

ARBITRATOR/MEDIATOR SPOTLIGHT

Hon. Thomas Cromwell



CAREER & BACKGROUND

My legal career started as a generalist litigator, appearing in civil, criminal, family and administrative law matters. I became an academic in 1982, teaching at the Dalhousie Law School in Halifax NS. While there, I was active as a grievance arbitrator and served as Vice-chair of the Labour Relations Board and the Construction Industry Panel. I served as a judge of the Nova Scotia Court of Appeal from 1997 until 2008 and as a judge of the Supreme Court of Canada from 2008 until 2016. Since my retirement from the Court, I have been senior counsel with Borden Ladner Gervais LLP in the Ottawa and Vancouver offices and on the mediator/arbitrator roster at Arbitration Place. Although active as a mediator and arbitrator, most of my ADR work has been in mediation.

ARBITRATOR/MEDIATOR PRACTICE

My ADR work is varied and wide-ranging. I have mediated complex public sector disputes, class actions in areas ranging from price-fixing to manufacturers' liability, commercial cases, professional liability and estate matters. My arbitration experience includes employment, construction and family business and succession planning disputes.

BENEFITS OF ARBITRATION/MEDIATION

Of course, ADR preserves confidentiality and reduces time and cost. With respect to mediation, a well-run process helps the parties to focus on the realities of their positions and frequently helps counsel in dealing with their clients. Even an "unsuccessful" mediation – i.e. one in which a complete resolution is not achieved – will often narrow the issues and set the parties on a path that leads to resolution further along in the process. Perhaps above all, ADR gives the parties the ability to select the person who will lead the process. The parties' shared confidence in the appointee strengthens that person's ability to serve the parties well.



TIPS FOR COUNSEL TO BE MORE EFFECTIVE IN ARBITRATION/MEDIATION

Here are my two top tips for mediation. First, in a dispute with many issues, start with a list of the elements that must be present in any resolution. In other words, break the dispute down into its constituent parts. This allows the parties to keep in mind what an overall resolution would look like. It also allows the parties to work on resolving the dispute in smaller pieces and – often – to recognize that there are things about which they agree or at least do not seriously dispute.

Second, get an offer ready early. I have an informal "11:00 o'clock" rule: if there is not a meaningful offer from at least one side on the table by 11:00 am, I know we may well be in trouble. My impression is that parties worry unduly about "bargaining against themselves" or being the first one to make a realistic offer. There are ways of avoiding the risks that spawn those concerns. But the matter will never resolve if nobody puts a realistic offer forward. I have had matters in which the opening positions were \$250 million versus zero. Really? You signed up to negotiate, so start negotiating.