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EXPECT THE BEST

New Ontario Law Makes Commercial Mediation More Compelling Option For Settling Disputes

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Mediation in its various forms continues to evolve as an alternative to litigation.

Ontario's new *Commercial Mediation Act, 2010*, which took effect last October 25, introduces some welcome features to this collaborative dispute resolution process generally, one in which the parties opt to have a mediator, who cannot impose any particular outcome, help them resolve the dispute.

A helpful and unusual feature of the new legislation is that it permits the parties to apply it to their mediation in its entirety or to apply only particular parts of it to certain aspects of the mediation.

Key Features

The Act deals only with "commercial disputes," contractual or not. It aims to facilitate the effective use of mediation by enshrining certain requirements specifically designed to make it more likely that the process will accomplish what the parties are seeking. This is not to say that these features were not in use before, but only that they are now legally mandatory, which means, among other things, that if there is a breach of the mediation rules, the aggrieved party now has a clear remedy. Here are some of these key features:

- **conflicts of interest** – the proposed mediators must first make sufficient inquiries to determine if they have any conflicts of interest or if there are any circumstances that could give rise to a concern about any bias. If there is, there must be full disclosure to the parties, which still have the option of allowing the person to mediate the case.

- **fairness in the process** – the *Act* explicitly requires the mediator to treat the parties fairly throughout the process. If a party concludes that it has been treated unfairly, it is open to the party to seek a remedy in the courts.

- **relation to litigation or arbitration proceedings** – mediation can proceed before, during or after litigation or arbitration and will be always available, if needed, to preserve the rights of a party or to assure that the interests of justice are met.

- **confidentiality of information** – this issue can often be a significant barrier to a successful mediation. Now there is an explicit obligation on everyone involved to keep information relating to the mediation confidential unless all parties agree to disclosure or if the success or fairness of the process requires it. This is designed to (a) minimize the risk that business- sensitive information

disclosed to facilitate a mediated settlement will become widely known and (b) after a mediation is concluded, to prevent a party that has learned something during the mediation from launching a subsequent suit on an unrelated subject.

- **admissibility in other proceedings** – The new *Act* sets out a lengthy list of information that cannot be used in other legal proceedings (arbitration, litigation or administrative/regulatory), whether relating to the same subject matter as the mediation or not (unless, as before, there is consent or that the effectiveness of the process, or the general law, requires it). The obvious intent here is to encourage the parties to make the best of the mediation. The fact that there was a mediation, views were expressed, things were said or done or proposals made, together with information or documents generated for the purposes of the mediation, are now all protected from being admitted in other proceedings.

- **enforcement** – this is a particularly welcome feature which simplifies greatly what one needs to do in order to enforce an agreement reached through mediation. In short, the new *Act* does away with the prior step of commencing a lawsuit for breach of the mediated agreement. (In many cases, having to do this would have the effect of rendering the original mediation rather pointless.) Now, a party simply applies to the court to have the agreement registered, after which it is as good as a court judgment and can be enforced through the established means available for the enforcement of judgments here and elsewhere.

Conclusions

Mediation, both formal (court mandated) and informal, has been a component of the dispute resolution landscape in Ontario and elsewhere for many years. For those already sold on the concept, the new *Act* simply makes the case more compelling.

By removing some of the long-standing concerns about mediation as a process, the new *Act* should also result in an increased number of mediations.

At the very least, parties regularly exposed to commercial litigation should take a moment to review their approach to such litigation and consider revising their dispute resolution documents to ensure that resorting to the full set of features in the new *Act* will be an option when the next dispute arises.

In addition to making mediation of commercial disputes more effective and likely more common in Ontario, the new *Act* also can be expected to make Ontario more attractive for parties interested in mediation for the resolution of their disputes. (Only one other province at the moment, Nova Scotia, has a similar scheme).

This would mean that across the land (and maybe even beyond, as Toronto and other large Canadian cities position themselves as global Alternative Dispute Resolution centers), parties and their lawyers would do well to consider what changes they should make to their approach to commercial dispute resolution in order to take advantage of the features of Ontario's new commercial mediation regime.