

ARBITRATOR/MEDIATOR SPOTLIGHT

The Honourable Russell Juriansz



ARBITRATION PLACE

An all-encompassing approach

CAREER & BACKGROUND

I began my career with the government, where I was in private practice for 24 years, mainly in administrative and constitutional law. I was later appointed to the Superior Court of Justice as a trial judge (then called the Ontario Court (General Division), where I remained for six years, until I was appointed to the Court of Appeal in 2004. In September 2021, with the mandatory retirement age looming, I retired from the Court of Appeal. I had been on the court for over 17 years. I joined the Arbitration Place roster in January 2022, and in April 2022, I was appointed a part-time adjudicator with the Capital Markets Tribunal.

One thing I enjoy about my present work is that I get to find facts, decide credibility, and actually determine the result of a dispute. It is refreshing to be free of the constraint of deference that the Court of Appeal must show the fact-finder.

I have enjoyed sitting on arbitration panels with my former colleagues on the Court, including Robert Armstrong, Dennis O'Connor, Robert Blair and Robert Sharpe. Cases with a three-person panel of former Court of Appeal justices tend to involve significant disputes with substantial records. I believe that my facility with technology is an asset in dealing with such cases efficiently. As a judge, I was a member of every technology committee the courts had, and I actively promoted the use of technology to increase judicial productivity. I started taking a computer into court in 1998. Over the years, I have developed useful techniques to review and organize digital records when preparing for a hearing and to navigate the records during the hearing. I usually work with three screens so I can view different documents at the same time.

ARBITRATOR/MEDIATOR PRACTICE

Apart from arbitrating commercial cases, I have especially enjoyed presiding over Mock Appeals. In a mock appeal, either alone or as part of a panel, I hear counsel present the argument they have prepared for a pending appeal. We critically question counsel about their positions and discuss with them how they might be more effective. Lawyers have told me that American clients expect them to have a mock appeal as part of the routine preparation of an appeal. In a couple of recent engagements, I have become involved at an earlier stage, reviewing and discussing with counsel their draft factums and the opposing party's factum before presiding at the mock appeal. I foresee that counsel may start to use this type of preparation for significant motions with much at stake.

BENEFITS OF ARBITRATION/MEDIATION

The traditional benefits of arbitration over the court process include confidentiality, choosing the decision-maker, defining the process, and finality, because of the narrower path to an appeal. Now, I think speed has become a primary factor. The courts are overburdened. They must prioritize criminal cases, resulting in even greater delays in the civil stream. By contrast, counsel, especially if they are flexible in choosing the arbitrator, can schedule the arbitration whenever they want. Clients don't want their disputes languishing in the court system for years. Win or lose, they would like to get on with business.



TIPS FOR COUNSEL TO BE MORE EFFECTIVE IN ARBITRATION/MEDIATION

Thanks to COVID-19, most hearings now proceed with a digital record, even with in-person hearings. Unfortunately, some senior counsel are still not at ease with digital materials. Fumbling with the digital material can detract from the momentum of an argument. Aside from helping senior counsel with their argument, a mock appeal can help them better coordinate with junior counsel who may be controlling their computer screen. Preparing a digital compendium for argument will reduce the need to call up documents from different sources.

Some counsel could do a better job helping the arbitrator navigate an extensive record. For example, references to document page numbers should include the source's PDF page number. At the hearing, citing the PDF page number enables the arbitrator to call up the reference almost instantly, while citing the hard copy document page number can detract the arbitrator from the argument while they scroll to locate the reference. Bookmarking the material is essential, but the content of bookmarks should be specific to be helpful. I have seen affidavits with their exhibits bookmarked as "Exhibit A" through "Exhibit M" without the bookmark identifying what the exhibit is. Links to authorities should take one to the passage relied upon and not to the first page of the case. One can not have too many links and bookmarks. I add my own as I review the material before the hearing and when deliberating. For example, I link each party's submissions on a particular issue to the other party's submissions on that issue. Toggling back and forth helps me to get a fuller appreciation of what is disputed more quickly.

Even though we have emerged from the COVID isolation, we will not return to using hard copy. The next generation of counsel will expand the use of technology in litigation.