

THE COMMERCIAL MEDIATION ACT, 2010

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Introduction

The arsenal of alternative dispute resolution mechanisms has recently been expanded in Ontario with the enactment of the *Commercial Mediation Act, 2010*.¹ The Act was enacted as part of Bill 68², an omnibus bill proposing changes to some 100 pieces of existing provincial legislation³. The Bill was itself part of the Government of Ontario's "Open for Business" initiative. A May 17, 2010 press release issued by the government provided that:

As part of Open Ontario, the province is taking steps to support economic growth and foster simpler, better and faster interaction between government and business.⁴

Arguably, the Act does not, in and of itself, simply foster more efficient interaction between government and private parties. It does, however, permit parties to resolve commercial disputes in a much more expedient manner than is currently afforded by the civil courts. Its adoption "is being viewed as a further legitimization of the use of alternative dispute resolution methods to help steer more cases away from busy courthouses."⁵

What may be gleaned from the government's initiative and the enactment of the Act, as well as of the many amendments and other changes that Bill 68 incorporated, is a desire to make the province a more attractive market for business

¹ *Commercial Mediation Act, 2010*, S.O. 2010, Chapter 16, Schedule 3 ("Act"). The Act received Royal Assent on October 25, 2010.

² Bill 68 (Chapter 16, Statutes of Ontario, 2010).

³ Government of Ontario, Ministry of Economic Development and Trade, November 23, 2010: www.ontariocanada.com.

⁴ *McGuinty Government's Proposed Act Will Deliver Results For Business*, Press Release, May 17, 2010: <http://news.ontario.ca/medt/en/2010/05/ontario-is-open-for-business.html>.

⁵ Todd, Robert, *Ontario Bolsters Mediation*, Law Times (online edition), December 6, 2010.

and investment, as well as an acknowledgement that conventional means of resolving commercial disputes, principally our civil court system, do not work well, are ineffective and inefficient. Indeed, one can argue that they act as disincentives to a more open and proficient marketplace.

Needless to say, other efforts have previously been undertaken in Ontario to encourage and implement mediation as an alternative to the conventional court system. In some jurisdictions in the province, mediation is mandatory as part of (or, perhaps more accurately, as an adjunct to) the conventional court process. It appears, however, that the Act is meant to go further than existing processes by making the implementation of settlements and their enforceability far more streamlined. In fact, the Act contemplates that, ideally, commercial disputants ought not to go to Court at all.

The Act

The objective of the Act is to provide parties to a commercial dispute with the means and mechanism to resolve their dispute without recourse to the Courts. The role of the Courts is meant to be limited to the enforcement of a settlement agreement, and then only if that becomes necessary. The powers granted by the Act, as will be seen, should mean that enforcement proceedings will be relatively swift and summary in nature.

The Act's purpose is concisely set out in the Act itself:

The purpose of this Act is to facilitate the use of mediation to resolve commercial disputes.⁶

⁶ Act, supra, section 1.

Consistent with the “open for business” message meant to be conveyed, the Act is premised on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002).⁷ Section 4 of the Act provides that “in interpreting this Act, consideration must be given to its international origin, the need to promote uniformity in its application and the observance of good faith.”⁸

The Act is applicable only to “commercial disputes”, defined as follows:

... a dispute between parties relating to matters of a commercial nature, whether contractual or not, such as trade transactions for the supply or exchange of goods and services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investments, financing, banking, insurance, exploitation agreements and concessions, joint ventures, other forms of industrial or business co-operation or the carriage of goods or passengers.⁹

As can be seen, the Act is not applicable to non-commercial disputes, such as one may encounter, for instance, in family or personal injury matters, and which arguably may be subject to Court-annexed mediation.¹⁰ The Act does, however, provide for rather broad application and seems to contemplate the possibility that disputes involving areas other than those stipulated therein will come within its scope.¹¹

Application of the Act is not mandatory. Parties engaged in a commercial dispute may choose not to mediate or may agree to mediate without it. With two exceptions, parties may also agree to apply the Act “with such modification as the

⁷ Act, supra, section 4(1).

⁸ Act, supra, section 4(1).

⁹ Act, supra, section 3.

¹⁰ Act, supra, section 2(4). For example, the Act does not apply to mediations under or relating to the formation of a collective agreement, computerized forms of mediation taking place without an individual as mediator or mediations to be conducted under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

¹¹ Note the use of the words “such as”, suggesting that the list of types of disputes set out in section 3 is not meant to be exhaustive.

parties have agreed on.”¹² The exceptions are contained in sections 4(4) (parties may not opt out of the application of the UNCITRAL Model Law) and 7(5) (parties may not deviate from the mediator’s duty to maintain fair treatment).¹³

The manner in which mediation may be convened is straightforward:

A mediation commences on the day on which the parties to a commercial dispute agree to submit the dispute to mediation.¹⁴

If there is no agreement to mediate, a party may invite another to do so, whereupon the invitee may reject such invitation:

A party who invites another party to mediate may consider its invitation rejected if the party does not receive acceptance within 30 days after the day on which the party sent its invitation, or within the period specified in the invitation.¹⁵

The selection of the mediator may take place by agreement of the parties or, failing that, by reference to a third party for recommendation or appointment of a mediator.¹⁶ Under the Act, unlike in other circumstances where a similar obligation does not exist, the appointed mediator is under a continuing duty to disclose potential conflicts of interest and is obligated to make such “sufficient inquiries” to ascertain whether she may have “a current or potential conflict of interest or if any circumstances exist that may give rise to a reasonable apprehension of bias.”¹⁷ The mediator’s obligations in this regard continue until the termination of the mediation.¹⁸

¹² Act, supra, section 2(2).

¹³ Act, supra, sections 4(4) and 7(5).

¹⁴ Act, supra, section 5(1).

¹⁵ Act, supra, section 5(2).

¹⁶ Act, supra, section 6.

¹⁷ Act, supra, section 6(3).

¹⁸ Act, supra, section 4.

Insofar as the conduct of the mediation is concerned, the Act appears to codify certain generally accepted practices:

- a. the mediation shall be conducted in a manner agreed upon with the parties; if no such agreement is reached, the mediator shall determine the process, "taking into account any requests by the parties and the circumstances of the dispute, including any need for speedy resolution";¹⁹
- b. the mediator may meet with the parties jointly, separately or in any other combination and make proposals for settlement at any stage of the mediation;²⁰
- c. the mediator is to "maintain fair treatment of the parties throughout the mediation, taking into consideration the circumstances of the dispute."²¹
- d. unless a party has expressly requested of the mediator that she not disclose information provided by that party, the mediator may do so to other participants in the mediation;²²
- e. mediation is to be a confidential process and all information relating to same must be kept confidential by all participants, subject to the usual exceptions, which are enumerated in the Act.²³

Perhaps of greatest significance are the provisions in the Act dealing with enforcement of a settlement agreement reached at a mediation held under the

¹⁹ Act, supra, section 7(1).

²⁰ Act, supra, section 7(3).

²¹ Act, supra, section 7(4). I am not certain as to the reason for the qualification providing that mediators shall take account of the circumstances of the dispute. It implies that "fair treatment" will mean different things in different circumstances. It would seem preferable to simply provide for "fair treatment" and nothing more.

²² Act, supra, section 8(1).

²³ Act, supra, section 8(2).

auspices of the Act. While these provisions are amongst those that parties may opt out of, it would seem inadvisable to do so. The ability to enforce a settlement through the Courts²⁴ in a significantly streamlined, summary-like procedure, is, in my view, one of the most critical elements of the Act.

The Act provides:

If a party to a settlement agreement fails to comply with the terms of a settlement agreement, another party wishing to enforce the agreement may, on notice to all other parties who signed the agreement,

- (a) apply to a judge of the Superior Court of Justice for judgment in the terms of the agreement; or
- (b) apply to the Superior Court of Justice for an order authorizing the registration of the agreement with the court.²⁵

The Act further states:

On the filing of a true copy of the settlement agreement with the registrar pursuant to an order authorizing the registration of the agreement,

- (a) the settlement agreement is registered with the court and has the same force and effect as if it were a judgment obtained and entered in the Superior Court of Justice on the date of registration; and
- (b) the costs of and incidental to the registration of the settlement agreement and the application for registration are recoverable as if they were sums payable under a judgment.²⁶

The Act is a relatively brief document but provides a reasonably comprehensive code for its application and for the conduct of mediations under its terms. As it gains popularity in application we should develop a greater appreciation for its effectiveness. Over time we should also obtain a sense of how Courts will interpret the Act and whether, as one would expect, they are disposed to enforce settlements freely entered into.

²⁴ The Court with jurisdiction over the process is the Ontario Superior Court of Justice.

²⁵ Act, supra, section 13(2).

²⁶ Act, supra, section 13(7).

Analysis

There are a number of factors that commend commercial disputants to consider using the Act in order to resolve disputes. Some of these are not particularly novel, although they have now been codified so as to give them further legitimacy and structure.

First, the Act provides for an “out of court” resolution before parties resort to litigation, with its attendant costs and delays. The mediation contemplated does not take the form of an “after the fact” mechanism that parties turn to only after they have commenced legal proceedings and have become entrenched in their respective and opposing positions. This is not to say that resort to the Act cannot be had after litigation has been commenced, however, it would seem that the objective in this regard is to keep matters from getting to Court in the first place. Also, as is often the case, it becomes more difficult to resolve a dispute once parties have “staked out” their ground.

Second, the Act provides that mediation is to be voluntary. No party can be compelled to mediate if it does not wish to do so. Arguably, the process is made more attractive as a means of resolving disputes when the disputants know that they are not being compelled to do so, that they are engaging in the process of their own free will and that the mediator will not impose a settlement upon a party that is not satisfied with the settlement terms. Needless to say, a further compelling

feature is the fact that the process will be far more cost-effective and timely insofar as reaching a solution is concerned, than if the matter proceeds to litigation.²⁷

Third, as is already the practice in many quarters, the Act provides that the parties to a dispute may themselves negotiate with the mediator the process to be used in the mediation. If the parties “own” the process, they will be that far more comfortable with it, will have greater respect for it and the participants, and, lastly, should be that much more accepting of and satisfied with the outcome.

Fourth, perhaps in light of the fact that settlements reached pursuant to the provisions of the Act are to be more readily enforceable through the Courts, as discussed below, provision is made for ensuring that mediators maintain a scrupulously conflict-free position vis-à-vis the disputants.²⁸ As set out above, mediators are bound to make reasonable inquiries to ensure that they are not in or perceived to be in any form of conflict that might conceivably render the process less transparent and even-handed. The mediator’s duty in this regard continues throughout the mediation, further providing parties with reassurance that they are receiving fair and equal treatment.²⁹

²⁷ I do not list cost savings as a separate factor commending the application of the Act, although one may well do so. The fact that alternative means of dispute resolution are meant to reduce costs and provide more expedient means of resolving disputes seems clear by now.

²⁸ Douglas F. Harrison writes:

A conflict of interest is deemed to occur if a mediator has a financial or personal interest in the outcome of the mediation, or has an existing or previous relationship with a party or a person related to a party to the mediation. Once appointed as a mediator, that individual cannot also be an arbitrator of the dispute or a related dispute unless the parties agree.

Harrison, Douglas F., *New Commercial Mediation Act Makes Ontario a Better Choice for Commercial Dispute Mediation*, Stikeman Elliot LLP, November 5, 2010: www.stikeman.com/eps/rde/xehg/seen/hs.xsl/14607.htm.

²⁹ It would seem that ensuring that there is no conflict should already be the practice of any competent mediator.

From a litigator's standpoint, perhaps the most attractive and revolutionary aspect of the Act is that which I list as fifth, namely the ability to enforce settlement agreements that are not adhered to through the Courts in a relatively simple, expeditious and summary manner. As it stands, settlements reached in the context of a conventional piece of litigation that are not adhered to by one or another of the parties to it can be enforced through the Courts by moving for judgment on the terms of the settlement and proceeding to enforce that judgment in the usual manner prescribed by the Rules of Court. That often follows long and protracted litigation. That is what the Act is meant to help parties avoid.

The Act provides two ways of enforcing a settlement agreement, as provided for in section 13, the relevant parts of which I have reproduced above. First, section 13(2)(a) provides that a party may "apply to a judge of the Superior Court of Justice for judgment in the terms of the agreement."³⁰ Such a procedure does not appear substantively different than what was already available to disputing parties: namely, application to the Court for judgment upon the terms of a settlement agreement.

Second, under section 13(2)(b), a party may, rather than apply to a judge of the Court, "apply to the Superior Court of Justice for an order authorizing the registration of the agreement with the court."³¹ This process entails an application to the Registrar of the Court for "registration" of the agreement with the Court.³²

³⁰ Act, *supra*, section 13(2)(a).

³¹ Act, *supra*, section 13(2)(b).

³² While the process for registration is not set out and will be subject to the provisions of the *Rules of Civil Procedure*, presumably the process will entail the filing of a requisition to the Registrar for registration of the settlement. This may be done on what is known as an "over the counter" basis, namely the filing of a requisition and related documentation with the Court and without any necessity for an actual attendance in person to make submissions.

Whether by way of application to a judge or the Registrar of the Court, it must be made on notice to all other parties who signed the settlement agreement.³³

This second option appears more desirable than the first as it does not entail the more formal application to and attendance before a judge. The provision of two separate options may stem from the fact that the Registrar, in most circumstances, does not enjoy the same level of discretion that a judge does in assessing matters that may come before her.

The Act provides that a judge “may grant judgment”³⁴, while the Registrar “shall ... make an order”³⁵ unless any of the exceptions enumerated in section 13(6) are present. That section states:

No judgment or order shall be granted or made if it shown to the court that,

- (a) a party to the mediation against whom the applicant is seeking to enforce the settlement agreement did not sign the agreement or otherwise consent to the terms of the agreement that the applicant is seeking to enforce;
- (b) the settlement agreement was obtained by fraud; or
- (c) the settlement agreement does not accurately reflect the terms agreed to by the parties in settlement of the dispute to which the agreement relates.

In the result, while the Registrar has no discretion or jurisdiction to make the contemplated order in circumstances where the *bona fides* of the settlement is in doubt, a judge may, presumably on the basis of an evidentiary record, assess such objections as a party may raise and make a determination. The ability to apply to a judge should serve to preclude parties to an agreement from resiling from their obligations thereunder, giving the Act that much more authority.

³³ Act, supra, section 13(2).

³⁴ Act, supra, section 13(4).

³⁵ Act, supra, section 13(5).

Application to a judge, if successful, will result in a judgment of the Court that can be enforced in the normal course. The Act need not speak further to the issue. Additionally, the presiding judge will have her residual and discretionary power to award the costs of the application to the successful party, presumably that seeking to enforce the terms of settlement.

Where the Registrar makes the requisite order, section 13(7) provides:

On the filing of a true copy of the settlement agreement with the registrar pursuant to an order authorizing the registration of the agreement,

- (a) the settlement agreement is registered with the court and has the same force and effect as if it were a judgment obtained and entered in the Superior Court of Justice on the date of registration; and
- (b) the costs of and incidental to the registration of the settlement agreement and the application for registration are recoverable as if they were sums payable under a judgment.³⁶

Whether by way of judgment or order made by the Registrar, the settlement agreement assumes the form of a judgment, enforceable in Ontario or in any other jurisdiction where such judgment may be enforced through treaty or other arrangement.³⁷

Conclusions

Much like contractual arbitration provisions which compel parties to an agreement to resort to arbitration rather than litigation in order to resolve disputes, we are likely to see the incorporation of provisions in contractual documents providing for the resolution of disputes pursuant to the terms of the Act. With the

³⁶ Act, supra, section 13(7). Section 13(8) provides for the determination of costs under section 13(7).

³⁷ Harrison, in *New Commercial Mediation*, supra, writes that such judgment could arguably then "be registered in other provinces or the United Kingdom under the applicable reciprocal enforcement of judgment rules."

exceptions mentioned above, the provisions of the Act may be incorporated as they are or as modified by the parties to accommodate their particular needs. Harrison writes that the Act applies not simply to mediations conducted in Ontario, but also to mediations governed by Ontario law, and goes on to state that:

... parties who include dispute resolution clauses in their commercial agreements and wish to avail themselves of this new legislation should consider stipulating that any mediation be governed by Ontario law or be held in Ontario.³⁸

Whereas arbitration has itself become a complex and cumbersome process, with arbitral challenges and other interlocutory-type proceedings often rendering it not much more expedient than the conventional court process, mediations under the Act may well serve to provide a significantly and truly more expedient process. Of course, time will tell. With an ever increasing caseload and judicial resources that appear to remain static at present levels, one may conclude that the Courts will act aggressively to encourage the use of the Act's mediation process and provide it with legitimacy by upholding and enforcing settlements duly and fairly entered into.

Enactment of the Act may also serve another purpose: that of promoting Ontario as a suitable jurisdiction for the early and efficient resolution of commercial disputes, consistent with the government's introduction of such legislation as a means to encourage economic activity. Ontario is only the second Canadian jurisdiction to implement this type of legislation, and only three of the United States of America have done the same.³⁹

It would appear that Ontario is moving in the right direction.

³⁸ Harrison, *New Commercial Mediation Act*, supra.

³⁹ In Canada, Nova Scotia enacted such legislation in 2005. The three American states are Illinois, New Jersey and Ohio. See Todd, *Ontario Bolsters Mediation*, supra.