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Waiver of Dispute Resolution under the New Rules

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Cases Considered:

IBM Canada Limited v Kossovan, 2011 ABQB 621.

In *IBM Canada Limited v Kossovan*, Mr. Justice Bryan E. Mahoney provided the first judicial interpretation of an important new provision in the Alberta *Rules of Court*, Alta Reg 124/2010 (New Rules). The provision in question – Rule 4.16(2) -- governs applications to waive the dispute resolution processes mandated by Rule 4.02(e) of the New Rules. As Justice Mahoney notes (at para 4), "[w]hile the New Rules contemplate circumstances wherein the requirement might be waived, as yet, there is little guidance from our Court as to how this Rule is to be interpreted." Using case law from other jurisdictions that have adopted similar mandatory dispute resolution procedures, this decision begins to provide that guidance. However, as much of that guidance is based on anecdotal evidence and intuitions about the effectiveness of dispute resolution, it is to be hoped that the mandatory dispute resolution provisions of the New Rules will be empirically evaluated for both costs and benefits in the near future.

The relevant provisions under the New Rules are 4.2(e), 4.16 and foundational rule 1.2:

> **4.2** The responsibility of the parties to manage their dispute and to plan its resolution requires the parties (a) to act in a manner that furthers the purpose and intention of these rules described in rule 1.2,
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> ...
>
> (e) to consider and engage in one or more dispute resolution processes described in rule 4.16(1) unless the Court waives that requirement.
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> **4.16**(1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:
>
> (a) a dispute resolution process in the private or government sectors involving an impartial third person;
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> (b) a Court annexed dispute resolution process;
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> (c) a judicial dispute resolution process described in rules 4.17 to 4.21;
>
> (d) any program or process designated by the Court for the purpose of this rule.
>
> (2) On application, the Court may waive the responsibility of the parties under this rule, but only if
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> (a) before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial,

(b) the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties,

(c) there is a compelling reason why a dispute resolution process should not be attempted by the parties,

(d) the Court is satisfied that engaging in a dispute resolution process would be futile, or

(e) the claim is of such a nature that a decision by the Court is necessary or desirable.

(3) The parties must attend the hearing of an application under subrule (2) unless the Court otherwise orders.

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

In this particular case, IBM had applied to the Chief Justice under the November 1, 2010 Notice to the Profession, "Waiver of Dispute Resolution before Trial" and Justice Mahoney was designated to hear their application for a waiver, brought under Rules 4.2(e).

IBM had sued Kossovan and Schmidtke, two of its former employees, alleging that they had perpetrated a fraud against the company while working for it. The law suit alleged that Schmidtke posed as a qualified contractor using a false resume and then submitted time records seeking payment for work which he did not perform. When IBM paid Schmidtke's invoices — which it allegedly did to a total of $278,000 — the two defendants allegedly split the money. The defendants claimed that Schmidtke did perform the work and that IBM invoiced and received payments from its clients for that work. The case was scheduled for judicial dispute resolution (JDR) but IBM sought to proceed directly to trial instead.

IBM argued that this case was an appropriate one for the waiving of the dispute resolution requirement for the following reasons:

- The company had a very strong case, having obtained a number of admissions during the discovery process;
- As a matter of corporate policy, IBM will not settle a case involving fraud for anything less than full or near-full indemnity; and
- It was unlikely that the defendants have the resources to satisfy a judgment for $278,000 plus costs and so they could not agree to a settlement for near-full indemnity.

Therefore, IBM argued there was no realistic chance of the matter settling at JDR — thereby satisfying Rule 4.16(2)(b) — and JDR would be a waste of resources for the parties and the court — thereby satisfying Rule 1.2(1)(d).

Justice Mahoney begins his analysis by agreeing (at para 11) with earlier decisions which have held that every provision in the New Rules must be interpreted in such a way so as to give effect to the purpose statement contained in the foundational rule, Rule 1.2: *Donaldson v Farrell*, 2011 ABQB 11 at para 10; *Envision Edmonton Opportunities Society v Edmonton (City)*, 2011 ABQB 29 at para.44. The provisions mandating dispute resolution are particularly compatible with the purposes set out in Rule 1.2(2)(a)-(d) as the foundational rule points to the importance of identifying issues in dispute and effective communication and emphasizes resolution of the dispute as early as possible for at the least expense. Thus, it should come as no surprise that, as Justice Mahoney put it (at para 31) that "the threshold for obtaining [waivers] is high and parties can assume that they are used sparingly."

Justice Mahoney usefully summarizes some of the case law from Ontario, Saskatchewan and Newfoundland and Labrador on the types of matters that both have and have not resulted in exemptions from mandatory dispute resolution (at paras 16 and 30). The following fact situations have <u>not</u> given rise to exemptions or waivers:

- The parties' consent to an exemption from mediation: *Ross v Seib* (1996), 145 Sask R 62 (QB) paras 7-8;
- One party's unwillingness to settle the action: *Cassidy v Westwood Holdings*, [2000] OJ No. 5396 (Ont SCJ) (Master) at para. 2; *Dumoulin v Ontario*, [2004] OJ No 2778 (Ont SCJ) at para 6; *Drodge v Martin*, 2005 NLTD 73, 247 Nfld. & PEIR 223 at para 27;
- The perceived strength of one party's claim: *Pelham Properties Ltd. v Hessdorfer*, 2005 SKQB 234, 264 Sask R 148, at para 8;
- A party's belief that he or she may not be able to meaningfully participate: *O.(G.) v H.(C.D.)* (2000), 50 OR (3d) 82 (Ont SCJ);
- When a court is disposed to grant an application for summary judgment: *Pelham*, at para 10;

On the other hand, the following types of facts or arguments <u>have</u> given rise to exemptions or waivers of mandatory dispute resolution:

- When the parties have already engaged in a form of dispute resolution and they ought not to be required to repeat the effort: summarized in *O.(G.)* at para 13 and also found in Rule 4.16;
- When the issue involves a matter of public interest, such as police wrongdoing, or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases: *Maldonado v Toronto (Metropolitan) Police Services Board*, [2000] OJ No 5401 (Ont SCJ) (Master) at para 5; *O.(G.)* at para 13;

- If a party is incapable or disabled from participating: *O.(G.)*;
- If the case is complex and involves such things as a catastrophic claim, a large exposure, multiple defendants, cross-claims, and third-party complaints for indemnity, coverage issues, and other complex obstacles to settlement;
- If one party lives in a foreign jurisdiction and the expense of attending the mediation outweighs the probable advantages of the session: *Ross* para. 9 (but see *Wheataliba Farms Ltd. v Alhauser*, 2010 SKQB 391, 363 Sask R 287, and *Chase*);
- If it is not yet known whether a class action would be certified: *Dumoulin*, at para 6
- If there are issues of assault and power imbalances or abuse or violence where it would be detrimental to the emotional, mental or physical health of either party to participate and a mediator trained to address the parties' concerns is not an option: *Maldonado* at para. 5; *O.(G.)*.

A number of those cases addressed arguments of futility or inappropriateness that were similar to those made by IBM: *Pelham, Cassidy* and *Dumoulin*. Justice Mahoney noted (at para 22) that the following comments in *Drodge v Martin* at para 27 were particularly instructive:

> It is important to be sensitive to the attitudes of the parties because mediation is less likely to be successful if it also has to overcome recalcitrance. But, as Green, C.J. of this court has said, "... a skilled mediator can do a lot to encourage participation by reluctant litigants and to bring them around to a positive way of thinking ...

Based on these precedents, his own experience with dispute resolution processes that had produced unexpected positive results and the high threshold for exemptions, Justice Mahoney held that IBM has failed to discharge the onus on it to show that this was a proper case for waiver. He noted that IBM's concerns about precedent and reputation but held (at para 36) that a consent judgment reached as a result of the JDR process could address these concerns. On the key issue of futility based on IBM's corporate policy that they would not settle a case involving fraud for anything less than full or near-full indemnity, Justice Mahoney held (at para 42) that a "belief that there is little room for flexibility and no major concessions as to amount will be made does not act to render the alternate dispute resolution process futile." Relying on anecdotal evidence, He noted (at para. 43) that even if no settlement is reached in the JDR, other benefits of JDR may be obtained: "At the very least, getting together to refine the legal issues and plan the next court steps can also result in time and cost savings."

The outcome of *IBM Canada Limited v Kossovan*, the reasons advanced for that result, the precedents reviewed, and the high threshold set by the New Rules for obtaining a waiver all suggest that waivers of dispute resolution before trial will be rare. One can only hope that, at some point in the near future, the now one-year-old mandatory dispute resolution approach is evaluated to determine its benefits and its costs. The Ontario Mandatory Mediation program was evaluated in 2001, only 23 months after its implementation on a pilot basis – but not since. Controversy over mandatory dispute resolution in the context of domestic violence continues unabated, in part because of a dearth of empirical evidence. For a recent review of the literature and the evidence, see Susan D. Landrum, "The Ongoing Debate about Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness" (2011) 12 Cardozo J. Conflict Resol. 425, noting that very few empirical studies have evaluated the effectiveness of mediation in cases where there is a history of domestic violence and that those studies that have been done are very limited and involved only a small number of subjects.

The absence of systematic and scientific study and the corresponding reliance on anecdotal evidence and intuitions by scholars, dispute resolution providers and courts alike, in both the context of domestic violence and other contexts, is lamentable. Parties are required by New Rule 1.2(3)(b) to "periodically evaluate dispute resolution process alternatives". One can hope that those responsible for developing the recommendations for a new set of Rules – the Alberta Law Reform Institute, the Rules of Court Committee, the judiciary, Alberta Justice, the legal profession, and other stakeholders – will also seek to ensure the New Rules are demonstrably working to meet their stated goal of increasing access to justice for Albertans.