Kluwer Mediation Blog

Mediation and the Public's Right to Know: Has that Ship Sailed?

Rick Weiler (Weiler ADR Inc.) · Saturday, July 6th, 2019

A developing story here in Canada has raised concerns about whether the public should have the right to know the terms of a high profile, mediated settlement agreement involving the government of Canada.

The case involves now retired Vice-Admiral Mark Norman, the former number two in the Canadian military. The detailed background of the story can be seen here and here but the boiled down version is as follows:

- The previous Conservative government had approved a CAN$668 million contract to convert a civilian cargo ship to a military supply vessel. The contract was awarded to a Quebec-based shipbuilder.
- In 2015 the newly elected Liberal government reached a cabinet level decision to delay the awarding of the contract.
- Details of that cabinet decision appeared in a press story in November 2015. The press story also reported allegations that political interference by a competitor with ties to the Liberal party had led to the decision to delay.
- Vice-Admiral Norman was suspended from his position in early 2017 and in 2018 was charged with breach of trust for leaking the cabinet secrets.
- Norman pleaded not guilty while his lawyers alleged political interference from the Liberal government in the prosecution.
- In May 2019 the case, which was slated to go to Court in August and would have run through the federal election scheduled for October of this year, was stayed by prosecutors saying "there was

no reasonable prospect for conviction".

- Vice-Admiral Norman expressed a desire to return to his old job.
- The House of Commons unanimously passed a motion apologizing to Vice-Adm. Norman and his family for what they had been through although Prime Minister Justin Trudeau had left the house moments before the vote.

Then, on June 26th it was announced that Norman and the federal government had reached a confidential settlement in mediation and that Norman would be retiring from the Department of National Defence.

Unsurprisingly, with a federal election around the corner, opposition Conservative Members of Parliament have accused the Liberal government of buying Norman's silence with the mediated settlement. With Parliament wrapping up sittings for probably the last time before the October election it seems that this issue will be left to be debated on the hustings.

Mediators involved in high profile matters involving a government or public agency at any level may appreciate guidance on whether a public interest exception exists to the usual rule of mediation confidentiality and, if so, would that exception be triggered in this case.

This issue has been discussed extensively in the contest of international commercial arbitration where one of the parties is a government. Indeed, this post by Stavros Brekoulakis on The Kluwer Arbitration Blog highlights the concerns by noting,

> "Resolution of public-private disputes within [the arbitration] private law framework gives rise to a number of potential threats to the public interest. One threat is the likely non-application of public law norms, such as the administrative law doctrines of ultra vires and the rule against fettering, which allow public bodies to disrupt public-private contracts to pursue a competing public interest goal. **A second potential threat is the non-application of public law principles of openness and accountability. As public bodies are given their powers on the understanding that they are to be exercised in the public interest, the public has an interest in ensuring such powers are not abused.** However, this objective cannot be achieved in public-private arbitrations, which are typically private and confidential." (emphasis added)

While I have not been able to find much on the possible conflict between the public interest in the effective settlement of disputes (as in mediation) and the public interest in openness and accountability, I did come across this quote taken from a 2007 address given by a highly respected Canadian mediator and former Chief Justice of Ontario,

> "Any case in which a party is motivated to engage in mediation, but only for improper tactical reasons, is not one appropriate for mediation. There are many examples. A party may want mediation, not with a view to settlement, but to carry out an illicit discovery; to test the opponent's resolve; to tease out disclosure of an improvident settlement position to later advantage; to intimidate the opponent into abandoning the case; **or to further some other improper purpose,** such as to disclose publicly that mediation is ongoing. **In every one of these scenarios, the mediator runs the risk of becoming a foil for the wrongdoer.** To be sure, such cases are not always easily identified. Often it is only after the mediation has begun that the abuse of process becomes obvious. Once apparent, however, the process should be halted as quickly and as discretely as possible." (emphasis added)

The author of those words, Warren Winkler, served as mediator in the Norman matter.

I will keep you posted on this story as it develops and I invite readers of this blog to comment below on this issue.

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