this sense, the methodology applied is itself tinged with this paternalistic spirit, as it aims to protect society's well-being rather than to maximize individual interests. Nevertheless, this does not mean that those seeking to maximize their personal interests should not favour mediation over other means of dispute resolution. To the contrary, many economic models demonstrate that a rational actor will often prefer mediation instead of risking litigation, unless the conflict is a truly legal matter.⁴⁸ In short, from an economic standpoint, the new *Code of Civil Procedure* is a nudge in the right direction. 🏠

Bibliography

Code of Professional Conduct of Lawyers, CQLR c B-1, r 3.1
Code of Civil Procedure. CQLR c C-25.

- Ian Ayers and Jennifer Gerarda Brown, "Economic Rationales for Mediation," (1999) 80 Virginia L. Rev. 2, 323.
- Ken G. Binmore, *Game Theory: A Very Short Introduction*, (Oxford: Oxford University Press, 2007).
- Laurence Boulle and Kathleen J. Kelly, "Legal Issues in Mediation" in Boulle, Laurence, *Mediation Principles, Process, Practice*, (Toronto: Butterworths, 1998).
- Jean-Yves Brière, "La conciliation et la médiation" in Jocelyne Tremblay (ed.), *Justice participative*, (Montreal: École du barreau du Québec, 2016).
- Steven J. Brams, *Negotiation Games: Applying Game Theory to Bargaining and Arbitration*, (New York: Routledge, 2003).
- Robert A. Baruch Bush and Sally Ganong Pope, "Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation," (2002) 3 Pepperdine Dispute Resolution Law Journal 1.
- Luc Chamberland, *Le nouveau Code de procédure civile commenté*, (Cowansville, Quebec: Editions Yvon Blais, 2014).
- Robert Cooter, Stephen Marks and Robert Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior" (1982) 11 Journal of Legal Studies 2, 225.
- Hélène de Kovachich, "La médiation privée et la conciliation judiciaire" in Jocelyne Tremblay (ed.), *Justice participative*, (Montreal: École du barreau du Québec, 2016).
- Alexandre Désy, "Les coûts et les délais judiciaires de la médiation judiciaire; les discours théoriques et pratiques sous le regard de l'analyse économique du droit." Master's thesis. University of Sherbrooke, 2016.
- Denis Ferland and B. Emert, *Précis de procédure civile du Québec*, 5th edition (Cowansville, Quebec: Editions

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- Yvon Blais, 2015).
- Anne Gaignaire, "Nouveau Code de procédure civile: qu'en disent les experts?" *La Presse* (January 26, 2016) <<http://affaires.lapresse.ca/portfolio/droit/201601/26/01-4943791-nouveau-code-de-procedure-civile-que-n-disent-les-experts.php>>
- Ronald J. Gilson and Robert H. Mnookin, "Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation" (1994) 94 *Columbia Law Review* 2, 509.
- Maria Goltsman, Johannes Horner, Gregory Pavlov and Francesco Squintani, "Mediation, Arbitration and Negotiation" (2009) 144 *Journal of Economic Theory*, 1397.
- Christine Jolls, Cass R. Sunstein and Richard Thaler Alessio "A Behavioral Approach to Law and Economics," (1998) 50 *Stan.L.R.* 5, 1471
- Russell B. Korobkin and Thomas S. Ulen "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics," (2000) 88 *Cali.L.R.* 4, 1051.
- James Marshall, "Lawyers, Truth and the Zero-Sum Game" (1971-1972) 47 *Notre Dame Law*, 919.
- Carrie Menkel-Meadow "Lawyer Negotiations: Theories and Realities – What We Learn From Mediation" (1993) 56 *The Modern Law Review*, 361.
- Carrie J. Menkel-Meadow, "When Winning Isn't Everything: The Lawyer as Problem Solver," (2000) 28 *Hofstra L. Rev.*, 905.
- Priscilla Murphy, "The Limits of Symmetry: A Game Theory Approach to Symmetric and Asymmetric Public Relations," (1991) 3 *Public Relations Research Annual*, 115.
- O. Russel Murray, *The Mediation Handbook*, (Denver: Bradford Publishing Company, 2011).
-
- 1 Private processes include negotiation, mediation and arbitration; Luc Chamberland, *Le nouveau Code de procédure civile commenté*, (Cowansville, Quebec: Editions Yvon Blais, 2014) i to ix and p. 3.
 - 2 *Code of Civil Procedure*. CQLR c C-25, Preliminary Provision [C.C.P.].
 - 3 C.C.P., Art. 1, para. 3 and 148, para. 1.
 - 4 Mathematical economics is the use of mathematical methods to analyze problems related to economics.
 - 5 I say "unintentional" as the lawmakers did not in fact claim that this was the case.
 - 6 Québec, Assemblée nationale, *Journal des débats de la Commission des institutions*, 41st Legislature, 1st Session, Vol. 44, No 5 (Rita de Santis). < <http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/ci-41-1/journal-debats/Ci-140625.html>>.
 - 7 Denis Ferland and B. Emert, *Précis de procédure civile du Québec*, 5th edition (Cowansville, Quebec: Editions Yvon Blais, 2015) p. 1-20.
 - 8 C.C.P., Art. 1, para. 3
 - 9 Barreau du Québec, *Mémoire du Barreau du Québec sur le projet de loi no 28 intitulé Loi instituant le nouveau Code de procédure civile*, < <http://www.barreau.qc.ca/pdf/medias/positions/2013/20130913-pl-28.pdf>>, p. 10.
 - 10 Anne Gaignaire, "Nouveau Code de procédure civile: qu'en disent les experts?" *La Presse* (January 26, 2016) <<http://affaires.lapresse.ca/portfolio/droit/201601/26/01-4943791-nouveau-code-de-procedure-civile-que-n-disent-les-experts.php>>
 - 11 Ibid.
 - 12 Richard Posner, *The Economics of Justice*, (Cambridge: Harvard University Press, 1983) p. 4.
 - 13 Alan Stitt, *Mediation: A Practical Guide*, (London: Routledge, 2004) p. 135; O. Russel Murray, *The Mediation Handbook*, (Denver: Bradford Publishing Company, 2011) p. 44.
 - 14 See generally: Christine Jolls, Cass R. Sunstein and Richard Thaler Alessio "A Behavioral Approach to Law and Economics," (1998) 50 *Stan.L.R.* 5, 1471; M. Paccès, "Normative Law and Economics: Asking the Right Questions," (2015) RILE Working Paper Series No 2015/03; Russell B. Korobkin and Thomas S. Ulen "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics," (2000) 88 *Cali.L.R.* 4, 1051.
 - 15 Ken G. Binmore, *Game Theory: A Very Short Introduction*, (Oxford: Oxford University Press, 2007) p. 5.
 - 16 Priscilla Murphy, "The Limits of Symmetry: A Game Theory Approach to Symmetric and Asymmetric Public Relations," (1991) 3 *Public Relations Research Annual*, 115, p. 128.
 - 17 Alexandre Désy, "Les coûts et les délais judiciaires de la médiation judiciaire; les discours théoriques et pratiques sous le regard de l'analyse économique du droit." Master's thesis. University of Sherbrooke, 2016, p. 171.
 - 18 Laurence Boulle and Kathleen J. Kelly, "Legal Issues in Mediation" in Boulle, Laurence, *Mediation Principles, Process, Practice*, (Toronto: Butterworths, 1998) p. 276-321.
 - 19 Hélène de Kovachich, "La médiation privée et la conciliation judiciaire" in Jocelyne Tremblay (ed.), *Justice participative*, (Montreal: École du barreau du Québec, 2016) p. 71.
 - 20 Robert A. Baruch Bush and Sally Ganong Pope. "Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation," (2002) 3 *Pepperdine Dispute Resolution Law Journal* 1, 67, p. 71.
 - 21 Jean-Yves Brière, "La conciliation et la médiation" in Jocelyne Tremblay (ed.), *Justice participative*, (Montreal: École du barreau du Québec, 2016) p. 76.
 - 22 Id., p. 80.
 - 23 Id., p. 76.
 - 24 Xavier Jarque, Clara Ponsati and Jozsef Sakovics, "Mediation: Incomplete information bargaining with filtered communication" (2003) 37 *Journal of Mathematical Economics* 7, 803, p. 804.
 - 25 Maria Goltsman, Johannes Horner, Gregory Pavlov and Francesco Squintani, "Mediation, Arbitration and Negotiation" (2009) 144 *Journal of Economic Theory* 1397.
 - 26 Id., p. 1398.
 - 27 Robert Cooter, Stephen Marks and Robert Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior" (1982) 11 *Journal of Legal Studies* 2, 225, p. 235.
 - 28 Ian Ayers and Jennifer Gerarda Brown, "Economic Rationales for Mediation," (1999) 80 *Virginia L. Rev.* 2, 323, p. 326.
 - 29 John Peter Weldon, "La médiation transformative au soutien de l'autodétermination des parties," (2012) 21 *Journal d'arbitrage et de médiation du Canada* 1, 37, p. 41.
 - 30 Thomas C. Schelling, *The Strategy of Conflict*, (Cambridge: Harvard University Press, 1960), p. 148.
 - 31 *Supra* note 25, p. 1407.
 - 32 Donald H. Regan, "The Problem of Social Cost Revisited" (1972) 15 *J. Law & Econ.* 42, 427, p. 437.
 - 33 *Supra* note 27, p. 239.
 - 34 Ibid.
 - 35 E.g. According to a study led by Pierre Noreau examining the costs of judicial activities in civil matters under the jurisdiction of the Court of Québec, the average cost of a dispute resolved by means of case management and conciliation is \$2,133, while the average cost of a normal trial is \$6,036; Pierre Noreau, "Les Conférences de conciliation et de Gestion judiciaire, Cour du Québec. Projet pilote de Longueuil," <http://www.droit-justice.ca/files/sites/23/2015/03/Rapport-Longueuil-final.pdf>, p. 60.
 - 36 *Supra* note 27, p. 246.
 - 37 *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1, Art. 36.
 - 38 Ronald J. Gilson and Robert H. Mnookin, "Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation" (1994) 94 *Columbia Law Review* 2, 509, p. 514-522.
 - 39 James Marshall, "Lawyers, Truth and the Zero-Sum Game" (1971-1972) 47 *Notre Dame Law*, 919, p. 926.
 - 40 Carrie J. Menkel-Meadow, "When Winning Isn't Everything: The Lawyer as Problem Solver," (2000) 28 *Hofstra L. Rev.*, 905, p. 921.
 - 41 Ibid.
 - 42 Carrie Menkel-Meadow "Lawyer Negotiations: Theories and Realities – What We Learn From Mediation" (1993) 56 *The Modern Law Review*, 361, p. 364.
 - 43 Steven J. Brams, *Negotiation Games: Applying Game Theory to Bargaining and Arbitration*, (New York: Routledge, 2003), p. 64.
 - 44 Robert J. Rhee, "A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation under Uncertainty" (2006) 56 *Emory L.J.*, 619, p. 668-673.
 - 45 *Supra* note 39, p. 921.
 - 46 Richard Thaler and Cass Sunstein, *Nudge – La méthode douce pour inspirer la bonne décision*, (Paris: Vuibert, 2010); Frédéric Orobon, "Le 'paternalisme libéral', oxymore ou avenir de l'État-providence?" (2013) 7 *Esprit*, 16, p. 22.
 - 47 Iyad Rahwan and Kate Larson, "Pareto Optimality in Abstract Argumentation" (2008) *Proceedings of the Twenty-Third AAAI Conference on Artificial Intelligence* 150, p. 155.
 - 48 *Supra* note 27, p. 246; *supra* note 21, p. 375.

COMPLEX MULTIPARTY COMMERCIAL MEDIATION: CHALLENGES AND STRATEGIES

INTRODUCTION

Volumes have been written on the range of techniques and strategies for managing the typical two-party commercial mediation involving a single plaintiff and a single defendant. Much less ink has been devoted to the challenges of and strategies for dealing with complex multiparty commercial mediations involving a minimum of three and often well over a dozen separate parties. Yet, these mediations are so much more demanding and fraught with difficulties than the typical two-party variety that they deserve some real attention.

WHAT DO I MEAN BY COMPLEX MULTIPARTY COMMERCIAL MEDIATION?

Working backwards, by commercial mediation, I am excluding the resolution of most community-based or workplace disputes, collective agreements, matrimonial conflicts, or medical malpractice claims, even where more than two parties may be implicated. My focus here is on tort or contract-based liability, often involving claims of negligence resulting in financial loss to one or more plaintiffs, allegedly caused jointly or severally by one or more defendants, third, fourth, or fifth parties. Although they can arise in a variety of contexts, these disputes often arise in the context of construction, environmental, or product liability claims, or failed real estate transactions, to name a few.

SOME EXAMPLES WILL BE HELPFUL TO APPRECIATE THE CHALLENGES:

- 1) During the course of a 100-year rain-storm event, a portion of the roof of a large warehouse collapsed allowing large volumes of water into the premises, causing millions of dollars of damage to the goods being stored there. The warehouse was built a decade earlier. Claims totaling more than \$8 million were made and paid by the insurers of the warehouse owner, the tenant operator of the premises, and two companies whose goods were being stored in the warehouse.

These four insurers brought subro-

gated claims against the architect and the prime contractor, who, in turn, brought third-party claims against the structural engineer and the structural steel subcontractor. Those parties brought fourth-party claims against the structural steel erection sub-subcontractor and the engineering firm retained by the owner to ensure compliance with the contract documents during construction. A separate engineer retained to review the structural connections in the shop drawings was joined as a fifth-party by the erection sub-subcontractor. Each of the responding parties was also being defended by an insurer. Finally, in separate but related actions, the parties whose goods were damaged in the warehouse brought claims against each of the owner and the operator of the warehouse, and the owner and operator brought cross-claims against each other.

The cause of the loss was identified as a structural design error initially caused by the structural engineer for the project, who was a sole practitioner with limited insurance coverage. Each of the other parties confronted theories of liability based on either their direct contractual responsibility for the work of the negligent engineer or for their own negligence in failing to identify the design error. The issues were further



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complicated by a variety of insurance coverage positions and limitations defences. On the first day, there were more than 45 legal counsel, insurance representatives, and party participants seated around the table for the opening joint session.

- 2) Over a period of approximately three decades, the owners of a small strip plaza leased space to a dry-cleaner. Chemicals used in the dry-cleaning operation gradually found their way into the groundwater beneath the building and migrated, directly or indirectly, under five surrounding properties. Property owners immediately adjacent to the source sued the owners of that property and the current and former operators of the dry-cleaning operation. Other property owners adjoining the immediately adjacent owners sued those owners as the

indirect source of the contamination on their respective properties.

- 3) A real estate developer entered into an agreement of purchase and sale with a builder. The developer had to fulfil a specific condition by a certain date and so notify the purchaser, or obtain an extension of time to meet this requirement, failing which the agreement would lapse. Several extensions of time were requested and granted but, either due to an oversight by the developer's lawyer or a miscommunication between the two lawyers, a further extension was not formalized by the expiry of the most recent deadline. In the meantime, the market took a dramatic turn for the worse, and the builder used this technical breach to back out of the transaction and receive a refund of its deposit. Ultimately, there were claims, counterclaims, and cross-claims between the developer and the builder, between the developer and its own lawyer, and between the two lawyers, both of which were insured by the same insurer.

WHAT ARE SOME OF THE COMPLEXITIES THAT ARISE IN THESE MEDIATIONS?

The first area of complexity usually concerns the factual matrix. In an ordinary two-party mediation, sorting out "who did what to whom" may sometimes be difficult, but the process is essentially a binary exercise. In the multiparty context, the mediator must sort out the relationship between the various parties and then develop an understanding of the factual allegations that each party may be making in respect of one or more other parties. Depending on the quality of the mediation briefs, much of this sorting out can be done before the session, but, in many cases, gaps may need to be filled when meeting with each of the parties. In any event, just coming to grips with the factual matrix sufficiently to confidently outline the case and discuss the various issues with the parties requires significant effort on the part of the mediator. Moreover, factual disputes between two or more of the parties may need to be resolved, even where those disputes do

not implicate other parties.

The second area of complexity involves the legal relationship between each of the parties. As will be clear from the examples, the legal relationship between certain parties may be based exclusively on contract, and the claims and counterclaims of these parties may involve allegations of breach, including negligence or bad faith in the performance of a contract. As between other parties, the claims may be based on negligence, strict liability, nuisance, trespass, interference with contractual relations, abuse of public office, or breach of statutory duties.

Different limitations issues may arise as between various parties, depending on the nature of the claims, their discoverability, and whether parties have made contribution and indemnity claims against third or subsequent parties. As will, by now, be apparent, the theoretical combinations and permutations of the legal relationships between individual parties can become quite overwhelming. Yet, the mediator must get a handle on these issues to develop a strategy for conducting the mediation.

A third area of complexity involves the financial means, including insurance coverage, of individual parties. While this issue frequently arises in two-party cases, the issues are multiplied when more than two entities are involved. Plaintiffs may be advancing subrogated claims, together with claims by an insured party for a shortfall in the amount received under the policy, such that there may be competition between two counsel claiming recovery from multiple defendants. Similarly, insurers for one or more defending parties may be denying coverage or defending cases under a reservation of rights and, in some cases, there may be declaratory relief applications pending between those parties. In other cases, such as in the first example above, a key defendant may be underinsured and operating through an effectively judgment-proof company. In other situations, parties may show up at the mediation but, intentionally or inadvertently, have failed to put their insurers on notice of the

claim. In many instances, none of this will be apparent from the mediation briefs submitted by the parties, and the mediator will have to explore and discover the capacity of each party to contribute to a settlement during the course of the mediation session.

Obviously, not all these factual, legal, and financial intricacies will come into play in every multiparty mediation, but it should be apparent, by now, that the more parties that are involved, the greater the potential complexity that the mediator will need to deal with, often, on the fly. The challenges that this presents to the mediator include obtaining enough initial information to work with, organizing the information in advance of the session, trying to ensure the attendance of all necessary participants, and compartmentalizing and retaining the information, together with the added material learned over the course of the mediation session. While notes can help, it is my experience that the mediator must be able to internalize a great deal of this information to effectively manage the process.

WHAT ARE SOME OF THE PRACTICAL ISSUES AND DYNAMICS AT WORK?

LOGISTICAL ISSUES

In a simple two-party mediation, establishing a date, time, and place for the mediation session is usually fairly straightforward. In some cases, even a half-day will suffice. In multiparty mediations, the first decision the parties will need to agree on is whether to book one, two, or even three days. Given the difficulty in aligning schedules, some parties will want to book the longer period to ensure that there is sufficient time to complete a settlement. Other parties, perhaps those more pessimistic about the outcome, will not want to incur the costs associated with a three-day process and will suggest booking a single day with the prospect of coming back on another date, if progress is being made. Of course, given the number of participants, finding a mutually acceptable return date can push the matter out for months, resulting in lost momentum.

From the mediator's perspective, it is



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usually desirable to have a continuous process. Not only does this maintain momentum, but resistance is inevitably broken down over the course of several days, and this benefit will be lost if the parties return with renewed resolve weeks or months later. And, as a practical matter, if there is a significant adjournment before the return date, the mediator must again spend time getting back up to speed on the facts and relationships between the parties.

Another logistical issue involves the selection of appropriate facilities. Some are of the view that, in addition to a very large room for the opening joint session, there must be a separate breakout room for each party where the mediator will conduct individual caucus discussions. Where there are four or five parties, this is not a major issue, but it can be challenging and expensive in situations where there are a much larger number of individual parties in attendance.

One approach that I sometimes employ is to have a large boardroom for the joint session and three or four breakout rooms. I will typically put the plaintiff in one breakout room, use another breakout room for a key defendant, and reserve one room for myself. I will meet with the plaintiff and the key defendant in their separate rooms, but I will leave the remaining parties in the large boardroom and cycle them through my separate room, as required. The main challenge that this approach presents is the need to get a firm commitment from all the other participants that they will not spend their time together in the boardroom discussing the case, their relative contributions, or trying to cut side deals. If that should happen, the mediator loses complete control of the process, and failure is assured.

One exception to this concern arises in the case of situations involving insured parties and their insurers. For example, a plaintiff may be seeking recovery of the uninsured portion of its loss, and its insurer may be pursuing a subrogated claim in the same action for amounts paid out to the insured party under the policy. It is not uncommon in such cases for the insured and the insurer to

be represented by separate legal counsel. Similarly, counsel for an insurer may be representing the defendant in a negligence claim, while separate counsel may be acting for the insured party in a related counterclaim for an unpaid portion of the contract price. In these situations, it may be helpful for these parties and their respective counsel to meet and confer in the absence of the mediator to resolve any issues that will inevitably be at play in these situations.

A party representative with ultimate decision-making authority is required to attend the mediation session. Similarly, where an insurer is involved, the *Rules of Civil Procedure* in Ontario require attendance by a representative of the insurance company. From time to time, this does not occur. The party representative may purport to have ultimate authority but, as the day goes on, it becomes apparent that the authority is significantly constrained, and that the real decision-maker is not in the room. Similarly, it is not unusual for insurance representatives to attend the mediation with limited authority based on established reserves for the file. Although most mediations are successful, when they fail, the greatest single cause is the failure to attend of persons with authority.

This problem is magnified in the case of multiparty disputes. In these more complex cases, typically, two or three days have been booked with the mediator. Given the preparation and attendance of multiple lawyers, party representatives, facilities rental charges, and the mediator's own fees, a very significant time and financial investment has been made in the process. If even one party attends without the necessary authority, the ability of the mediator to secure a global resolution of the dispute may be severely limited and, when it becomes known to the other parties that the mediation is threatened because of this, animosity will be engendered towards the party that has defaulted in this regard. Yet, this is a matter over which the mediator has little real control. While the mediator can insist that persons with authority attend, where there is a failure to comply, the media-

tor has no enforcement power. It is important for counsel participating in these mediations to ensure that all other parties are committed to having the necessary representatives in attendance.

Finally, there is the question of whether all parties must be in attendance throughout the process. Clearly, all participants must be there for the opening session. Following the joint meeting, however, I may know that I will need one or two hours with the plaintiff, to be followed by several hours with one or more key defendants. In a case where there are eight or ten responding parties, I may be able to predict, with certainty, that I will not be getting around to all of them during the balance of the first day. In those circumstances, I might excuse several parties for the balance of the first day and ask them to come back at specific times the following day. For example, I might ask certain parties to arrive at 10 AM the next day and excuse others until noon, and so on. When this occurs, I routinely asked counsel to provide me with a telephone number at which they can be reached, if a consultation is required. Inevitably, I will want all parties in attendance throughout the course of the final day.

PSYCHOLOGICAL FACTORS

In a typical two-party commercial mediation, the plaintiff is usually seeking payment of as much of its claim for damages as possible, and the defendant is seeking to pay as little as possible. The mediator emphasizes the need to compromise and the consequences of not settling in terms of litigation risk, one's own party-and-party costs, and exposure to the other side's costs. Depending on the mediator's particular style, in order to emphasize the litigation risk, he or she may also give some evaluative input, with a view to resetting unrealistic expectations and providing a reality check. Fear of the unknown is a common motivator in these situations.

In a multiparty scenario, the plaintiff or plaintiffs clearly want to get as much as they can, but the psychological dynamics, in play, can be very different.

First, the plaintiff may have only sued one or two parties directly but, as a result of claims over for contribution and indemnity, it may find itself confronting a trial process involving a large number of parties which will, inevitably, ramp up the delays and costs associated with getting its claim resolved. If a simple lawsuit can take two or three years to get to trial, a multiparty dispute can take considerably longer, given the need for all parties to produce documents, participate in examinations for discovery, and schedule mediations and pre-trials. The already unmanageable costs of litigation can become prohibitive. The plaintiff's awareness that it has, in effect, lost control of the lawsuit because of the addition of third, fourth, and fifth party claims will, in many cases, be an operative factor at work favouring a settlement.

The same concern will also be operating in the minds of the various responding parties and, in particular, those parties who may be well down the chain of liability with little, if any, actual exposure. It is not unusual that the so-called scattergun approach results in a multiplicity of parties with minimal exposure being brought into an action with the expectation that they will contribute something to a settlement for no other reason than what is often referred to as "nuisance value". Although these parties will resent having been brought into the action, they will be anxious not to be dragged through a long drawn out process, only to recover 50% or 60% of their costs, and then, only if they are found to be without fault.

Insurers, who may have no real liability exposure at the end of the day, are, nonetheless, highly motivated to buy their way out of these protracted proceedings, because of their independent obligation to defend the claim on behalf of the insured party. The cost of providing a defence under a policy may significantly exceed any perceived indemnity obligation and justify making a significant contribution to fund a settlement, or even a partial settlement between one or more parties.

Although most insurers adopt a rela-

tively practical approach to settlement, this is not true for all. Some insurers, in particular those serving an identifiable group of professionals (i.e. lawyers, architects, engineers, accountants, etc.), may refuse to contribute to a settlement on a purely pragmatic basis and insist on adopting a principled approach. It will only pay if a clear avenue to liability can be demonstrated, without regard to the cost of defending the claim. In some such cases, these may be captive insurers fully funded by the professional group itself. Their reluctance to make “nuisance value” contributions is based on their perceived obligation to protect the reputations of their insured professionals and a desire to discourage future frivolous claims. There is often little that a mediator can do to move them off this position, except for the use of partial settlement strategies, as discussed below.

Partial settlement agreements, often referred to as Mary Carter Agreements and Pierringer Agreements, can be helpful in the context of a multiparty mediation. While there are certain differences in these two types of judicially recognized agreements that are beyond the scope of this discussion, both forms of agreement allow a plaintiff to settle with one or more defendants while continuing the action against any recalcitrant parties. Both devices can be used in multiparty mediation to resolve issues between two or more parties. Their use, however, raises certain ethical issues for the mediator, who has been paid equally by all parties to settle the dispute on a global basis, if possible. Accordingly, many mediators will not engage in discussions concerning partial settlements. Others, not until it is clear

that a global settlement cannot be achieved, perhaps as a result of one or more party’s refusal to contribute.

Most mediators, however, feel they have an equally clear obligation to try to settle the case for any willing participants. Sometimes, this will take the form of a settlement between one defendant and the plaintiff, with the plaintiff continuing the litigation against one or more other defendants. In other situations, there may be payments by certain third parties to settle claims for contribution and indemnity brought against them by one or more defendants. The settling parties are then let out of the action, and the parties with which they settled have the benefit of those payments to finance the continuing litigation.

Another advantage of the use of these agreements is that they often help break the logjam that can arise between the claimant and a stubborn defendant, including the above-noted “principled insurer”. When the resistant defendant realizes that others are prepared to settle the case, and that it will be left defending the case on its own, with full exposure to the remaining liability, this can often give rise to second thoughts about the wisdom of holding out. It is quite common that, when a party is advised that a Pierringer agreement is being structured, the discussions with that party get back on track, and a total settlement is achieved. This is especially the case where the reluctant defendant is not going to be made aware of the terms of the partial settlement, as a result of the confidentiality provision.

The other very significant psychologi-

cal factor that most multiparty mediations engage relates to the issue of comparative contributions. Usually, the mediator will first ascertain what amount will satisfy the requirements of the plaintiff. The mediator will then spend most of the remaining time trying to assemble that amount from the various responding parties. Although each contributor should evaluate its own contribution based exclusively on its own assessment of potential liability and exposure to costs, all too frequently, contributors want to know the total amount that the plaintiff is to receive and what each other responding contributor is adding to the kitty. Then, if they feel that the plaintiff is getting more than is warranted, or if their individual contribution does not conform to their sense of proportionality to the amounts being paid by other contributors, they may refuse to contribute an otherwise sensible sum, and a settlement may not be achieved.

A typical example may involve a plaintiff seeking \$1 million in damages, but who agrees to settle the claim, if the mediator can produce an overall offer of \$675,000. In this scenario, assume there are three defendants, each, on the facts of the case, having approximately equal exposure to liability. The mediator meets with the first defendant and succeeds in obtaining a commitment to contribute \$225,000 to a settlement. The mediator has similar success with the second defendant, but the third defendant refuses, or is simply unable, to contribute more than \$175,000. Thus, the mediator has a total of only \$625,000 to work with.

The mediator then visits with the plaintiff and, with some arm twisting, gets the plaintiff to agree to accept an all-in settlement of \$625,000, but not a penny less! When the mediator revisits the first and second defendants to advise that a deal has been struck, these parties will ask what the other defendants are contributing. When they learn that the third defendant is contributing \$50,000 less than they are, emotions take over, and one or both may indicate that they are not prepared to contribute disproportionately. This position is often expressed as a refusal to “bail out” an-

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LIONEL J. MCGOWAN AWARDS OF EXCELLENCE IN DISPUTE RESOLUTION — CALL FOR NOMINATIONS FOR 2017

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 *St. Johns, Newfoundland, October 18-20, 2017*. 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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DEADLINE

Nominations will be accepted until Friday, September 1, 2017. 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.

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other defendant. Since the third defendant cannot or will not go higher and the plaintiff will not go lower, unless the mediator can assuage this concern, a hard day's work comes to naught.

The position of these defendants is obviously irrational. They had independently determined that a contribution of \$225,000 to a settlement fund made sense, based on their own assessment of potential exposure to liability and costs. Ironically, in my example, they are not the ones bailing out the third defendant. Rather, it is the plaintiff that is taking the hit by reducing its settlement demand. Nonetheless, sometimes it is impossible to overcome this emotional reaction. The mediator will often be told that, if the plaintiff is now prepared to accept only \$625,000, that amount should be divided three ways equally.

For illustration purposes, I have presented a fairly simple example, but in situations where there are a larger number of variously situated parties, the problems associated with comparative contributions can become extraordinarily difficult to manage. Some mediators approach this problem by canvassing each contributing party on what it believes the plaintiff should receive in total, and how that amount should be divided between the various contributors. Sometimes, the mediator will use a table or chart recording each party's input, to see if a consensus can be reached regarding percentage contributions. Sometimes, the mediator will need to make several passes in this exercise.

Earlier in my mediation career, I emu-

lated this approach, but over the past several years I have developed a different methodology that works better for me. The key to my approach is to get "buy-in" from all the parties during the opening session, after I outline the approach and my reasons for using it. This method is designed to address, not only the comparative contribution problem outlined above, but to deal, as well, with the reluctance of parties to reveal their bottom-line positions, unless and until they know that a settlement will be achieved.

As most mediators will have experienced, parties to a dispute often come into the process with anchored positions, knowing full well that the case will not settle on those bases, but, at the same time, not wanting to reveal what they are ultimately prepared to do to put the dispute behind them. They are afraid that, if they reveal how high or low they are prepared to go, this will be taken as a display of weakness by the other side. Moreover, they are concerned that whatever position may be put forward will become the starting place for future negotiations if the mediation fails. Accordingly, parties want to keep their real positions close to the vest, until they know that the mediation will be successful. Although I often feel that these concerns are exaggerated, I do believe that it is a legitimate expectation of the parties that the mediation process, if unsuccessful, will do no harm to any participant.

My approach is to advise the parties during the opening session that I will be meeting with them individually to discuss the case, clarify my understand-

ing of any factual or legal issues, and perhaps to provide some limited evaluative input. I will then ask each party to reveal something much closer to its bottom-line position on a completely confidential basis. I assure them that I will not be disclosing this information to any other party, without their consent, unless and until an agreement is reached. I also tell them that I will not be revealing to them the total amount that the plaintiff will be receiving or the individual contribution of any other participant. In other words, the focus of discussion with each party will be on what makes sense for them to contribute, based solely on an evaluation of their own exposure to liability and costs and their respective risk profiles. While I may canvas their views on what they think other contributors should pay, I will not be revealing any other participant's contribution.

Because each party knows that I will not be disclosing their position in the event of an unsuccessful outcome, there is less need to posture for my benefit. Of course, parties still hope that I might be able to get them out of the dispute for less than they are really willing to pay, so they may hold back something in reserve. While this approach does not always result in a party initially giving me its real final position, I am usually given an amount that is much more realistic than the typical opening position that a mediator will hear using the traditional approach.

After making my rounds of the plaintiff and all the potential contributors, I know what I need, and I know what the contributors collectively are prepared to pay. I will then usually have to make one or more additional visits to each room to increase the contributions but, again, I only discuss that party's contribution. Based on the totality of the information that I have, my comments will typically be along the lines of, "I appreciate that you have shared with me your willingness to contribute \$200,000 to settle this dispute. While I do not believe that I can get you out of this for that amount, I am reasonably confident that the matter can be settled, if you are prepared to contribute \$230,000. Can we talk



about whether that might make sense for you?”

Despite my opening comments, I am frequently asked by parties what one or more other participants are contributing. I then remind that party that, in exchange for protecting their position, I am committed to not revealing any other party's position. In some cases, I believe that they are asking the question to test the legitimacy of the process, and my refusal to answer serves to reinforce their confidence that I am not disclosing their position to any other party. This builds trust and, as a result, we are able to have a more open and forthright discussion.

When I have assembled as much by way of contributions as I believe I can achieve, I then go back and visit with the plaintiff and let them know whether I can meet their stated demand. Of course, the plaintiff has often asked for an amount a little higher than what they are really prepared to accept, and, with a little bit of coaxing, I am usually able to complete the settlement, as long as I am close to meeting their reasonable expectations. If agreement is reached, I then ask each party to independently confirm their contribution in formal minutes of settlement, and, when all parties have signed off, each party will then

learn, for the first time, how much the plaintiff is receiving and how much each other contributor has paid. In those rare cases where a settlement is not achieved, however, the parties leave the process knowing that no other party knows their position, and, likewise, they have no knowledge of any other party's position.

While this approach has the advantages that I have identified, it is not without its challenges. First, I have to exercise great care not to inadvertently reveal what I have agreed not to disclose. Second, some parties see some value even in a failed mediation, if they come away from the process with a clear idea of what they could have settled for, or what amount in total the plaintiff would have accepted. They believe that this information might benefit future negotiations. Using this method, however, they may have a rough idea of what they could have contributed to a global settlement, but they will not know the plaintiff's bottom-line or the willingness of other parties to contribute and in what amounts.

Finally, this approach requires the mediator to engage in a balancing act, of sorts. If, at the end of the process, a party with perceived liability of 20% of the claim discovers that it has paid 80%

of the settlement amount, that party will be understandably disgruntled, even if its contribution is based on a sound risk-based assessment. Although the mediator will never promise the parties that their respective sense of the fairness of the comparative contributions will be met, contributions that are grossly disproportionate to a reasonable assessment of liability should be avoided. Although this is a theoretical concern, in reality, it rarely arises, since each party is typically represented by capable legal counsel and able to intelligently evaluate what makes sense, and the mediator is generally working at the margins of that evaluation.

CONCLUSION

For these and other reasons, conducting complex multiparty commercial mediations is not for the faint of heart. On the other hand, once a mediator has developed the skill set and strategies for dealing with the various challenges, they can be extremely rewarding. The successful resolution of one of these disputes, especially if achieved at an early stage of the litigation process will often save millions of dollars in legal fees and expenses for the parties. In my experience, the expressions of gratitude that the mediator receives at the end of the process are palpable and genuine. 🏠

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