ADR IN THE AMERICAS:
THE CANADIAN PERSPECTIVE

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I would like to open with a quote from a lawyer named Lannan who practised in Calgary, Alberta during the Great Depression. This quote was made in response to a young man speaking to Mr. Lannan about the prospects of becoming a lawyer. Lannan said as follows:

> "The work of a lawyer is of the most exacting nature. No mistakes are permitted him; he must always be right; he cannot be subject to the ordinary human frailties. [H]e must go through the world with a great part of that world looking on him as an unconvicted thief....
>
> [S]o unless you have the blood of martyrs in your veins and you are prepared to devote your entire life to self-sacrifice, and to always have your motives misunderstood, your greatest efforts received with ingratitude, your legitimate accounts be treated as grand larceny, I would advise you to devote your energies to some other line of pursuit."

Lawyers are a hardy breed and we have survived another 60 years including a second Great Depression. But maybe some of us have taken Mr. Lannan's advice and have devoted our energies to some other line of pursuit.

In this connection, I am pleased to report to you that Alternative Dispute Resolution is alive and well and living in Canada.

Last year the outgoing President of the Canadian Bar Association, believing that the justice system is outmoded and overdue for change, made the following remarks:

"The Justice system must become faster, cheaper and less complicated and more responsive to the modern realities of time and technology."

As lawyers who must serve our clients' interests in a more sensitive, responsive and comprehensive way than ever, we are beginning to understand that dispute resolution outside the courts, should perhaps no longer be seen as an alternative form of dispute resolution, but as a more appropriate form of dispute resolution for many cases.

I. DEVELOPMENTS IN CANADA

I looked up the word "mediation" in the 1979 edition of the Encyclopaedia of Words, Phrases and Legal Maxims. Not surprisingly, there was no entry or definition. Things have changed rapidly since that time in Canada, and more particularly, in recent times. I want to refer you to some of the developments which have been taking place.

In Ontario, in 1994, a pilot project was undertaken for two years in Toronto and Ottawa. This project involved the opening of an Alternative Dispute Resolution Centre annexed to the Ontario Court (General Division). This is the main trial division in Ontario and comprises what used to be our County and District Courts, and the Supreme Court of Ontario. The system was applied particularly to the Commercial Court section which involves cases primarily in the area of business and commercial law. The premise was that once the issues were raised in the pleadings, the case would be referred on a **mandatory** basis to the ADR Centre before examinations for discovery or depositions were undertaken. Counsel were obliged to meet in advance of the ADR session with a view to try and settle the matter. If they could not, the case would proceed to the ADR Centre for mediation. There was an opportunity for opting out, but only if both counsel would sign a certificate indicating significant reasons why mediation would not work. Keeping in mind that this is a mandatory referral, I am pleased to advise that after the initial break-in period, the level of successful settlement in one meeting has been over 70%. This compares very favourably with voluntary mediations being conducted in the private sector. And I should add that initially only 1 out of 10 cases was referred, but this was increased to 8 out of 10 cases over the two year period.

The initial two year pilot project ended March 31, 1996, but was extended for a further six months by our Attorney General. I have been involved in the meetings with the Attorney General and the Chief Justice of Ontario and others in connection with the creation of an ongoing ADR

Centre. At present, it is the intention of our government to create a permanent ADR aspect to our litigation stream. While the government does not wish to be responsible for funding full time mediators as has been the case during the pilot project, the plan most likely is to have an amendment made to our procedures whereby a mandatory referral will occur. It is also likely that there will be an approved roster of mediators who will have to be paid privately by the parties. This will not be unlike the costs of the Official Examiner in whose offices, examinations for discovery are conducted daily in proceedings across Canada.

I have no doubt that the experience of the American jurisdictions will be sought out in the course of putting into place this permanent system in Ontario.

I should point out that in Canadian jurisprudence, typically, Ontario and British Columbia are the most progressive leadership provinces and the places where most business is conducted, and so it is to be expected to find these developments taking place in these jurisdictions first in Canada. Others will likely follow.

There are a range of processes that have been available at the ADR Centre in Toronto. These have included Mediation, Early Neutral Evaluation, Mini Trial and Summary Jury Trial.

I am certain everyone is familiar with the mediation process and I am happy to report that the process that is followed at the Centre, and by most trained private mediators, is the model which is taught at Harvard and at CDR in Boulder, Colorado. In fact, my own training is from both centres.

Early Neutral Evaluation is a process in which a judge of the court or a dispute resolution officer evaluates the relevant strengths and weaknesses of the positions advanced by the parties, and the proper outcome at trial, and advises the parties accordingly. In these sessions, counsel present the core of the case in the presence of the parties and the neutral evaluator gives an assessment of the strengths and weaknesses of the case of each of the parties afterwards. This process has been very effective where used, but its use has been relatively low so far. I believe that as counsel begin to understand the value of this concept more, and begin to have more faith in ADR generally, there will be significantly increased use of Early Neutral Evaluation.

In our jurisdiction, the Mini Trial is a process in which opposing counsel present their best case to the parties and to a Judge of the court who moderates the presentations and renders a non-binding opinion as to the proper resolution of the dispute after trial. One interesting feature of the Mini Trial is the fact that counsel are presenting the case to the other party as well as to a Judge. This is an early opportunity to make an effective presentation to the other party in the case, and counsel have begun to realize what a great opportunity it is to be able to attune the other party to your client's interests on a more common ground basis than in an adversarial setting. Again I expect a significant increase in the use of the Mini Trial in Canada.

Summary Jury Trial is a procedure connected to the formal litigation process and is available once the case is ready for trial. It is most typically advantageous in large complex cases that are expected to be very lengthy trials. The counsel for the parties present their best cases to a real jury. The jury is not advised that the trial is not a real one. However, the presentation is an abbreviated one so that it lasts only one or two days. There are no outside witnesses called. The business principals with authorization to settle are the parties who attend the trial. A judge presides over the summary jury trial. The jury renders a non-binding verdict. This becomes a starting point for negotiations in order for the parties to achieve settlement without the need for the complex trial.

I am happy to report that Canada is moving quickly into the 21st century at the corporate level as well. In particular, you will all be familiar with CPR in New York. Similar efforts are now being made in Canada by many commercial organizations which have joined the Canadian Foundation for Dispute Resolution, a similar type of organization. While the warrior mentality litigators may still exist, it is clear that corporate counsel have attuned their minds to more appropriate ways of seeing their companies' disputes resolved.

II. ARBITRATION

Let me turn for a few moments to private arbitration. In Canada, such arbitration has gone on since early this century. The provinces all have **Arbitration Acts** which are quite simple and straightforward. Arbitrations are often resorted to in commercial matters pursuant to clauses inserted in the original agreements between parties. Historically, there have been very few statutory approaches for or requirements for arbitration.

In Ontario the only legislated forms of arbitration exist under the **Ontario Labour Relations Act**, which is, of course, a very old statutory format for arbitration, and more recently, under the **Insurance Act** at the Ontario Insurance Commission. This latter format was developed in 1990 when our tort system for motor vehicle accidents went virtually completely no-fault. And that is not to say that cases do not still go through the court system. They do. However, there are prescribed procedures under the revised legislation which must go through mediation and arbitration processes, either solely or before going to court. The Ontario Insurance Commission has become an exceedingly busy place in the last half a dozen years.

There are also industry related formats of arbitration in many areas. I myself sit on one national arbitration plan in the motor vehicle field, and one provincial panel in the agricultural field.

III. INTERNATIONAL ARBITRATION

Prior to 1985, in Canada there was no special legislation with respect to international arbitration. The Provinces applied their Arbitration Acts generally (these were based upon the provisions of the U.K. Arbitration Act of 1889) to all kinds of arbitration whether it was domestic or international, commercial or non-commercial.

Although every Province had its own Arbitration Act, these Acts were all different; i.e. there was no Uniform Law. The reason for this was that the Canadian Constitution did not provide for uniformity of Acts on matters of provincial jurisdiction. In Canada, arbitration whether international or not, had always been a matter of provincial jurisdiction.

IV. WHY DID CANADA NOT ACCEDE TO THE NEW YORK CONVENTION UNTIL 1986?

As you know, Canada's major trading partners, the USA and the UK, did not accede until 1970 and 1975, respectively. So, the economic pressure was not very strong and this general apathy was combined with technical problems:

The Convention contained a "federal state clause" in Art. XI (b) providing that where the national government of a contracting state does not have the constitutional jurisdiction to implement all parts of the Convention, it must bring the terms of the Convention that it cannot implement to the attention of the governments in the country that can do so and recommend that they do implement those provisions.

The federal authority to implement the Convention was not clear, because the provisions of the Convention relate to administration of justice within the province, a matter of provincial jurisdiction under the **Constitution Act**. Since the Convention did not provide partial implementation by a contracting state, the federal government hesitated to accede to the Convention without unanimous provincial implementation.

Let me add that another factor in Canada's decision to act in the international arbitration field may also have been the fact that UNCITRAL adopted the Model Law of International Commercial Arbitration on June 21st, 1985. Canada had participated in drafting this Law. It was available to any jurisdiction that wanted it. It might have been the necessary "kick-start" needed to push the matter forward.

V. LEGISLATION FROM 1985 TO PRESENT

Efforts at legislation were made by the federal Minister of Justice who brought the matter forward at regular meetings of the federal and provincial Justice Ministers in 1985. Ultimately, the provinces all agreed in principle to implement the Convention.

In August 1985, the Uniform Law Conference of Canada adopted a short form Uniform Act called the "Uniform Foreign Arbitral Awards Act" declaring the Convention to be in force. This Act provided that the rules of the Convention were to be applied only to commercial arbitrations and to awards made in other contracting states. In December 1985, British Columbia adopted the Uniform Act.

In May 1986 the Uniform International Commercial Arbitration Act adopted the provisions of the UNCITRAL Model Law and the provisions of the Convention. At that time, the Uniform Foreign

Arbitral Awards Act was merged with the provisions of the Model Law because no other province except B.C. had implemented the Convention at that time.

From May 1986 to December 1986 almost all provinces and the two territories implemented both the Convention and the Model Law following the lead of the Federal Government. By 1988, in time for the advent of the Free Trade Agreement, the Convention and Model Law were implemented in every province of Canada.

VI. INTERNATIONAL ARBITRATION IN NAFTA

Art. 2022 is entitled "Alternative Dispute Resolution" and provides in its first paragraph that each of Canada, USA and Mexico "shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of ADR for the settlement of international commercial disputes in the free trade area." An Advisory Committee on Private Commercial Disputes has been established with each of Canada, Mexico and the USA having ten serving members. The Committee is to provide recommendations respecting the availability, use and effectiveness of arbitration and other procedures.

It is believed that article 2022 in NAFTA is unique in international trade agreements. A colleague tells me he is developing the first case in this area in Canada, but won't provide the details as yet. On a personal note, my information from the Advisory Committee is that mediation is being considered as the favoured mechanism. We shall see.

VII. INSTITUTIONS FOR INTERNATIONAL COMMERCIAL ARBITRATION IN CANADA

On May 12, 1986, the International Commercial Arbitration Centre in Vancouver was opened. On January 15, 1987, the second centre was opened in Quebec City. It is interesting to note that very few international arbitrations have gone on in Quebec City and that Vancouver has been averaging about one or two a year (although numerous domestic and private arbitrations are conducted there). While that was not unexpected in the immediate years following implementation

of the Model Law in Canada, one begins to wonder in the 1990's why there has not been more activity. On a personal note I took notice back in 1986 that no centre was opened in Ontario. That was curious having regard to the fact that Toronto is the commercial heart of Canada and Ottawa is the national capital and both are in Ontario. One would have thought it logical that one of these cities would have been chosen as an international commercial arbitration centre. On the other hand, both cities had a reputation as being centres for significant aggressive commercial litigation and may be it was considered that the softer approach of ADR was not appropriate in such centres. If that is the case, a lot has changed in ten years. Toronto, in particular, has a very respectable number of well-trained arbitrators today.

As we speak, another centre was to be opening in Windsor, Ontario. This one is called the Dispute Resolution Institute of North America or DRINA. It was planned to offer mediation and conciliation services in connection with the University of Windsor and, of course, with a view to handling free trade related agreements. It is noted that Chrysler Canada has its national headquarters and major manufacturing plant in Windsor, Ontario, and, of course, this is immediately contiguous to Detroit. It was also established later than the Commercial Arbitration & Mediation Centre for the Americas (known as CAMCA), which was established by the International Chamber of Commerce in Mexico City for similar purposes. The parties are, of course, free to select in their own agreements, the rules to be followed in arbitrations. These may include those of the International Bar Association, the International Chamber of Commerce or the American Arbitration Association.

VIII. HOW HAVE THE CANADIAN COURTS BEEN DEALING WITH INTERNATIONAL ARBITRATION

It appears that the Canadian courts have been ready from the beginning to encourage international arbitration. This is strictly with respect to arbitration and submission agreements as well as the enforcement of Foreign Arbitral Awards. They rarely intervene, rather they give respect to the parties' agreements and arbitral awards as a matter of public policy.

In **Quintette Coal** v. **Nippon Steel Ltd.**, the British Columbia Court of Appeal said "it is meet therefore, as a matter of public policy to adopt a standard which seeks to preserve the

autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing International Commercial Awards in British Columbia".

It is considered contrary to public policy not to give effect to arbitral submissions and to enforce a foreign arbitral award except on very limited grounds found in Sections 35 and 36 of the model law.

In the case of **Schreter** v. **Gasmac Inc.**, the Ontario Court (General Division) commented, "...if this court were to endorse the view that it should reopen the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction, and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute."

Concerning arbitration submission agreements, in the case of **BWV Investments Ltd.** v. **Saskferco Products Inc.**, the Saskatchewan Court of Appeal held that the role of the court is to apply the law in a manner that would uphold the objectives of the Model Law, and that it would constitute a violation of the strong public policy of International Commercial Arbitration to fail to do so. A similar approach has been taken in the Alberta Court of Appeal in the case of **Kaverit Steel** v. **Kone Corp.**

Lastly, I want to refer to the first case involving an international arbitration agreement which has reached the Supreme Court of Canada. In the case of **Canadian National Railway** v. **Burlington Northern Railroad**, leave to appeal to the Supreme Court of Canada was granted on March 7th, 1996. This is a matter which had arisen in British Columbia where a party to an arbitration agreement had commenced legal proceedings in court against the other party to the agreement. The other party had applied to the court to stay proceedings. The question is whether the arbitration agreement is inoperative on the basis of a party's refusal to comply with the agreement.

As I have said, it seems that Canadian courts have been keeping their hands off arbitral decisions generally, across the country. This would seem to indicate that the courts are very much in favour of allowing ADR to find its own level within our system of justice.

This development is not unlike that which has occurred in the United States. Very recently, I was in Washington, D.C. where I addressed an international association of lawyers on ADR. At that conference, Justice Sandra Day O'Connor of the U.S. Supreme Court, made an address and in the question period I asked her how her court viewed ADR in the scheme of dispute resolutions at large, and as an available service within the justice system. Justice O'Connor's response was very positive. She indicated that the Supreme Court of the United States favours Alternative Dispute Resolution; that it has been working very successfully in the federal system in the United States, and that this was true right up through the appellate level.

IX. CANADA AS A FORUM FOR INTERNATIONAL ARBITRATION

I think it is fair to say that Canada is recognized in the international community as a stable country, one which has had a major peacekeeping role, and one which is in support of human rights both domestically and abroad. As such Canada has been seen as a source of impartiality and fairness.

From the point of view of dispute resolution more particularly, Canada and the United States share a common language, principles of common law, and similar cultures.

Recently, I had a call from a lawyer in San Francisco who is acting for a California company which had become embroiled in a dispute with an Irish company. He was speaking to me about the prospect of Toronto as a venue for an international arbitration. He recognized all of the considerations which I have just raised in addition to making reference to Canada's physical convenience and reputation for neutrality internationally. I know his views were correct and I hope that more of you will find that Canada's reputation for neutrality and justice will recommend it as the ideal candidate for ADR matters which arise in your clients' affairs.

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