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Discussion

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## Discussion after the Speeches of Justice John Sopinka and Robert Coulson

QUESTION, *Mr. Miller*: Is it correct to say that mediation is a decision-making process?

ANSWER, *Mr. Coulson*: No, I think there is a difference between mediation and decision-making. Mediation is an extension of negotiation. If the parties choose to settle, they have reached a settlement; they do not reach a decision. The only decisions made are those concerning which concessions should be made in order to reach settlement.

Arbitration is different. The parties cannot reach a settlement, and in order to avoid going to court, they select an arbitrator to make a decision.

QUESTION, *Professor King*: There are several companies in the United States that have been in the forefront in using mini-trials. Do you think this can be done internationally?

ANSWER, *Justice Sopinka*: I do not think there is a national problem involved in negotiating - one can negotiate anywhere in the world. The mini-trial is simply a sophisticated way to negotiate a settlement.

QUESTION, *Mr. Edwards*: Could you please comment on the differences and advantages between a reasoned award and a conclusory award in an arbitration case?

ANSWER, *Mr. Coulson*: It depends on what the parties want. In the United States, it is customary to have reasoned awards in labor cases, alimony cases, international cases, and in a few arbitration systems set up by statute. But it is the general custom and practice in commercial construction arbitration in United States to have no opinion. Most lawyers and arbitrators would like opinions; but many business people feel that they need a decision which will be easily confirmed in court. Without an opinion, the court has no way of knowing why the panel reached a decision. This probably makes the arbitration award less likely to be appealed.

Some may ask, how can we be sure that justice is done? Well, most business people do not care about whether or not justice is done. They simply want a process for dispute resolution. They are not concerned with setting precedent or discovering who is at fault.

ANSWER, *Justice Sopinka*: If no reasons are given, trial judges can justify their opinion by saying that they reached their decision based on the evidence. The court is very reluctant to interfere with such a pronounce-

ment. If the judge says nothing, counsel is free to speculate that the judge made the decision based on an error of law.

It seems to me that the same would be true in the case of an arbitration. It could be speculated that the arbitrator made errors in arriving at his conclusion.

**QUESTION, Mr. O'Grady:** What do you see as the supervisory role of the court in a system where a large part of civil litigation is in fact conducted on a private level?

**ANSWER, Justice Sopinka:** I think it should depend on the consensus that is reflected to some extent in Canadian law. For instance, if the parties have specifically agreed to confer jurisdiction on the arbitrator to deal with the law, then the court should have no supervisory role. This should be the case unless the arbitrator has participated in some egregious denial of natural justice.

If the parties want everything decided by the arbitrator, they should be allowed to agree to this without interference from the court. However, the agreement must clearly state whether the arbitrator is to have the final decision or whether some degree of judicial review is to be allowed.

**ANSWER, Mr. Coulson:** It is different in the United States where it is a legislative question. Congress has told the courts what role they are to have in private arbitration. The courts are to enforce all arbitration clauses that have been negotiated. They must enforce arbitration awards unless the four or five very narrow grounds for vacating the award exist.

Judges in the United States have a growing tendency to retire from the bench and become private arbitrators. This is interesting when the ceremonial value of the court is considered. Parties to arbitration do not have much interest in ceremonial things. Arbitrators are not asked to wear robes; they do not have an American Flag hanging behind them; and, the rules of evidence are not usually requested, although such a request could be made. It is apparent that many of the elements of a typical courtroom can be dispensed with. All that is needed is a person who has the background, the knowledge, and the experience to understand the dispute, and to come to a decision about an award. All that the parties want is a chance to tell their side, with their lawyer representing them. They are willing in most cases to abide by the award. That may be a difference of perception between business people and lawyers.

**QUESTION, Mr. Stayin:** The National Machine Tool Builders Association recently conducted a survey of their members and found that 90% of their cases were settled before trial, and about 10% went to litigation. They won 9% of those cases. I would suggest that contrary to some of the views expressed, one of the most important qualities of a good attorney is the ability to mediate between his client and the other attorney.

Apparently, in respect to the Machine Tool Builders, 90% of their cases are mediated that way.

I would like to ask both of you whether you have a view as to whether there are cases that definitely should go to trial and those that should be sent into arbitration.

ANSWER, *Justice Sopinka*: I do not believe that you can look at a case and say this is an arbitration case. So much depends on what sort of a solution the parties want. If they want a quick solution with very little judicial interference, then they are better off going to arbitration. But in deciding whether they should or should not go to arbitration, if there are a lot of thorny questions of law involved, I would not want an arbitrator making the final decisions. It would probably be better to go to court in that situation. I would want to leave as many avenues open for my client as possible.

ANSWER, *Mr. Coulson*: I have a somewhat different point of view. I think cases should not go to arbitration when they involve issues of public policy. The parties should not be allowed to negotiate a solution in such a situation. This would eliminate major criminal cases, and cases which involve the interests of broad numbers of people who would not be parties.

I also think that the only cases that should go to arbitration are the ones in which the parties decide that they want to arbitrate. They can decide this at the time they enter into a contract, or at the time the dispute arises. I really look on it as part of the Democratic process. I think people should also have the right to settle their own disputes, and they should have the right to use a mediator. If they cannot settle a particular issue, they should have the right to pick an arbitrator and proceed under a set of rules.

QUESTION, *Mr. Roman*: I would like to know whether questions which involve governments, but not necessarily any state principles or any complex issues of constitutional law, can also be arbitrated, or would it be impossible to get governments to participate in arbitration. After all, it does not cost the government anything to litigate an issue, because the cost comes out of the budget of the Department of Justice. In addition, if the government never has to admit that it is wrong, then it never has to accept responsibility for its conduct.

ANSWER, *Mr. Coulson*: One of the purposes of the dispute resolution act which Congress passed last year was to encourage federal agencies to create innovative programs which would give swifter remedies to people who come in conflict with government agencies. However, I do not think that anybody should be forced to arbitrate with the government. If it is in their best interest, they should be given an opportunity to enter into a contractual arbitration clause with the government.

QUESTION, *Mr. Edwards*: I want to ask about the question of consent

in two areas. The first involves the labor area. When proceeding with collective bargaining agreements the union may agree, but the question is whether the workers will necessarily agree. The second involves the securities area where the average individual who deals with a brokerage firm does not have much choice in this matter because standard forms are used.

ANSWER, *Mr. Coulson*: Those are very good examples of how far you can push this process. The theory of using arbitration with collective bargaining is that when a majority of the workers elect a union, the union, under the law, is given the right to negotiate on behalf of the entire bargaining unit. The pattern in the United States is to have bargaining between the individual union and the individual employer in most cases, resulting in a three-year collective bargaining contract that covers many terms. One of the terms is the grievance procedure, where the union is given the right to negotiate with the employer on behalf of all its members through various steps in the grievance procedure. It is then usually submitted to one form of arbitration or another.

For most American workers, this system works pretty well. However, for a worker who is in the minority of the union, it may not work so well. In such a case, there is an applicable doctrine of American law known as unfair representation. This gives the individual employee the right to sue the union, and the union has the right to bring in the employer. So in an egregious case where an individual employee is treated unfairly, there is an opportunity for a lawsuit in Federal Court.

The securities field has a different problem. Many securities firms will accept a client without entering into any agreement at all if it is a cash account. But if the client is on margin, there probably is an agreement which states that the client must agree to arbitrate disputes. In addition, the client must agree to arbitrate before the National Association Security Dealers, the New York Stock Exchange, and the American Stock Exchange. Of course, if the client is unhappy with this arrangement, he can do business with people who would put the American Arbitration Association in the clause, or else take it out entirely.

Since clients do have such an option, there is not too much of a problem with consent in the securities area. The reason the Supreme Court of the United States upheld the securities arbitration system is because it feels that the securities industry is a regulated industry due to its regulation by the SEC. It is a benefit to the industry to have a private tribunal. Because the SEC feels that these tribunals are reasonably fair, and because they operate under the supervision of the SEC, the system has been accepted by the Supreme Court.

QUESTION, *Mr. Robinson*: A question for Mr. Justice Sopinka. You mentioned the Zuber report with approval. Subsequent to the Zuber report, even though it did not recommend one, Ontario has a developing

commercial court. It is modeled on the English commercial court, which is just a panel of judges.

There were comments to the effect that the creation of the commercial court was white collar law versus blue collar law. Do you think that it is a good idea to have particular panels of the bench with responsibility for particular areas of expertise? Does this assist the streamlining and speeding up of the judicial process?

**ANSWER, Justice Sopinka:** I am not convinced that we should have specialized courts. I think that sometimes judges who specialize have very firm views. Matters of expertise should be decided on the basis of expert evidence, rather than on personal views. When I was arguing before the court, I was always concerned if I had a judge who was a noted expert in the area that we were litigating. It was likely that he would have firm views, and I could never be sure which side they would favor.

On the other hand, I think it makes a lot of sense when appointing judges who will be dealing with commercial cases to make sure that there are a representative number of them who have done commercial type work in particular. The chief justice can then decide who to assign to a particular case. But I am not a big supporter of having a commercial court composed of a regular panel of judges that does nothing but decide commercial cases. I think that it is often better to have a fresh view. Then a decision can be made after listening to the evidence and the arguments. Sometimes this results in a better decision.

**COMMENT, Mr. Shanker:** After hearing what has been said here yesterday and today, it seems to me that a distinction should be made between arbitration and settlement.

An arbitrator is just as much a judge as a judge who sits on a court to the extent that he is given the power to enter judgments by the State. This is simply because the judicial system does not have enough judges to do the job, and has become so ceremonial and bogged down in its procedures that people prefer other kinds of judges. Arbitrators are judges, and the State enforces that judicial power.

It seems to me that Mr. Coulson was suggesting that there is another process which he called the settlement process. In this process, where no person has the final authority, at least you do not rely on the final authority of some neutral person to decide the case. In the settlement process, a spirit is engendered that suggests that you could be wrong or that you have made errors. You call it the spirit of compromise or the spirit of negotiations. I wish we would have more time to concentrate on how it is done.

**COMMENT, Mr. Coulson:** I do not want to give the impression that I believe that arbitrators are just judges. I think it is really a different process. Judges are appointed by the State to provide a public service. There should be more judges, and the judges should be better paid.

But arbitrators are different. The authority for the arbitrator's decision flows from the parties. It is the parties that have said that insofar as this contract or dispute goes, we would prefer to have some voice in choosing the person that hears our case and who makes the decision. The State allows that. But it is not the State appointing the arbitrator. It is the State approving of a system that allows people and corporations the freedom to resolve their own disputes.