Kluwer Mediation Blog

Ontario Decision Highlights Settlement Related Issues in Mediation

Rick Weiler (Weiler ADR Inc.) · Monday, March 24th, 2014

The recent Ontario Superior Court decision of Healy J. in Southlake Regional Health Centre v. Beswick Group Properties touches on a number of issues arising from settlement at mediation.

Briefly, this was a landlord and tenant dispute relating to a Medical Arts Building and other development lands. The full factual background can be read by linking to the decision above. Basically the landlord and tenant sued each other in 2011 alleging various breaches of a development agreement and lease. Those disputes went to mediation with Larry Banack, a well known and highly respected Ontario mediator, in September 2013 and a settlement was reached. The mediator drafted the Settlement Agreement which included a provision that, "In the event of and disagreement in the implementation of these Minutes of Settlement the parties agree to promptly return to Larry Banack as mediator to address such matters."

After some back and forth a mutual release was executed at the end of September 2013 and settlement funds were paid to the tenant shortly thereafter. The decision makes clear that the landlord was, in effect, attempting to buy peace with the tenant because there was an ongoing effort to sell the development property.

Things were mostly quiet for a month and then on November 1 the tenant, Southlake, claimed that as a result of its review of certain documents it realized it had overpaid additional rent (taxes, maintenance, etc.) for 2010 and 2011 by about $665,000 and, notwithstanding the earlier settlement and releases, Southlake wanted the alleged overpayment repaid.

The parties brought new applications before the Court. There is no indication that they went back to Mr. Banack as provided in the Settlement Agreement.

In the materials filed with the Court the tenant included the two mediation briefs that had been used in the earlier mediation and asked the Court to take those into account in determining the scope of the issues which were intended to be released by the earlier settlement.

In the end the Court ruled mostly against the tenant, deciding that the claims it was now attempting to advance were fully released as part of the earlier settlement.

From my perspective as a mediator this decision raises at least three issues for reflection.

1. **First, should a commercial mediator be the one drafting the Settlement Agreement?**

Ontario practice on this issue varies with some mediators absolutely refusing to be involved in the drafting. Others, and I'm in this category, are prepared to crank off a draft settlement agreement on the iPad for consideration by the parties and their lawyers. Indeed, for most standard insurance-related mediations many mediators carry pre-printed Settlement Agreement forms and simply fill in the blanks once the settlement has been reached. Clearly there are practical risks to this approach and those risks increase with the complexity of the settlement. In this case there doesn't appear to have been any negative reflection on the mediator's role in drafting the settlement agreement, but this decision was just released at the end of February so it's still early days.

2. The second issue relates the the **"future disputes" provision in the Settlement Agreement and the ongoing role of the mediator**. In many settlements there will be things to be done to finalize resolution following the day of the mediation. This can lead to a renewed flare up of the dispute. I believe it is good practice for a mediator to raise the possibility of further disputes arising during implementation and to suggest that the mediator could play an ongoing role in the event of such disputes.

For example, the settlement of a shareholder dispute I mediated required the transfer of shares which necessitated a share purchase agreement and other closing documents. In that case, because the parties wanted to bring finality to the dispute, they provided in the settlement agreement drafted at the mediation that if any such disputes arose I would become an arbitrator, pursuant to the Ontario Arbitration Act, with power to decide the final form and content of closing documents. In the event, disputes did arise which were quickly dealt with via a document and phone arbitration. The transaction was completed and the parties got on with their lives.

In the Southlake case the Settlement Agreement provided that the mediator remained involved in the case but only as mediator. It may have been that the possibility of arbitration was raised but that the parties and their counsel demurred due to the larger amounts involved.

3. The third issue I want to focus on arises from the attempt by one of the parties to **introduce the mediation briefs into the subsequent Court proceedings**. Shocked? You shouldn't be. At least not in Ontario where I hear about breaches of mediation confidentiality by counsel time and again. For example, I heard about a pretrial settlement conference before a Superior Court judge where one of the counsel blurted out that mediator Weiler had proposed a settlement of $X during the unsuccessful mediation. Without missing a beat the judge said, "well, that sounds like a good number to me." I'm not sure if the judge had been apprised that the only thing that $X had to recommend it was that it was precisely the mid-point between the "dug in" points of the two parties.

In the Southlake case the judge wisely refused to consider the mediation briefs which had been included in the application material and the comments are instructive:

> **"This is not evidence that can be considered on this application. The mediation agreement entered into by the parties prior to mediating the matter to resolution provides a complete bar to the production of documents produced in the mediation for any purpose, including to establish the meaning of any settlement or alleged settlement arising from the mediation. The confidentiality of the mediation process must be recognized and enforced by the Court so that the integrity and usefulness of such an alternative dispute mechanism remains intact. Further, the mediation statements are an outline for the benefit of defining the issues for the mediator; however, they do not limit**

> **the scope of the mediation in any way. Anyone familiar with the mediation process knows that the topics raised and discussed during the mediation can expand or restrict or change altogether during this dynamic process. What was discussed at the mediation remains, and must remain, known to only those who participated."**

This interesting case also discusses whether a consent judgement following a mediated settlement can form the basis of a ***res judicata*** finding (short answer: Yes).

Experienced mediators are aware that the job is not over when the parties reach resolution. At least as much care needs to go into the drafting of the settlement agreement reflecting that resolution and the attending to the various tasks to finalize that settlement agreement.

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