Publisher's Note

2018 — Release 3

Previous release was 2018-2

From Your Library:

☐ _____

☐ _____

☐ _____

☐ _____

☐

McLaren

Innovative Dispute Resolution: The Alternative

This comprehensive work offers a thorough analysis of available alternative dispute resolution techniques, including mediation, arbitration, fact-finding, mini-trial and private court. Extensive case histories illustrate practical applications of resolution techniques in actual fact situations and practical precedents to provide guidance on how best to structure and manage ADR agreements. Also included are techniques and tips on the selection of experts, timing considerations, the role of lawyers and the dispute resolution process itself.

What's New in this Update

This release features valuable case and commentary updates to Chapters 4 (Mediation), 5 (Arbitration) and 8 (International Commercial Arbitration) as well as the Court-Annexed Procedures section. In addition, two legal memos have been updated: Is an agreement to mediate enforceable? and In what circumstances will an arbitral award be set aside for fraud?

THOMSON REUTERS CANADA®

Customer Support

1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
Email CustomerSupport.LegalTaxCanada@TR.com

Highlights

Mediation — The Technique — The Process — Settlement: A class action settled through mediation is not binding unless it is approved by a court. *Perdikaris v. Purdue Pharm* confirmed the test to approve a class action settlement reached through mediation is the steps outlined in *Driediger v. Ashley Furniture Industries Inc*. The court must be satisfied that the settlement is "fair, reasonable, and in the best interest of the class as a whole". The settlement does not have to be perfect, but within a "zone of reasonableness". In *Perdikaris*, the national settlement of a pharmaceutical class action was not approved. The class counsel in estimating average recovery for compensation did not account for expenses or other costs such as the substantial amount payable to Provincial Health Insurers (PHIs). Secondly counsel relied on dated case law to predict potential recovery that focused solely on injury from Oxy, rather than the effects of addiction, to the exclusion of more relevant cases. Further the awards used to predict potential payout from litigation were not adjusted for inflation. These mistakes led the court to the conclusion that the settlement agreement was not reasonable. Finally, to approve the class action settlement agreement in *Perdikaris*, the court required approval from all the PHIs in accordance to their individual subrogation legislations. The class counsel only provided PHI approval for an earlier iteration of the settlement agreement. Hence the PHIs, other than Alberta who anticipated further changes in its written agreement, did not grant approval. The court in its order left open the possibility that the plaintiff could reapply with supplementary material: *Perdikaris v. Purdue Pharma*, 2018 SKQB 86, 2018 CarswellSask 138 (Sask. Q.B.).

Arbitration — The Technique — The Process — Appeals and Judicial Review: On appeal, the Supreme Court of British Columbia held that the arbitrator did not err in holding that dishonesty was not required to find a breach of good faith in the exercise of contractual discretion. The court also held that the arbitrator's finding that Wastech was deprived of its contractual expectations was not subject to review as it was within the arbitrator's fact-finding jurisdiction. However, the court found that the arbitrator erred in law by conflating the "organizing principle" proposed in *Bhasin* with a freestanding obligation of good faith. Therefore, the appeal was allowed as the arbitrator erred in interpreting and applying the relevant legal principles: *Greater Vancouver Sewerage & Drainage District v. Wastech Services Ltd.*, 2018 BCSC 605, 2018 CarswellBC 910 (B.C. S.C.).