

**IN THE MATTER OF THE *ARBITRATION ACT*,
S.O. 1991, c. 17 as amended
and the *FAMILY LAW ACT R.S.O. 1990 c.F.3 as amended***

B E T W E E N:

XXXXXX

(XXX)

- and -

XXXXXX

(XXX)

- and -

MALCOLM BENNETT

(the “Mediator” and/or “Arbitrator”)

MEDIATION-ARBITRATION AGREEMENT

SUBMISSIONS

1. This Agreement is a Family Arbitration Agreement made under the *Arbitration Act* and the *Family Law Act*. It is effective when:
 - (a) It has been signed by both parties and witnessed;
 - (b) Each Party's Certificate of Independent Legal Advice and each Lawyer's Certificate of Independent Legal Advice has been signed, in the forms attached; and
 - (c) The Arbitrator has signed the Certificate of Arbitrator, in the form attached.
2. The Arbitrator for this Arbitration is Mr. Malcolm Bennett. As set out in this Agreement, the Arbitrator may act as Mediator or Arbitrator, but throughout, he shall be termed Mr Bennett.
3. The Certificates of Independent Legal Advice and the Certificate of Arbitrator appended to this Agreement are part of this Agreement.
4. This Agreement may be signed in counterparts.

5. This Agreement takes effect once signed by both parties, their counsel, and Mr. Bennett, and not before.

WAIVER OF RIGHTS TO LITIGATE IN COURTS

6. By submitting to arbitration those issues designated in paragraph 10 below, the parties hereby waive any right to further litigate those issues in Court, whether pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, as amended; the *Divorce Act*, R.S.C. 1991, c. D-3.4 (2nd Supp.), as amended; or any other statute or law, subject to the rights of judicial review and appeal.
7. The parties waive any right to further litigate the issues listed in paragraph 4.1 below in court, pursuant to the *Family Law Act*, the *Divorce Act*, or any other statute or law, subject to the right of appeal and rights under the *Arbitration Act* and the *Family Law Act* as set out below.
8. Nothing in this Agreement impairs any enforcement rights that a party may have through the courts or otherwise.
9. On application by either party and subject to the court's discretion, the operative terms of this Agreement may be incorporated into a consent court order.

SUBSTANTIVE ISSUES

10. The following issues are submitted for determination for temporary relief, if appropriate and final determination:
 - Custody or any incident of custody
 - Access or any incident of access
 - Child Support
 - Child Support – Section 7 Expenses
 - Spousal Support
 - Equalization of Net Family Property
 - Exclusive Possession of Matrimonial Home
 - Exclusive Possession of Contents of Matrimonial Home
 - Sale of Property
 - Interim Fees and Disbursements
 - Preservation/Non-Dissipation of Assets

- [] Other (attach schedule)
- [] Costs of the Arbitration Process

CONFIDENTIALITY

11. The proceedings under this Agreement and the record thereof shall be private and confidential, except as may be necessary to implement or to enforce the Arbitrator's award, and subject to their being produced in proceedings for judicial review or appeal or as required by law. The parties, their counsel and Mr. Bennett shall not disclose any information about the parties, the mediation, the arbitration, or the screening for power imbalances or domestic violence to anyone, except as required by law.
12. The parties acknowledge and agree that Mr. Bennett's legal obligations to disclose may include:
 - (a) Filing a report about the award with the Attorney General in accordance with the Regulation under the Arbitration Act, 1991;
 - (b) Reporting a child in need of protection in accordance with section 72 of the Child and Family Services Act;
 - (c) Where he believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily or psychological harm, disclosing such confidential information that is required in the circumstances to prevent such death or harm.

APPLICABLE LAW

13. The arbitration will be conducted in accordance with the law of Ontario, and the law of Canada as it applies in Ontario, as more particularly described in paragraphs 14-16, inclusive, below.

SUPPORT

14. Issues related to child support and spousal support (on an interim and permanent basis) shall be determined in accordance with the provisions of the *Family Law Act*, R.S.O. 1990, c.F.3, as amended, or the *Divorce Act*, R.S.C. 1991 c. D-3.4 (2nd Supp.), as amended as may be applicable.

CUSTODY AND ACCESS

15. Issues related to custody and access of children (on an interim and permanent basis) shall be determined in accordance with the provisions of the *Children's Law Reform Act*, R.S.O., 1990, c. C12 or, if a divorce has been granted or the parties are involved in

divorce proceedings, then under the *Divorce Act*, R.S.C. 1991 c. D-3.4 (2nd Supp.), as amended.

PROPERTY

16. All property issues (and interim property issues) shall be determined in accordance with the provisions of the *Family Law Act*, R.S.O. 1990, c.F.3, as amended or any other applicable legislation.

MEDIATION

17. Mr. Bennett shall conduct a mediation in respect of the issues in dispute. The procedure for the mediation (including the date, time and place) shall be determined by Mr. Bennett in consultation with the parties and their counsel or both.
18. The location for the mediation shall be the offices of:

Bluewater Mediation
1800-140 Fullarton Street
London, ON N6A 5P2
19. Upon signing this agreement, each party shall provide to Mr. Bennett through his or her lawyer the following:
 - (a) This agreement, duly executed by the party and his or her lawyer;
 - (b) A retainer in the sum of \$2,500.00 payable to Bluewater Mediation. Any unused portion of the retainer shall be refunded to the payor, and (*See Schedule "A"*)

DOCUMENTS FOR MEDIATION

20. Unless otherwise agreed between Mr. Bennett and both parties, each party shall provide to Mr. Bennett through his or her lawyer the following, no later than seven days prior to the commencement of mediation:
 - (a) A mediation brief containing the following documentation:
 - (i) Relevant factual information about the issues and the relief sought together with the facts supporting his or her claims for relief;
 - (ii) What issues have been resolved, and the terms of the agreement;
 - (iii) Any relevant factual information about the relationship between the parties;
 - (iv) Copies of any relevant reports, assessments or appraisals;
 - (v) The party's current personal Financial Statement;

- (vi) Copies of any relevant court orders or agreements;
 - (vii) Any other information or documentation that in the opinion of either party or his/her lawyer is important for the resolution of the issues;
 - (viii) Such other documents that Mr. Bennett may request.
21. The parties acknowledge and agree that in assisting them in resolving the issues set out in paragraph 10 above, Mr. Bennett will be acting in his capacity as Mediator and that he will not provide legal advice to parties individually or collectively. If, during the course of the mediation, the Mediator expresses an opinion or comments on an issue, the parties acknowledge that that opinion or comment is not to be construed as constituting a statement of the law or legal advice in any respect.
 22. Mr. Bennett may meet with the parties together or separately and whomsoever Mr. Bennett deems relevant to a resolution of the issues between the parties. Any meeting between any person who is not a party to the process shall be held only with the consent of the parties.
 23. The parties agree that the mediation sessions are settlement negotiations and that disclosures during mediation are inadmissible in any future litigation or arbitration. The parties are not to subpoena or otherwise require Mr. Bennett to testify or produce records or notes in any future proceedings. No transcripts shall be kept of the mediation proceeding.
 24. The parties specifically waive Section 35 of the *Arbitration Act*. They agree that the Arbitrator may act as Mediator in this matter and, specifically, that the Arbitrator is not disqualified from adjudicating any or all issues because he has acted as Mediator in an attempt to resolve the issues before him prior to or during the arbitration hearing.
 25. The mediation shall continue until Mr. Bennett determines that continued mediation is unlikely to result in a settlement, at which point, Mr. Bennett may terminate the mediation and set a date for an arbitration.

PROCEDURAL FOR ARBITRATION

26. **Time and Place:** If Mr. Bennett determines that an arbitration is required, the arbitration hearing shall take place in London, Ontario, at a time and date to be determined by him after consultation the parties (and their counsel if applicable).
27. **Procedure on Hearing:** The procedure for the arbitration hearing shall be determined by the Arbitrator, in consultation with the parties (and their counsel if applicable). It shall be similar to court procedure wherever possible, and in particular:
 - (a) all witnesses shall be sworn (or affirmed) and shall be subject to cross-examination and re-examination, save and except the Arbitrator may direct that

some or all of the Evidence-in-Chief by some or all of the witnesses be given by affidavit in such manner as the Arbitrator may direct;

- (b) all usual rules for the admissibility of evidence in court proceedings will apply as amended by the *Arbitration Act*, as will the *Family Law Rules and Rules of Civil Procedure* where applicable.
- (c) If a hearing is conducted, it may be conducted in person, electronically, by telephone, by teleconference, by written submissions or by any other procedure which shall be determined by Mr. Bennett in consultation with the parties (and their counsel, if applicable).
- (d) Mr. Bennett may determine a timetable for the delivery of briefs, financial disclosure and other documents.
- (e) Mr. Bennett may deliver notices, awards or other communications to the parties via ordinary mail, fax or e-mail.
- (f) Notwithstanding paragraph 23, Mr. Bennett may, with the consent of the parties, admit into evidence documents or other information received by him during the mediation phase.
- (g) The parties agree: (Select one)
 - There will be a reporter, the cost of which will be initially shared equally between the parties; or
 - There will not be a reporter; or
 - There will be a reporter appointed as required for all or part of any arbitration as determined by Mr. Bennett in consultation with the parties (and counsel, if applicable).

PRE-ARBITRATION CONFERENCE

28. Mr. Bennett may convene a pre-arbitration conference to determine:

- (a) The issues for arbitration;
- (b) The documents to be provided prior to the commencement of the arbitration;
- (c) The order of presentation of evidence;
- (d) The names, addresses and telephone numbers of witnesses to be called and a synopsis of their evidence;

- (e) A timetable for pre-arbitration events, including the exchange of expert reports, the delivery of opening statements, the exchange of document briefs and questioning, if required;
- (f) Estimates of the time required for the arbitration;
- (g) Any physical arrangements necessary for the attendance of parties or witnesses; and
- (h) Any issues arising out of the results of the screening.

EXPERT EVIDENCE FOR ARBITRATION HEARING

- 29. The parties specifically authorize Mr. Bennett to determine the necessity of retaining professional(s) to provide expert opinion(s) respecting any outstanding issues(s) and to retain such professional(s) as he deems appropriate.
- 30. The parties agree to contribute to the fees of the expert(s) in the amounts or proportions determined by Mr. Bennett and authorize Mr. Bennett to include these fees as a disbursement on her account to the parties.

WITHDRAWAL FROM MEDIATION OR ARBITRATION

- 31. Neither party may unilaterally withdraw from this Agreement at either the mediation or arbitration stage. However, with their joint consent in writing, both parties may terminate this Agreement. The Arbitrator shall proceed with arbitration as provided for in the Agreement notwithstanding that the mediation has been unsuccessful or that one of the parties no longer wants to participate in the arbitration.
- 32. Mr. Bennett may at any time resign from his appointment as mediator/arbitrator, without the need to provide reasons, by providing written notice of his resignation to the parties.
- 33. In the event that Mr. Bennett's appointment is terminated, and the parties are unable to agree on a replacement, a court of competent jurisdiction shall appoint a replacement arbitrator on either party's application to the court.
- 34. In the event that Mr. Bennett appointment is terminated, the parties agree that any interim or interlocutory award(s) made by Mr. Bennett will continue to bind the parties and will continue in full force and effect as the basis for the continuation of the arbitration with the replacement arbitrator.

ARBITRATORS AWARD

- 35. After the evidence has been received and submissions on the law have been made, the Arbitrator shall deliver an Award on all issues submitted for determination.

36. The Arbitrator's Award shall be final and binding upon the parties and may be incorporated in a Consent Order or Judgment, as the case may be, of the *Ontario Superior Court of Justice*, at the initiation of either party, in accordance with the *Arbitration Act* and the *Family Law Act*. Any rights of appeal from the Arbitrator's decision shall be governed by Appeal section below.

COSTS

37. As the issue of costs is submitted to the Arbitrator, the Arbitrator's discretion regarding costs shall include the power to require one party to pay more than one-half, or all of the Arbitrator's fees and disbursements.

APPEAL

38. The parties shall have the right to review the Arbitration Award in accordance with s. 46 of the *Arbitration Act* and such right to appeal the Award on a question of law, with leave, as provided in s. 45 of the *Arbitration Act* and the *Family Statute Law Amendment Act*.
39. In addition to the appeal rights provided in s. 45(1) of the *Arbitration Act*, a party may appeal any Award. Such appeal shall be on (*check where appropriate*):

[] a question of law (without leave);

[] a question of fact; or,

[] a question of mixed fact and law;

FEES, DISBURSEMENTS AND CANCELLATION POLICY

40. Mr. Bennett's Schedule of Fees is attached at *Schedule "A"*. The parties also agree to abide by the mediator's cancellation policy, which is as follows:

- Cancellation notice received **less than 72 hours** in advance of the scheduled commencement of the mediation: the fee for all preparation completed by the time notice of cancellation is received at the rate of \$400 per hour, plus \$550.00, plus actual expenses and disbursements incurred by the mediator to that date, plus HST.
- Cancellation notice **more than 72 hours** but less than one week before the scheduled commencement of the mediation: the fee for all preparation completed by the time the notice of cancellation is received at the rate of \$400 per hour, plus actual expenses and disbursements incurred by the arbitrator to that date, plus HST.
- Cancellation more than one week before the scheduled commencement of the mediation: The parties will be required to pay for all preparation completed by the

time notice of cancellation is received at the rate of \$400 per hour, plus any actual expenses and disbursements incurred by the mediator to that date, plus HST.

41. The parties shall be jointly and severally liable for the fees and disbursements of the Arbitrator as set out in *Schedule "A"*.
42. In the event that one of the parties fails or refuses to pay to Mr. Bennett his or her share of Mr. Bennett's fees, disbursements or retainer accounts, he may accept payment of the defaulting party's share from the other party and exercise his discretion with respect to costs to require the defaulting party to reimburse the other party the amount of such payment.
43. Mr. Bennett is empowered to order interim fees and disbursements of the arbitration, including his retainer, fees and/or disbursements, on notice to the parties following receipt of submissions if either party wishes.
44. Mr. Bennett may withhold his award until all outstanding fees, disbursements, or retainers have been paid.

ENFORCEMENT

45. Subject to the appeal remedies and rights to apply to set aside Mr. Bennett's Award under sections 45 and 46, respectively, of the *Arbitration Act* and subject to the other applicable provisions of the *Arbitration Act*, and the *Family Law Act*, all awards of the Arbitrator shall be binding upon the parties. Any temporary, interim or final award may be incorporated into a consent order of the Ontario Superior Court of Justice. Either party may apply for the enforcement of any award under section 59.8 of the *Family Law Act*.
46. Upon the request of either party, Mr. Bennett shall issue an arbitral award incorporating the terms of any agreement reached by the parties during the course of the mediation or arbitration.

WAIVER OF LIABILITY

47. The parties hereby waive any claim or right of action against Mr. Bennett arising out of these proceedings.

SEVERABILITY OF TERMS

48. Each of the terms of this agreement are severable from the others and will survive the invalidity or unenforceability of any other term of this agreement.

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, _____, Barrister and Solicitor, have reviewed the attached Mediation/Arbitration Agreement (the "Agreement") and have fully explained to my client, _____, the meaning and intent of the Agreement and have given to him/her independent legal advice prior to the Agreement being signed. I have also explained to my client that the Agreement is a "domestic contract" within the meaning of the *Family Law Act*, and as such, a court may set aside the Agreement under various circumstances about which I have informed him/her. In my opinion, my client is aware of the need for financial disclosure existing when this Agreement is made, understand the nature or consequences of this Agreement, and is not signing this Agreement as a result of any undue influence placed upon him/her by any person.

My client has been separately screened for power imbalances and domestic violence and I hereby confirm that I am satisfied that my client is fully able to participate in this mediation/arbitration and is doing so voluntarily.

Date

ACKNOWLEDGEMENT OF CLIENT

I, _____, confirm that I have received independent legal advice. I have read the above Certificate, and I understand and agree with the statements set out in it.

Date

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, _____, Barrister and Solicitor, have reviewed the attached Mediation/Arbitration Agreement (the "Agreement") and have fully explained to my client, _____, the meaning and intent of the Agreement and have given to him/her independent legal advice prior to the Agreement being signed. I have also explained to my client that the Agreement is a "domestic contract" within the meaning of the *Family Law Act*, and as such, a court may set aside the Agreement under various circumstances about which I have informed him/her. In my opinion, my client is aware of the need for financial disclosure existing when this Agreement is made, understand the nature or consequences of this Agreement, and is not signing this Agreement as a result of any undue influence placed upon him/her by any person.

My client has been separately screened for power imbalances and domestic violence and I hereby confirm that I am satisfied that my client is fully able to participate in this mediation/arbitration and is doing so voluntarily.

Date

ACKNOWLEDGEMENT OF CLIENT

I, _____, confirm that I have received independent legal advice. I have read the above Certificate, and I understand and agree with the statements set out in it.

Date

ARBITRATOR'S CERTIFICATE

I, *Malcolm Bennett*, confirm the following matters:

- i. I will treat the parties equally and fairly in the arbitration, as subsection 19 (1) of the *Arbitration Act, 1991* requires.
- ii. I have received the appropriate training approved by the Attorney General.
- iii. The parties were separately screened for power imbalances and domestic violence and I have considered the results of the screening and will do so throughout the arbitration, if I conduct one.
- iv. The parties were separately screened for power imbalances and domestic violence by someone other than me and I have considered his or her report on the results of the screening and will do so throughout the arbitration.

Date:

Malcolm Bennett, Arbitrator