

**IN THE MATTER OF THE *ARBITRATION ACT*,
S.O. 1991, c. 17
and the *FAMILY STATUTE LAW AMENDMENT ACT*,
2006, S.O. 2006 c.1**

B E T W E E N:

- and -

(the Parties)

- and -

MALCOLM BENNETT

(the "Arbitrator")

ARBITRATION AGREEMENT

The parties wish to retain the Arbitrator with respect to the issues they have agreed to submit to mediation.

SUBMISSIONS

The parties appoint Malcolm Bennett (hereinafter referred to as the "Arbitrator") to arbitrate the outstanding issues between the parties.

CONFIDENTIALITY

1. The proceedings and the record thereof shall be private and confidential, subject only to their being produced in proceedings for a judicial review.

ADVERSARIAL PROCESS SUSPENDED

2. The parties agree that during the mediation, they will not start or take any additional steps in any Court proceedings except as may be necessary to extend the time limit to preserve existing rights in any such proceeding.

MEDIATION HEARING

3. Malcolm Bennett shall conduct a mediation with the parties in respect of the issues in dispute beginning _____.
4. The location for the mediation shall be the offices of:

Bluewater Mediation
140 Fullarton Street, Suite 1800
London, Ontario N6A 5P2

PROCEDURAL ISSUES FOR MEDIATION HEARING

5. **Time and Place:** The hearing(s) shall take place at dates and times to be set by the Arbitrator in consultation with counsel.
6. **Applicable law:** The mediation will be conducted in accordance with the laws of Ontario, and the laws of Canada as it applies in Ontario.

MEDIATION

7. The parties agree that through the voluntary, informal dispute resolution process of mediation, they will use their best efforts, with the assistance of the Arbitrator to reach an agreement on the issues in dispute between them. The parties acknowledge that they are responsible for resolving the matters in dispute and that the Arbitrator is responsible for assisting them in so doing.
 - (a) The parties acknowledge that they, and their respective lawyer (and/or representative at the mediation) have full and unqualified authority to settle the issues in dispute and understand that the mediation may result in a binding and enforceable Settlement Agreement, unless otherwise disclosed by the party and agreed by the Arbitrator at the time of signing the Mediation Agreement.
 - (b) Each of the parties undertakes to participate in the mediation in good faith and in a principled fashion, based on full and fair disclosure. The parties agree to keep confidential all information and documents exchanged between them as a result of the mediation, except for the purposes of enforcing any settlement agreement.
 - (c) All oral statements made by the parties and their counsel in mediation will be without prejudice and treated as settlement negotiations. Those statements will not constitute evidence in any other proceeding. No record shall be made of any mediation except to record agreements and for the personal use of the counsel and the parties. No such record shall be admitted in any other proceeding.

- (d) All communications with the Arbitrator outside of meetings will be joint, including both parties' counsel, except as consented to. Meetings during mediation may be conducted by the Arbitrator with counsel and parties together or separately.
- (e) The parties agree to disclose to each other and to the Arbitrator the information relevant to the issues in dispute. If there is an existing Court action or proceeding, each party shall provide the Arbitrator with his or her court documents, sworn financial statements and income tax returns from the proceeding, including Case Conference Briefs, and Settlement Conference Briefs. Those documents shall not refer to settlement efforts or Offers to Settle. The Arbitrator may provide further directions as to the documents or reports required by him or her prior to or during the mediation.
- (f) The Arbitrator will not disclose in any proceeding or to third parties, confidential information provided during the course of the mediation except as required by law. Nor will the Arbitrator be compellable as a witness to testify on behalf of either party.

ROLE OF THE ARBITRATOR

- 8. The parties acknowledge and agree that the Arbitrator is a facilitator and not an advocate. The Arbitrator does not provide legal or other professional advice. It is not the Arbitrator's duty to protect the legal rights of any party, to raise issues or matters not raised by the parties themselves or to determine who should be parties to the mediation. If the Arbitrator offers a suggested solution, it is intended to be a suggestion only. The Arbitrator may disclose to other parties information provided by a party during the mediation, including information received during meeting separately with the parties, if the Arbitrator considers it to be relevant to the issues in dispute, unless the party specifically requests that the Arbitrator is to keep certain information confidential.
- 9. The Arbitrator may assist the parties in preparing a Settlement Agreement or Memorandum, if agreement is reached on some or all of the issues in dispute. If a settlement or resolution is not reached, the Arbitrator will be under no obligation to provide a report unless required by law or by agreement of the parties. The Arbitrator will destroy all documents related to the mediation (including all notes taken by the Arbitrator during the mediation), 30 days after the end of the mediation, except for any Settlement Agreement or Memorandum reached at mediation.
- 10. Each party is responsible for seeking and obtaining all necessary advice, including legal advice. The Arbitrator strongly encourages each party to obtain legal advice throughout the process and before any Agreement is signed.

THE PROCESS

11. The Arbitrator will first meet each party separately, to identify issues, goals and concerns of that party. Thereafter, the parties and the Arbitrator will meet together, either with or without their counsel, as they may agree.
12. The Arbitrator may meet or communicate with either party separately at any time. The Arbitrator may, in his discretion, disclose information or documents provided in such private meetings (called a “caucus”) to the other party, and/or to a party’s lawyer, unless agreed otherwise during the caucus.
13. All intake and screening information is confidential between the Arbitrator and the party who completed the screening questionnaire, subject to the confidentiality provisions set out below.
14. Either party may have his or her lawyer attend the mediation. Other professionals or other persons whose presence is required (such as counselors or therapists for children, or financial planners) at the mediation may be present if all parties agree. Any third parties present must agree in writing to be bound by the confidentiality terms of this agreement.
15. Mediation is a voluntary process. Either party or the Arbitrator may terminate the process at any time.
16. **The parties are advised to obtain, from independent legal and other advisors, all necessary legal, tax or other advice at the outset of the mediation process, and are advised to also obtain independent advice on the terms of any proposed settlement. They understand and acknowledge that an agreement reached without the benefit of legal and other necessary advice may be invalid, may later be set aside, or may have unintended consequences.**
17. The Arbitrator may at the parties’ request prepare a draft contract, setting out Arbitrator’s understanding of the terms of the agreement reached between the parties in mediation. However, the parties agree that they will not conclude a binding agreement in mediation. Any binding agreement shall be made by the parties following the mediation with the advice of lawyers retained by each of them to provide independent legal advice.

18. The parties fully indemnify the Arbitrator from any claims arising out of any agreements entered into following this process whether they have obtained legal advice or not.
19. The parties authorize the Arbitrator to discuss all aspects of the mediation with each other's lawyers and other advisors, excepting information that has been agreed to be confidential as per paragraph 15. The parties authorize the Arbitrator to provide the parties' respective lawyers with all progress notes and all documents provided to the Arbitrator for the purpose of mediation or prepared during the mediation, unless those documents are subject to a specific confidentiality agreement between the party that provided the document and the Arbitrator.
20. The mediation will be held in private. Other professionals or persons may be in attendance with the consent of all parties and the Arbitrator. All third parties must agree to be bound by paragraphs 23 to 26 herein.

WITHOUT PREJUDICE COMMUNICATIONS

21. All information, documents, notes, memos, correspondence (including e-mail), progress notes, memoranda of understanding, drafts, or other communications prepared or provided by any person for the purpose of the mediation shall, unless otherwise discoverable, be treated as without-prejudice settlement discussions, and shall be inadmissible for use by anyone in any proceeding for any purpose. The parties agree that they will not summons, subpoena, including the access to any documents prepared or provided in connection with the mediation, including the file and notes of the Arbitrator. The Arbitrator shall not be called as a witness in any proceeding.
22. Closed mediation is a confidential, off-the-record process. Although the Arbitrator cannot guarantee confidentiality, the purpose of a confidentiality rule is to help parties feel comfortable freely exchanging information, ideas, options, offers and concerns. The parties agree not to divulge communications made during the mediation process to anyone who was not present, including progress notes and e-mails from or to the Arbitrator or between themselves, unless they all consent. **This rule does not prevent the parties from providing necessary information and documents to people whose advice they need in order to make informed decisions.**

23. The Arbitrator agrees to be bound by these confidentiality provisions. However, the Arbitrator may breach the rule of confidentiality in the following situations:
- a) To communicate with the lawyers for the parties , and to third party advisors retained by a party or both parties;
 - b) For research, writing or educational purposes, on a non-identifying basis (with the written consent of the parties);
 - c) Where ordered to do so by a judicial authority;
 - d) Where required to do so by law, including obligations to report a child in need of protection; and
 - e) Where the information discloses an actual or potential threat to human life or safety.
24. The confidentiality provisions of this Agreement apply to any assistant, intern, co-Arbitrator or observer in the mediation. Clients hereby acknowledge and accept that the Arbitrator's staff or those assisting the Arbitrator may discuss matters related to clients' mediation for the purpose of file management, document production, and supervision and consent to such limited sharing of information within this group.
25. The parties specifically acknowledge that the fact that the mediation has been held or that the parties entered into this Mediation Agreement is not confidential in relation to the Court process. They authorize the Arbitrator to disclose to a Court, through the use of a Mediation Report, a) that the mediation has been held, and b) whether or not agreement was reached, if requested to do so by either party. No other information shall be disclosed by the Arbitrator to the Court unless paragraph 23(c) herein applies.

RISKS AND LIMITATIONS OF MEDIATION

26. The parties acknowledge that there is no guarantee that they will resolve all issues in mediation, nor that they will be fully satisfied with the outcome. The parties further acknowledge that if no settlement is reached in mediation, any subsequent litigation may be more difficult than if the parties had not mediated.
27. The Arbitrator cannot guarantee physical safety during the mediation process. The Arbitrator cannot guarantee against bad faith or abuse of process by either party.
28. The parties acknowledge that there is a risk of loss of confidentiality through the use of e-mail and/or facsimile communication. They authorize the Arbitrator and his assistants to communicate with them by email and facsimile notwithstanding this risk.

DOCUMENT DRAFTING

29. The Arbitrator may draft interim memoranda or “progress notes” at the end of meetings and a final memorandum or a draft contract when the mediation concludes. All such memoranda are without prejudice settlement proposals; none are binding on a party until they have been finalized into legal agreements with the assistance of the lawyers for the parties.

TERMINATION OF MEDIATION

30. The mediation will end:
- (a) when a settlement is reached and a Settlement Agreement has been signed by the parties;
 - (b) when the mediation is terminated by any of the parties;
 - (c) when the mediation is terminated by the Arbitrator, if the Arbitrator believes that the case is not appropriate for mediation or that an impasse has been reached.
31. Upon termination the responsibility of the Arbitrator to assist the parties to reach an agreement on the issues and disputes shall be at an end.

WAIVER OF ARBITRATOR’S LIABILITY

32. The parties hereby waive any claim or right of action against the Arbitrator arising out of this agreement and the mediation.

EXECUTION

33. Each party may sign a separate copy of this Mediation Agreement and may deliver it by fax, all separately signed copies shall together constitute the Mediation Agreement.
34. This Agreement shall be governed by the law of the Province of Ontario.

