

## **ISSUES CONCERNING THE SPECIALIST ARBITRATOR**

by  
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This little paper will focus on the extent to which arbitrators selected for their specific expertise may properly rely on their education and experience in conducting their proceedings and preparing their awards. It will also touch on an approach to the dilemma faced by non-lawyers who must decide difficult legal issues during the hearing or while crafting their awards.

At the outset of this discussion, it is useful to reflect on the reasons that parties agree in advance to submit future differences to arbitration rather than relying on the court system. The (frequently wrong) perception that an arbitrated solution will be less costly than full court proceedings is a major motivator. In order to achieve this expected economy, it is common for them to identify a class of person with specialized talents to adjudicate disputes in the specific area that the agreement covers: engineers for construction issues; professional accountants for profit sharing determination; business appraisers for shareholder buyout matters and so on. It is in their minds that such persons will use their expertise to quickly isolate the relevant issues and solve their problem so that they may continue their endeavour in harmony or part company as friends. In short, at the agreement stage, all problems are remote and solvable with a bit of common sense.

Then the dispute erupts. A problem to be solved becomes a fight to be won – lawyers are retained and the matter proceeds to a hearing. The hearing takes on all of the characteristics of a courtroom trial: witnesses testify under oath; procedural objections are presented by both sides in 75 page bound briefs of the settled decisions on the topic, and all of the evidentiary aspects of the matter must be presented as though the arbitrator were a judge. Such parties now find themselves at the mercy of arbitrators who appear to

be unable to apply the specialized expertise for which they were appointed and lacking the legal knowledge that the process assumes they have.

These two issues may, however, be addressed with more authority and comfort than is generally understood.

The concept of adjudicators considering materials that are not proven at the hearing is called “judicial notice.” The “facts” so considered are called “notorious facts”. Both are defined as follows<sup>1</sup>:

Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.

Facts described at (a) are “facts which are known to intelligent persons generally” and the convention of accepting them is necessary to prevent trials from becoming mired in endless testimony that advances neither case; it needs no further discussion.<sup>2</sup>

But those referred to at (b) are the more controversial. As one author put it: “The borderline between judicial notice and evidence is peculiarly ill defined.”<sup>3</sup> Wigmore sets out the ability or perhaps even the obligation of the tribunal to resort to referring to “indisputable authority”: as follows:<sup>4</sup>

But whether the matter is so accepted, or what its tenor is if accepted, may not be within his recollection, or even may not ever have been known to him. Hence, he is entitled to aid himself in reaching a decision by consulting *any sources* of information that serve the purpose – official records, encyclopedias, any books or articles, or indeed any source whatever that suffices to satisfy his mind in making a ruling. (emphasis in the original)

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<sup>1</sup> Sopinka, Lederman, and Bryant: *The Law of Evidence in Canada*, 2<sup>nd</sup> Ed. 1999, p 1055

<sup>2</sup> *ibid*

<sup>3</sup> GD Nobes *The Limits of Judicial Notice*, LQR Vol 74 No 203 Jan 58

<sup>4</sup> *Wigmore*, Vol IX, p. 720

As to whether these techniques are available to arbitrators, useful guidance is to be found in the *Statutory Power Procedures Act* (SPPA) which provides as follows:<sup>5</sup>

16. A tribunal may, in making its decision in any proceeding,
  - a. take notice of facts that may be judicially noticed; and
  - b. take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

The SPPA does not have general application to proceedings under the *Arbitration Act* of Ontario, but at s 2, the *Arbitration Act* expressly includes s 16 of the SPPA.

Finally, Article II of the United States' *Federal Rules of Evidence* provide a succinct, understandable summary of the topic. It is appended to this paper in its entirety.

Two important restraints on the wholesale use of this technique must be emphasized. First, the "facts" that the tribunal intends to include in its deliberations must be obtained from publications and sources that

...are indisputable and can be ascertained from sources to which it is proper for the judge to refer. These may include texts, dictionaries, almanacs, and other reference works, previous case reports,...<sup>6</sup>

The facts cannot be known to the tribunal in his personal capacity. As Wigmore explains:<sup>7</sup>

There is a real but elusive line between the judge's *personal knowledge* as a private man and these matters of which he takes judicial notice as a judge. The latter does not necessarily include the former; as a judge, indeed, he may have to ignore what he knows as a man and contrariwise.

The second restraint is that the parties must know what notorious facts the tribunal plans to refer to and be given an opportunity to refer it to additional or, perhaps more importantly, later references that should be considered. Clauses (e) and (f) of the attached excerpt from the *Federal Rules of Evidence* provide helpful guidance as to the process to be followed.

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<sup>5</sup> R.S.O. 1990, c22

<sup>6</sup> Sopinka, p. 1058

<sup>7</sup> Wigmore, p. 722

My approach to this issue is as follows; When the statements of claim, defense and counterclaim are in my hands along with the parties' expert reports, I review them to ascertain the supplemental reference sources, including websites, that I *might* wish to consult. Before the hearing starts, I circulate the list and invite comment, additions or objections. If, in the crafting of my final award, I find it desirable to refer to materials not previously identified, I (now) write to the parties and advise them of my intentions and, again, invite comment.

Disputed legal issues can be particularly troublesome to the lay arbitrator. The problems are of two types: those where interim rulings are required and those that arise during the award drafting stage. An example of the former is an objection to the admissibility of an expert report or to the capacity of the expert to give opinion evidence. The arbitrator must make the ruling without delay but must consider and understand leading cases and principles that are second nature to experienced counsel. In complex technical cases the financial and time consequences of a ruling of inadmissibility can be huge. It is equally frustrating for lay arbitrators to find themselves with a lack of understanding of the differing positions of counsel after the hearing has terminated.

The techniques that I employ to address these challenges are as follows:

- At the first hearing management meeting when protocols and deadlines are being established for the delivery of documents, expert reports and so on, I set time limits for counsel to object to the *admissibility* of their opponent's experts or their reports. This process enables me to take the time necessary to digest the material, understand the matter and provide a considered ruling without delaying the hearing.
- I remind counsel that I do not have legal training and that I will not make rulings without, at a minimum, considering them overnight. This technique stimulates counsel to provide me with their written submissions in advance so that I can better understand the oral submissions and rule without delay. Even then, I recess the hearing for as long as I need to satisfy myself that I have no further questions before deciding.

- When counsel are relying on decisions, I ask them to exchange the cases with each other and with me at least 48 hours in advance of their oral submissions. I then have a better understanding of what I do not understand when the application is made. As well, I become comfortable that the lawyer opposing the application has provided me with a comprehensive objection.
- I remind counsel that they should not assume that I will apply legal principles that they have not expressly introduced into the hearing.
- Finally, if all else fails, I remind counsel of my right to call a legal witness on my own motion to help me interpret the issue. Not surprisingly, this threat stimulates cooperation between opposing counsel.

I hope this paper will encourage ADR practitioners to be creative in applying imaginative and non-traditional techniques to give the parties and their clients the full benefit of the flexibility of an arbitration process that they expected when they initially agreed to it.

EXCERPT FROM THE (US) FEDERAL RULES OF EVIDENCE

ARTICLE 11. JUDICIAL NOTICE.

Rule 201. Judicial Notice of Adjudicative Facts.

- (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of Facts. Judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) When Discretionary. A court may take judicial notice, whether requested or not.
- (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) Opportunity to be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
- (g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.