

## Legal Innovation

## Mediation: Moving beyond the virtual vs. in-person debate

By **Mitchell Rose**



Mitchell Rose

(July 11, 2022, 2:42 PM EDT) -- In my previous article about virtual mediation for this publication in early January, I boasted that I was "reasonably confident we won't return to in-person mediations this year, nor will they be the default mode beyond that."

Six months later, I am scoring myself a respectable 9/10 in my ability to make correct New Year's predictions.

Mediations of civil disputes where I practise, southern Ontario, remain virtually all-virtual *despite*:

- the lifting of various COVID-19 related mandates in the province by the early spring;
- around the same time, the Superior Court of Justice requiring that all mandatory mediations (under Ontario *Rules of Civil Procedure* 24.1 and 75.1) be presumptively in-person, unless the parties consent to virtual mediation or the court orders otherwise; and
- many of us gradually returning to the office, and to in-person social and professional gatherings.

Instead, and likely for the reasons outlined in my January article, it seems as though lawyers and their clients never got the messages. The 2022 mediations conducted thus far have been, almost exclusively, virtual. The same applies to bookings for the rest of the summer and into the fall. For all of these virtual mediations, counsel agreed in advance upon the mode of participation before hiring me.

I only conducted one hybrid mediation this year (my first since 2020), and, so far, I am booked for just one upcoming, fully in-person mediation. Other local mediators report similar findings. Yet the fact that some people want, or need, to participate in-person is one reason why I could not score myself a perfect 10/10. The other reason is that we are barely past the midpoint of 2022, and none of us can know what lies around the corner.

Still, even the problems some Zoom meeting hosts encountered this spring (myself included) connecting to, and staying in, their own meetings — which played havoc with some mediations — haven't caused a return to in-person mediation, or even a migration to other platforms like Microsoft Teams (but it is good to know that Teams is there as a workaround, or to satisfy some parties' unique security concerns).

Similarly, I doubt that the recent cross-Canada Rogers outage will cool a hot virtual mediation market unless such outages become a weekly occurrence. Even then, in-person mediations still carry their own inherent participation problems, such as traffic jams, transit disruptions, winter weather and participants travelling to the wrong location (back, in the day, this last problem happened to lawyers more than you may be aware).

The most notable developments in mediation thus far in 2022 don't concern a virtual versus in-person debate, because there is no debate of which I am aware — at least not at this time. For now,

virtual mediation has won the debate, and the dispute is settled. Instead, readers should look to important, recent court decisions which affect the conduct of mediations — and related ADR processes — beyond the mode of participation.

Here is a rundown:

In my last article, I referred to a 2021 Ontario Superior Court decision, *Peres v. Moneta Porcupine Mines Inc.*, 2021 ONSC 5798, which demonstrated the need for mediation agreements to prevent mediation communications from being made public in proceedings to enforce settlements. This need was further demonstrated by an unreported January 2022 decision of the same court. In *Karolidis v. Orthotics Holdings Inc.*, 2022 CV-20-00646315-0000, a judge considered, among other things, a party's mediation behaviour when assessing costs at the end of the proceeding, to the detriment of that party. There, the judge took issue with the fact that the defendant's lead counsel did not attend the mediation "and there were no reasonable offers made by the defendant on the mediation."

Months later, in *Campbell v. Gautreau Estate*, 2022 ONSC 3416, the Superior Court again permitted the disclosure of mediation communications to prove and enforce a settlement. This time, the dispute involved a self-represented plaintiff who sought to resile from the settlement, which was later upheld by the court. As in *Karolidis* and *Peres* though, there is no information in the decision about the existence of a mediation agreement that might have prevented the disclosure of what took place at mediation.

In another development, and in another province, the Alberta Court of Queen's Bench in *Singh v. Modgill*, 2022 ABQB 369, upheld an arbitral award in the course of a mediation-arbitration (med-arb) process that it described as "quick and dirty," which the parties designed and which prioritized expediency. This decision, including the following passage, will help to further increase the growing popularity of med-arb in the resolution of civil disputes: "arbitration litigation is not some lesser form of litigation than that being conducted by the courts ...unless that is what the parties bargained for."

Finally, there is a decision that might at first appear to be about the challenges of virtual mediation. However, it is actually about the challenges (and, often, the waste of time and money) of trying to recoup costs thrown away when a party fails to attend any form of mandatory mediation — if they have a good excuse. In *Shahi v. Greater Toronto Airports Authority*, 2022 ONSC 2341, a defendant sought \$9,585.22 payable within 30 days for costs thrown away as a result of an elderly, overseas plaintiff missing a virtual mediation for reasons related to a COVID-19 outbreak and technology issues. In the end, the associate justice awarded the defendant only \$1,000 made payable in any event of the cause.

So, what is on the horizon the rest of 2022 if it is not the return to in-person mediation? While I am feeling confident, I am going to make a prediction: The expansion of mandatory mediation in Ontario beyond Toronto, Ottawa and Essex County.

Of course, that could just be wishful thinking.

Stay tuned.

*Mitchell Rose is a mediator and settlement counsel with Rose Dispute Resolution/Mitchell Rose Law in Toronto and can be reached at [adr@mitchellrose.ca](mailto:adr@mitchellrose.ca). He is the author of the Lexis Practical Guidance chapter on Virtual Mediation.*

*Photo credit / LeoWolfert ISTOCKPHOTO.COM*

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at [Richard.Skinulis@lexisnexis.ca](mailto:Richard.Skinulis@lexisnexis.ca) or call 437- 828-6772.*