TRIAL PRACTICE DO’S AND DON’TS:  
HOT TIPS FROM THE EXPERTS

ADR:  FROM THE COURT OF APPEAL  
TO PRIVATE PRACTICE

Presented by  
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to  
The English Speaking Section  
of the Bar of Montreal  
Les grands rendez-vous de la formation

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Good morning,

I am very pleased to be a participant on this panel on the subject of Mediation and Arbitration.

I will be speaking about judicial mediation in the Court of Appeal and also about *ad hoc* mediation outside the Court structure. I will then make a few remarks regarding arbitration.

In my 35 years of practice, prior to being appointed to the Court of Appeal in 1995, there was very little activity in the fields of mediation and arbitration.

There was, of course, some arbitration imposed by statute or regulation, for instance in labour law matters; – collective agreement had to provide for a resolution of grievances by arbitration. There was also arbitration in certain regulations of professional associations. For instance, a regulation of the Bar provided that clients who wished to contest an account submitted by their lawyer could refer the matter to an arbitration panel of 3 lawyers set up by the Bar.

I acted for lawyers on a couple of occasions and one, stands out in my mind, because it was rather unusual.
A Montreal law firm represented a company situated in Montreal against an action in which the plaintiff joined the officers of the corporation as defendants. After the case was finished, the law firm submitted one account covering the company and the individual defendants. At about that time, the company was acquired by another corporation. The new management contested paying all or part of the account on the ground that it should not be liable for fees incurred in representing the officers even though they were acting for the company. This occurred about 40 years ago and the whole matter in dispute involved only 5 or 6 thousand dollars.

The representative of the new management, in his introductory statement to the arbitration panel of the Bar argued that they were contesting the invoice for fees as a matter of high principle. He was quite passionate about it and, as proof of the high moral ground he was invoking, declared: “we would rather give the money to charity than pay this account”. My lawyer/client nudged me and whispered “take them up on it – we will renounce to the fees”. I did exactly that and informed the panel that my client renounced to the fees if the amount in question was paid to a charity. I perceived that the representative
of the corporation became a bit pale but he could not go back on the statement he had made earlier, and so the only thing left to determine was, which charity would benefit from the arrangement. My client’s suggestion that it be the Montreal Lawyers Benevolent Society was accepted. Voilà, how justice triumphed in this arbitration.

**Mediation in the Court of Appeal**

The system of judicial mediation was established in the Quebec Court of Appeal in 1997, in large part due to the initiative and foresight of my distinguished colleague at the time, Justice Louise Otis. Prior to 1997, an organized system of judicial mediation was, for all practical purposes, inexistent in Canada.

When the system of judicial mediation at the appeal level was inaugurated there was scepticism, in some quarters, about the willingness of the party who was successful before the trial Court to agree to mediation, after having gone through the expense and anxiety of a trial and then having emerged victorious by a formal judgment of the Court. In other words, although one can readily understand that, at the trial stage, the
risk of losing the case can be a powerful incentive to mediation, and ultimately a settlement, this incentive might not exist at the appeal level, thus the winning party would not be inclined to participate in mediation once the case has gone to appeal.

This concern regarding the possible reluctance of the winning party to participate has, generally, turned out to be unfounded. The party who has been successful in first instance still faces the risk of losing in appeal. In Quebec, approximately 40% of the judgments in appeal either reverse or modify the decision of the trial court. The litigant must also consider the expense, the devotion of time and resources to the preparation and presentation of the appeal, further delays, unforeseen eventualities of an economic or personal nature and the inevitable worry and stress which accompany proceedings in Court.

The legal basis for judicial mediation in the Court of Appeal is found in Article 508.1 C.C.P. and in the Rules of the Court of Appeal in Civil Matters at Part 5 under the heading “Judicial Mediation, article 40 and following. The important factor of confidentiality is at article 44.
“Everything that is said or written during the mediation conference is confidential”.

The main features of judicial mediation in the Quebec Court of Appeal are that the process is:

1) Consensual
2) Confidential
3) Flexible and Informal
4) An occasion for the involvement and empowerment of the parties
5) Rapid

1) **Consensual**

The process is a strictly consensual one, it is not imposed. In other words, both parties must agree to proceed with the mediation in which a judge of the Court of Appeal is the mediator. The initiative to start the process may come from the parties themselves or it may come from the Court or one of its judges at any time in the appeal process. If the parties themselves take the initiative, the matter is dealt with by their signing a short document and filing it at the office of the clerk
of the Court. In other instances, for example, if the parties have to apply for permission to appeal and the judge hearing the application thinks that the case is susceptible of being resolved by mediation, then a suggestion is made to the lawyers that they discuss the possibility with their clients. It may be suggested by judges who have before them an interlocutory or incidental proceeding or who are preparing for the hearing of the appeal on the merits, and even, in rare cases, during the presentation of the oral arguments. In the latter circumstance, the Court would adjourn and give the lawyers a short delay to consult their clients to consider whether they will ask for mediation.

I wish to stress, however, that mediation is never imposed. It may be suggested by the Court, but if either of the parties does not want to proceed with an attempt to mediate the dispute, the case in appeal goes on without prejudice to any party and no negative inference is drawn.

A party, having commenced to participate in judicial mediation, may at any time decide that he or she does not wish to continue any longer with the mediation; at that point the process terminates, again without prejudice to either party or any negative inference being drawn. This is a necessary
corollary to the principle that the judicial mediation process is a consensual one. If either of the parties does not wish to continue or if the mediation effort is unsuccessful, the parties resume their preparation for the hearing before the Court of Appeal.

2) **Confidential**

A fundamental feature of the mediation process is the confidentiality of the proceedings. This is crucial. There is no recording of the proceedings, which are private, and what is said or written during the process is absolutely confidential. The panel of judges which hears the case, should the mediation not succeed, will not be informed of what has transpired and often will not even know that there has been an attempt to resolve the matter by judicial mediation. Similarly, neither of the parties may bring before the Court, or otherwise reveal, what occurs during the mediation process. Confidentiality of the proceedings is a cornerstone of the process and, as you know, our Courts do not hesitate to prevent any attempt to contravene this principle.
3) **Flexible and Informal**

The setting is informal. A specially designed facility provides separate rooms for each party and his or her lawyer, and a larger room where all the participants can meet.

It is essential that the parties themselves be present. If one of the parties is a corporation or organization the representative must have the power and authority to enter into and sign an agreement.

The judicial mediation process provides the opportunity for the parties to personally express themselves and enunciate what has been on their minds, without the constraint of the formal rules of evidence and without fear that they will damage their case. The party personally has a primary and active role. This in no way diminishes the value of the lawyers' participation.

The mediator can meet with all the participants together, and/or separately, going from one room to another. He or she may also meet with the lawyers or parties alone or together. It all depends on the circumstances.
The dynamics of each mediation are different and depend to a large measure on the personalities of the various participants.

4) **Involvement and Empowerment**

In the formal Court setting the conduct and participation of the litigant is governed by the constraints inherent in the system. The lawyers of the parties and the rules of evidence determine the participation. The discussion of the issues is often only between the lawyers and the judge and the party who is the litigant may, at times, feel like a bystander or even outsider. This is not so in judicial mediation. The party is a full participant, and can be as active as he or she wishes, in shaping a satisfactory settlement. This active participation may often be an empowerment which can lead to making the compromises which result in an acceptable settlement.

5) **Rapid**

Generally the mediation hearing takes place within a short delay. The parties have been through a trial. They know the issues. Usually by the end of a four hour session it will be known whether a settlement can be reached.
If the mediation process is fruitful, the agreement putting an end to the dispute is drawn up by the lawyers or parties, at times, with the assistance of the mediator with respect to questions of form. The document is signed by the parties and their lawyers. The judge who has acted as mediator then submits the agreement to a panel of the Court of Appeal of which he cannot be a member. The panel of the Court examines the agreement and, if it is found to be satisfactory, renders a short formal judgment homologating it. Thus the agreement of the parties reached as a result of judicial mediation becomes a judgment of the Court.

**Mediation outside the Court structure**

The non-judicial mediation of disputes can take place at any stage. It is generally initiated at the suggestion of the lawyers representing the parties. It can be prior to the institution of legal proceedings when a claim is made and there is an attempt to settle it. It can also take place once legal proceedings are instituted, before discoveries have taken place, or it can be just before the trial commences. In fact, it can even occur after the trial has started.
Once the lawyers have chosen the mediator and he or she has agreed to act, there should be an agreement drawn up with respect to the mediation, to be signed by the parties, their lawyers and the mediator, I suggest that it cover, amongst other, the following points:

1. Confidentiality: It is of prime importance that all participants bear in mind the significance and importance of this undertaking. The knowledge that whatever happens at the mediation is secret and that it will not be the subject of testimony or evidence is a great factor in freeing up the parties from any constraints with respect to expressing their views or making compromises.

2. A brief résumé of the contentions of each party.

3. A list of documents and materials to be submitted to the mediator prior to, and in preparation for, the mediation hearing.

4. The place and date of the mediation session and the anticipated duration.
5. Providing immunity to the mediator similar to that of a judge of the Superior Court for acts carried out in the performance of his or her functions.

6. An undertaking that the attending party or representative of a corporation will have the authority to make a settlement and sign the document(s).

7. The deposit of the fees in advance, and responsibility for each party to pay 50%.

A suitable facility should be chosen for the mediation and generally this involves the availability of three rooms, a conference room where all the parties meet and two other rooms where the parties can caucus with their lawyer and meet with the mediator.

Mediation means the predisposition of the parties to reach a solution to the dispute by compromise. It is very important, not only to be willing to compromise, but also to prepare a proposal for a solution.

Lawyers should instruct their clients that they should be prepared to participate in the mediation proceedings. In the
knowledge that all is confidential, the client should be amenable to play an active role.

Be ready to think “outside the box”. The solution to the dispute may be in what appears to be an extraneous element. For instance, a dispute involving the quality of goods sold and delivered might be solved outside the parameters of a reduction in price. Perhaps it could be in a new trading arrangement between the parties.

If a settlement is reached, the lawyers should be prepared to draft the settlement agreement and the appropriate releases and discharges. If the parties are ready to sign then, it can be done immediately. If one of the parties would prefer to reflect overnight or for a similar short period of time, a delay should be granted for that purpose.

Do not be unduly disappointed if the mediation does not result in an immediate settlement, the session was likely nonetheless to have been useful in narrowing and defining the issues for trial or it might form the basis for further settlement discussions between the parties and perhaps an agreement.
Arbitration

I turn now to arbitration.

An arbitration is not a trial before the Court. Arbitrations in Quebec are governed by the provisions in Book VII of the *Code of Civil Procedure*. Article 944.1 C.C.P. provides that “…the arbitrators shall proceed to the arbitration according to the procedure they determine”.

Recently, the United Kingdom Supreme Court in the case of *Jivraj*¹ v. *Hashwani* dealt with the distinctive nature of arbitration in the U.K. I think the reasoning is, also applicable, *mutatis mutandis*, to Quebec.

**Para 61.** *One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process for resolution of the dispute.*

Amongst the advantages for proceeding by way of arbitration is the ability to choose the person who is to decide the case and the relative informality and flexibility of the procedures. It is well to keep in mind that the award rendered by the arbitrators is final and binding and not subject to appeal.

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In practice, the arbitrators consult with the lawyers, and to the extent possible, establish the procedure and timetable the lawyers agree upon. If they do not agree, the arbitrators will make the determination, which must be followed.

The principals of natural justice must be respected foremost of which is the rule *audi alteram partem*. The parties must be given a fair opportunity to make their case.

Do not expect to use the whole panoply of procedures available in the *Code of Civil Procedure*. The system of arbitration is to provide, *inter alia*, a more timely, less expensive, less formalistic manner of resolving disputes in an expeditious manner.

The principle of proportionality is always to be kept in mind so as to avoid non-essential time consuming procedures and disproportionate costs.

Since one of the advantages of proceeding by arbitration is the ability to choose the person who will be deciding the matter, take time to consider what attributes or special knowledge you are looking for in the arbitrator and make your choice accordingly.
The agreement in which the arbitrator is named and accepts to act should be in writing and should mention, *inter alia*, the following:

1) That the appointment of the arbitrators is acceptable and there is no known ground for recusation.

2) The confidentiality of the proceedings.

3) The text of the arbitration clause or agreement.

4) The law applicable to the arbitration.

5) The immunity of a judge of the Superior Court being accorded to the arbitrator for acts performed in the execution of his or her duties.

6) The manner of calculating the fees of the arbitrators, e.g. hourly or daily rate.

7) When a cancellation fee is payable.

8) A provision for an advance deposit of the anticipated fees on a 50/50 basis.

9) The question of costs.

10) The language(s) of the proceedings.

11) The date and place of the hearing.

12) Whether or not there will be stenography.
The lawyers should meet with the arbitrators as soon as possible after their appointment to establish, in writing, the terms of reference, the procedure and the timetable. It is also at this stage that the issues and scope relating to the production of documents, examinations on discovery, adducing evidence by affidavit or will-say statements, the date for submitting a list of witnesses and reports by experts, as well as the manner of cross-examination are determined. Realistic limits should be suggested by the lawyers, if possible, with the approval of opposing counsel.

There should be no *ex-parte* communications between the lawyers and the arbitrators.

Parties and lawyers are often in different cities and there should be a provision for signature of the agreement and the terms of reference in counterparts.

Each arbitration is different, but there is one constant rule which will always stand you in good stead. You already know it – thorough preparation.

Thank you.