

Concerns About the Med-Arb

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## Introduction<sup>1</sup>

Med-Arb is a hybrid of mediation and arbitration in which the named individual (commonly referred to as the “neutral”) initially acts as a mediator and, failing to secure an agreement between the parties, proceeds to arbitrate the parties’ dispute.<sup>2</sup> The parties are typically required to attempt mediation before transitioning to the arbitration phase. This paper considers the disadvantages of Med-Arb in the context of estates disputes.

There are reasons to consider med-arb as viable and sometimes preferable alternative to traditional mediation. One need not look further than Charles Dickens’ oft-cited *Bleak House* to understand how a lack of finality could lead to indefinite litigation and a depletion of the estate. A more contemporary review is Howard Black’s brief “A 40 Year-Old Battle Over a Forest Hill Estate: Would ‘Med-Arb’ Have Been Better?”, which considers the benefit of med-arb in a dispute of an estate in the Forest Hill neighbourhood of Toronto.<sup>3</sup>

However, the tendency to tout the benefits of med-arb without due consideration of its inherent flaws unfairly disregards the importance of natural justice. While a med-arb neutral’s self-serving assurances of impartiality may be offered to satisfy concerns of bias, psychological studies on fact-finders in the legal process suggest that neutrals are susceptible to bias despite their best attempts to avoid it. This in turn heightens the risk that an arbitration award in a med-arb will be arrived at using otherwise inadmissible evidence extracted from *ex parte* communications in mediation.

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<sup>2</sup> Duncan W. Glaholt & Markus Rotterdam, *The Law of ADR in Canada: An Introductory Guide* (LexisNexis: Markham, 2011) at 90; *Marchese v. Marchese*, 2007 ONCA 34 at para 4, [2007] OJ No 191 (QL) [*Marchese*].

<sup>3</sup> Howard S. Black, “A 40-Year Battle Over a Forest Hill Estate: Would ‘Med-Arb’ Have Been Better?” *Minden Gross LLP* (May 2013), online: Minden Gross LLP <<https://www.mindengross.com/docs/default-source/publications/a-40-year-battle-over-a-forest-hill-estate-would-med-arb-have-been-better-.pdf?sfvrsn=5>>.

Lawyers and their clients ought to therefore consider whether the purported benefits of med-arb are worth the risk of receiving a tainted arbitration award. Properly considering the ramifications of med-arb to a client's rights to natural justice may instead lead to recommending traditional mediation. In the alternative, the lawyer and her client may decide to draft the med-arb agreement in a way that sacrifices some of the cost-savings benefits of med-arb in exchange for additional protections from bias.

This paper is divided into four parts. First, the paper discusses the use of med-arb and traditional mediation in the context of estates disputes in Ontario. Second, the paper addresses the issues of natural justice in med-arb and how the *Arbitration Act* and jurisprudence attempts to avoid these issues of bias. Third, the paper addresses how the psychological limitations of human's decision-making functions ultimately render the protections in the *Arbitration Act* and jurisprudence insufficient to combat bias. Fourth, the paper considers creative ways to structure the med-arb framework that reduce concerns of bias.

### **Mediation-Arbitration ("Med-Arb")**

Traditional mediation is already a major component of estates litigation in Ontario. Not only is mediation mandatory in several regions (including the City of Toronto),<sup>4</sup> but mediation can be well suited to settling estates litigation. By some estimates, over 90 percent of all lawsuits settle before trial, many of which are done through mediation.<sup>5</sup> These disputes are often coloured with decades of familial history. Mediation invites candour into the dispute resolution process, at least between the mediator and a party (and her lawyer), by encouraging each of the parties to put "on the table" the real reason for their positions. These candid discussions assist the mediator

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<sup>4</sup> RRO 1990 Reg 194: Rules of Civil Procedure, r 75.1 [*Rules*].

<sup>5</sup> Government of Ontario, Ministry of the Attorney General, "Public Information Notice - Ontario Mandatory Mediation Program", online:  
<<https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php>>.

in developing a resolution that is unique to the parties' situation.<sup>6</sup> While an arbitration or court proceeding determines a winner and loser (i.e. the will is valid or invalid), mediation allows the parties to factor in their respective litigation risk, legal costs and craft their own compromise. If the mediation fails, the parties are protected by the assurance that any confidential information addressed at mediation will not be disclosed in court.<sup>7</sup>

Arbitration is another type of alternative dispute resolution where an arbitrator will typically hand down a binding decision based on objective standards.<sup>8</sup> Arbitration follows a similar style to a courtroom proceeding, whereby the arbitrator accepts evidence, listens to witnesses, and hears the parties' arguments.<sup>9</sup> Some have criticized the use of arbitration in the estates context for its adjudicatory nature and lack of efficiency.<sup>10</sup>

The requirement of mediation in estates matters invites the possibility that parties instead agree to engage in med-arb. The general rule pursuant to s. 35 of the *Arbitration Act* is that an arbitrator is precluded from conducting any part of the arbitration as a mediation.<sup>11</sup> However, s. 3 of the *Arbitration Act* permits parties to contract out of s. 35, thereby bestowing the parties with the ability to draft a med-arb agreement that is tailored to address their specific goals and concerns.<sup>12</sup>

In some cases, the arbitration process can occur immediately after mediation. This will trigger the beginning of cross-examinations on affidavits, examination of

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<sup>6</sup> Brian A. Schnurr, *Estate Litigation*, 2d ed, loose-leaf (consulted on 21 May 2019), (Toronto, ON: Carswell), ch 20 at 20.3.

<sup>7</sup> Confidentiality of the mediation is enshrined in common law, legislation, and contract. That is, the notion of settlement privilege applies to mediation, which is affirmed in Rule 75.1.11. The parties also typically draft a provision in the mediation agreement to emphasize that all communications from mediation are confidential and shall not be disclosed.

<sup>8</sup> Yolanda Vorys, "The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes" (2007) 22 *Ohio State Journal on Dispute Resolution* at 881.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Arbitration Act, 1991*, SO 1991, c 17, s 35 [*Arbitration Act*].

<sup>12</sup> *Arbitration Act*, s 3; See *Marchese* at paras 5-6, where the Court of Appeal for Ontario holds that med-arb agreements are enforceable if the parties contract out of s 35 of the *Arbitration Act*.

evidence, and oral arguments. In rarer cases, the parties will agree to an arbitration process where the parties simply submit “final offers” to the arbitrator after the failed mediation without engaging in the typical fact-finding process, after which the arbitrator will choose the preferred final offer.

Many scholars have touted the benefits of med-arb, noting that it mixes arbitration’s guarantee of finality with mediation’s sensitivity.<sup>13</sup> It also said to result in significant efficiencies. For example, time is saved by the parties being able to narrow the issues on mediation, leaving often minimal differences to be adjudicated during arbitration.<sup>14</sup> Several of these scholars also commend med-arb’s apparent financial benefits, since the mediator, already possessing the necessary information to adjudicate the matter, acts as the arbitrator if mediation fails to fully settle the dispute.<sup>15</sup> Med-arb has been considered particularly beneficial for will challenges, since these disputes can be so contentious that they are often not resolved by mediation alone.<sup>16</sup> Further, like family disputes, estates disputes raise the risk of severing familial relationships.<sup>17</sup>

### **Natural Justice**

The perceived benefits of med-arb, although promising, should be balanced against the risk that the framework may impede the parties’ rights to natural justice and create a reasonable apprehension of bias. Natural justice is a dynamic concept that transfigures according to the applied context. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>18</sup> the Supreme Court of Canada noted that while procedural fairness “upholds the principle that individuals are entitled to fair procedures

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<sup>13</sup> Supra note 8 at 873; David C. Elliott, “Med/Arb: Fraught with Danger or Ripe with Opportunity?” (1995) XXXIV Alberta Law Review at 164.

<sup>14</sup> Supra note 8 at 884-885.

<sup>15</sup> Supra note 13 at 164.

<sup>16</sup> Supra note 8 at 889.

<sup>17</sup> Supra note 8 at 889 - 890.

<sup>18</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [Baker].

and open decision-making”, it also recognizes that “in the administrative context, this transparency may take place in various ways”.<sup>19</sup>

The *Arbitration Act* provides explicit safeguards to prevent against biased arbitration awards. Section 19(1) of the *Arbitration Act* provides that the parties in an arbitration must be treated equally and fairly.<sup>20</sup> This includes a duty to act impartially<sup>21</sup>, and cannot be contracted out of.<sup>22</sup> Section 11(1) states that an arbitrator shall be independent of the parties and shall act impartially. Section 11(2) requires the arbitrator to disclose any circumstances of which she becomes aware that may give rise to a reasonable apprehension of bias, and s. 11(3) mandates this prompt disclosure during arbitration.

The jurisprudence has been equally adamant that arbitrators must remain unbiased in form and appearance. In *Hercus v. Hercus*,<sup>23</sup> for example, Templeton J. noted the following:

It is settled law that the right to a fair hearing is an independent and unqualified right. Arbitrators must listen fairly to both sides, give parties a fair opportunity to contradict or correct prejudicial statements, not receive evidence from one party behind the back of the other and ensure that the parties know the case they have to meet. An unbiased appearance is, in itself, an essential component of procedural fairness.

The *Arbitration Act* permits the parties recourse in the event that a reasonable apprehension of bias exists. Section 13(1) of the *Arbitration Act* notes that a party may challenge an arbitrator on the grounds that circumstances exist that may give rise to a reasonable apprehension of bias. Section 15(1) of the *Arbitration Act* authorizes the court to remove an arbitrator if she does not conduct the arbitration in accordance with

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<sup>19</sup> *Baker* at para 44.

<sup>20</sup> *Arbitration Act*, s 19(1).

<sup>21</sup> Alexander Gay & Alexandre Kaufman, *Annotated Ontario Arbitration Legislation - Arbitration Act, 1991 and International Commercial Arbitration Act, 2017* (Carswell: Toronto, 2017). An arbitrator’s duty to act impartially is also required pursuant to s 11(1) of the *Arbitration Act*.

<sup>22</sup> *Arbitration Act*, s 3(1.)(ii); *Adams v. Canada (Attorney General)*, 2011 ONSC 325 (Div Ct) at para 31, 272 OAC 301 [*Adams*].

<sup>23</sup> *Hercus v. Hercus*, 2007 ONCA 34 at para 74, [2007] OJ No 191 [*Hercus*]; *Kainz v. Potter*, [2006] OJ No 2441 at para 70, 33 RFL (6th) 62 (Sup Ct) [*Kainz*].

s. 19 (equality and fairness to the parties).<sup>24</sup> Moreover, a party can apply to set aside an arbitration award on the grounds that the applicant was not treated equally and fairly.<sup>25</sup>

Determining whether a reasonable apprehension of bias exists includes considering the possibility that arbitrators may be unaware of their own biases. The test for whether there exists a reasonable apprehension of bias of an arbitrator is the same test applied to courts,<sup>26</sup> originally enunciated by Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*<sup>27</sup> and recently reiterated by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*:<sup>28</sup>

...what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. (Emphasis added)

These statutory and jurisprudential safeguards against bias, while encouraging, do not adequately protect the parties to a med-arb from the possibility of bias or a reasonable apprehension of bias. The common concern is that, during the mediation phase, the neutral will engage in confidential communications with each party in private caucuses, which will lead to an informational bias that will impact the neutral's decision making during the arbitration phase.<sup>29</sup> These *ex parte* communications are pervasive in estates litigation. A med-arb framework creates a risk that arbitration award will be at

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<sup>24</sup> *Arbitration Act*, s 15(1); *Universal Settlements International Inc. v. Duscio*, 2012 ONCA 215 at para 44, 214 ACWS (3d) 14 [*Duscio*].

<sup>25</sup> *Arbitration Act*, s 46(1)(6.).

<sup>26</sup> *A. T. Kearney Ltd. v. Harrison*, [2003] OJ No 438 at para 6, [2003] OTC 96 (Sup Ct) [*A. T. Kearney*].

<sup>27</sup> *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 SCR 369, [1976] SCJ No 118.

<sup>28</sup> *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 at para 20, [2015] 2 SCR 282 [*Yukon*].

<sup>29</sup> *Supra* note 13 at 166-167; Richard Fullerton, "The Ethics of Mediation-Arbitration" (2009) Colo. Law. at 34, online:

<[http://cedires.be/index\\_files/FULLERTON\\_Richard\\_The%20ethics%20of%20mediation-arbitration.pdf](http://cedires.be/index_files/FULLERTON_Richard_The%20ethics%20of%20mediation-arbitration.pdf)>; R. Lee Akazaki, "Overcoming Bias: Mediation-Arbitration in Canadian Civil Litigation" (2015), online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2653461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653461)>; Leslie Dizgun, "Med-Arb: Crossing the Line" in *A Practitioner's Guide to Commercial Arbitration*, edited by Marvin J. Huberman (Toronto: Irwin Law, 2017).

least partially determined using information gleaned from these *ex parte* communications, irrespective of the information's evidentiary value or admissibility.

Justice Gray in *McClintock v. Karam*<sup>30</sup> recognized that, when determining whether a reasonable apprehension of bias exists in the context of a med-arb, consideration must be given to special circumstances of the dispute resolution framework. While natural justice must still be rendered, its application must also be tailored. Paragraphs 68 and 69 of Justice Gray's decision are particularly informative about how a reasonable apprehension of bias ought to be considered in the context of med-arb:<sup>31</sup>

As stated by de Grandpré J., one of the considerations is the "special circumstances of the tribunal". In this case, the tribunal is a mediator/arbitrator, and he has been constituted by agreement. It must be concluded that the parties, in agreeing to mediation/arbitration, would understand the nature of the process of mediation/arbitration. The informed person, in deciding whether there is a reasonable apprehension of bias, would also understand the nature of the process of mediation/arbitration.

In order to effectively mediate, the person appointed must engage in a process that has a good deal of informality. Mediative techniques include persuading, arguing, cajoling, and, to some extent, predicting. Mediation is a process to secure agreement, if possible. All of those techniques, as well as others, will come into play in trying to secure agreement.

Justice Gray directly considers the fact that the neutral will necessarily retain information and conclusions acquired during mediation, but that this does not create a presumption of a reasonable apprehension of bias:<sup>32</sup>

If the mediator/arbitrator must move to the arbitration phase, it cannot be expected that he or she can entirely cleanse the mind of everything learned during the mediation phase, and of every tentative conclusion considered, or even reached, during the mediation phase. However, at a bare minimum the

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<sup>30</sup> *McClintock v. Karam*, 2015 ONSC 1024, 124 OR (3d) 616 [*McClintock*].

<sup>31</sup> *McClintock* at paras 68-70.

<sup>32</sup> *McClintock* at para 70.

parties are entitled to expect that the mediator/arbitrator will be open to persuasion, and will not have reached firm views or conclusions.

Proponents of med-arb acknowledge these natural justice concerns but are of the opinion that they can be managed by virtue of the neutral's dedication to objectivity, structural limitations imposed in the med-arb agreement, or a combination of both. For example, Leslie Dizgun notes in *A Practitioner's Guide to Commercial Arbitration* that, in his experience, it is very possible to make the transition from mediator to arbitrator, considering that adjudication is necessarily an evidentiary assessment and considering that lawyers are already adept at distinguishing between conversation at mediation and admissible evidence presented at arbitration.<sup>33</sup> R. Lee Akazaki notes in "Overcoming Bias: Mediation-Arbitration in Canadian Civil Litigation" that parties to a med-arb can overcome informational bias by crafting the med-arb agreement in a way that engages pre-agreed limits for the neutral to see privileged and non-privileged information.<sup>34</sup>

What is not addressed, however, is that these concerns of bias in med-arb may in turn impact the lawyers' strategies when advocating for their client during the mediation phase. For instance, in mediation, it is common that a lawyer be candid about the merits of her client's position, and may even make unilateral concessions in an effort to increase the likelihood of a settlement.<sup>35</sup> Where the lawyer knows that arbitration is imminent if mediation fails, lawyers will carefully guard their statements for fear that candour will be used against them at arbitration.<sup>36</sup> Parties to the dispute are effectively encouraged to "hide" their agenda, since there is the risk that a party's admissions made to a mediator will be known to the trier of fact during arbitration.<sup>37</sup> This can lead to

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<sup>33</sup> Leslie Dizgun, "Med-Arb: Crossing the Line" in *A Practitioner's Guide to Commercial Arbitration*, ed by Marvin J. Huberman (Toronto: Irwin Law, 2017).

<sup>34</sup> R. Lee Akazaki, "Overcoming Bias: Mediation-Arbitration in Canadian Civil Litigation" (2015) at 18, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2653461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653461)>.

<sup>35</sup> Daniel S. Melamed and Devra Charney, "Some Tips for Mediation and Arbitration: Why, When, and How to Be Effective" (Torkin Manes LLP) at 4 and 9.

<sup>36</sup> Brian A. Pappas, "The Best of Both Worlds May Be Too Good to Be True: A Response to Weisman", *Dispute Resolution Magazine* (2013) 19:3 at 42, online: <[https://www.americanbar.org/content/dam/aba/publishing/dispute\\_resolution\\_magazine/spring2013.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/dispute_resolution_magazine/spring2013.authcheckdam.pdf)>; Ellen E. Deason, "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review" (2013) 5 Y.B. Arb. & Mediation at 224.

<sup>37</sup> *Supra* note 6.

suboptimal results in a mediation where the self-limiting of information prevents the neutral from coming to a resolution that satisfies the mediating parties.

Imagine the following scenario. Audrey is the mother to Benjamin and Charlotte. Audrey dies and divides her estate between Benjamin and Charlotte equally. Charlotte claims a resulting trust of \$250,000 against Audrey's estate and produces a private letter from Audrey acknowledging that this money belonged to Charlotte. No further details were provided. Benjamin does not trust his sister and believes it all to be bogus.

The matter settled at mediation. In the privacy of mediation, Charlotte produced cheques showing that she gave Audrey \$250,000 in order to hide it from her spouse when they were going through divorce proceedings. The daughter would not make this admission at trial or in public because it would provide her ex-husband with ammunition in their ongoing litigation. Charlotte only felt free to make this admission because there was no risk of it becoming public knowledge or being used against her at trial.

If the mediator were to also be the trier of fact, Charlotte might worry that her admission would undercut her claim that the \$250,000 belonged to her in a resulting trust. Arguably, a resulting trust is an equitable remedy. In order to obtain such remedy, the applicant must approach the court with clean hands. Here, Charlotte did not do so, because she provided the funds to her mother to prevent her husband from accessing the funds.<sup>38</sup>

Admissions of this sort at mediation that lead to a resolution of the dispute may not happen if the mediator becomes the arbitrator. Charlotte would be concerned that

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<sup>38</sup> *Holland v. Holland*, (2008) W.D.F.L. 49, 49 R.F.L. (6th) 97 [*Holland*]. Justice Reilly's decision considered a number of cases involving a transfer of property where the intent was to defeat creditors. Most persuasive was His Honour's quote of Lord Denning in *Tinker v. Tinker*, (1970), 1 All E.R. 540 at 542:

*"... I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or the other. The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think that it belongs to her."*

the arbitrator would have to take into account the equitable principles precluding the daughter from seeking the relief on the basis that she did not come to court with clean hands. She would never have shared the admission and just relied on the incomplete documentary evidence to prove her case. This would not be the case if after a failed mediation a different neutral acted as arbitrator or if the case proceeded to trial in the court system.

### **Inherent Bias of Neutrals**

The common conception that neutrals can sufficiently mitigate concerns of bias by ignoring harmful information overlooks humans' psychological tendencies to retain and incorporate information into our decision-making, even if we believe that we are setting this information aside.<sup>39</sup> While a neutral may make significant efforts to disregard inadmissible evidence and information retrieved in private caucus with the parties, she may still be prone to making a decision that sub-consciously incorporates prejudicial information that would not otherwise be disclosed to an adjudicative body.

Failing to appreciate that neutrals share these psychological limitations creates a risk that the parties may assume that the neutral can simply block these impulses during the med-arb's arbitration phase. As Chris Guthrie notes in his paper "Inside the Judicial Mind":<sup>40</sup>

...Even if judges have no bias or prejudice against either litigant, fully understand the relevant law, and know all of the relevant facts, they might still make systematically erroneous decisions under some circumstances simply because of how they - like all human beings - think.

Consider the example by Ellen E. Deason in her paper "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review". The author posits that the concerns of a neutral retaining information from mediation to

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<sup>39</sup> Ellen E. Deason, "Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review" (2013) 5 Y.B. Arb. & Mediation at 220.

<sup>40</sup> Chris Guthrie et al., "Inside the Judicial Mind" (2001), Cornell Law Faculty Publications at 814, online <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1734&context=facpub>>.

arbitration are supported by scientific understandings of how humans make decisions.<sup>41</sup> Cognitive psychologists categorize how humans make decisions as “System 1” and “System 2”. According to Deason, System 1 processes are spontaneous and intuitive, while System 2 processes are deliberate and rule-governed.<sup>42</sup>

Deason notes that experimental work has shown that judges, and likely arbitrators, are prone to using the “mental shortcuts” associated with System 1 that can adversely impact a party once the mediation converts to the adversarial arbitration process.<sup>43</sup> This becomes problematic with med-arb, where the neutrals that work directly with parties become aware of inadmissible evidence, such as settlement demands, which may be internalized into the neutral’s decision making at arbitration.<sup>44</sup> Even if the neutral can ignore information, evidence suggests that initial information can influence the way later information is interpreted, meaning that such inadmissible evidence may become internalized despite the neutral’s best efforts to ignore it.<sup>45</sup>

A neutral’s belief that they are sufficiently impartial to prevent a miscarriage of justice may also have to do with that neutral’s “ego-centric biases”. Ego-centric biases occur for several reasons, including the need to search for evidence that supports the theory they want to believe.<sup>46</sup> Neutrals may therefore be inclined to interpret information in self-serving ways, which could lead to the neutral failing to identify improper influences that affect the neutral’s binding decision at arbitration.<sup>47</sup>

There are other theories as to why humans fail to disregard information. Some theories include the following:<sup>48</sup>

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<sup>41</sup> Supra note 39.

<sup>42</sup> *Ibid* at 228.

<sup>43</sup> *Ibid* at 229.

<sup>44</sup> *Ibid* at 229.

<sup>45</sup> *Ibid* at 229.

<sup>46</sup> Chris Guthrie et al., "Inside the Judicial Mind" (2001), Cornell Law Faculty Publications at 812, online <<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1734&context=facpub>>.

<sup>47</sup> *Ibid*.

<sup>48</sup> Andrew J. Wistrich et al., "Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding" (2005), Cornell Law Faculty Publications at 1251, online <[https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1019&context=lsrp\\_papers](https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1019&context=lsrp_papers)>.

- **Motivation.** People may attend to information despite instructions to otherwise ignore that information.
- **Ironic Process Theory.** It may be difficult to avoid thinking about information that they have been specifically instructed to ignore.
- **Mental Contamination.** Information may still affect someone's judgment on subsequent determinations, despite being told to ignore that previous information.

Whatever the reason, the prospect that a neutral cannot completely disregard inadmissible (and potentially prejudicial) evidence creates an unenviable situation for the neutral. On the one hand, the neutral is required by s. 19(1) of the *Arbitration Act* to treat the parties fairly and equally, and may be found to be biased, even if that bias is unconscious.<sup>49</sup> This finding of bias could warrant the removal of the neutral or the rescission of the arbitrator's award, pursuant to ss. 15 and 46 of the *Arbitration Act*. On the other hand, cognitive psychological studies indicate that a neutral may very well retain inadmissible information that could lead to a bias, despite the neutral's best efforts to "cleanse" that information.

The victim to the bias is in an even less enviable position, as she will need to put forward admissible evidence to satisfy the high bar in proving that a reasonable apprehension of bias exists. In *McClintock*, the judge's finding that the mediator/arbitrator invoked a reasonable apprehension of bias was largely based on written evidence, such as transcripts indicating that the neutral had prematurely come to a conclusion.<sup>50</sup> This is starkly different from where a party is faced with putting forward evidence that the neutral has internalized otherwise privileged information when making a specific finding. Despite the protections for requiring impartiality and protecting against

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<sup>49</sup> *Yukon* at para 20.

<sup>50</sup> *McClintock* at paras. 76-77.

unconscious biases, the actual task of presenting admissible evidence to show a reasonable apprehension of bias is daunting.

Serious consideration should therefore be given to whether voluntarily consenting to a med-arb structure warrants the risk of the neutral using otherwise confidential information to make a binding decision in arbitration. Parties that consent to this process should do so knowingly and willingly, and should consider that the neutral, as all humans, may be susceptible to internalizing inadmissible evidence disclosed during mediation when making a binding decision at arbitration.

### **Separating the Mediator and Arbitrator**

It is possible to reformulate the med-arb structure to minimize its inherent flaws related to bias. A simple way to remove these flaws entails separating the role of the mediator from the role of the arbitrator. For example, in “Can Judges Ignore Inadmissible Information”, to avoid a biased decision from a judge, the authors recommended separating the judge who supervises settlement discussions from the finder of fact in the same case.<sup>51</sup> Separating the mediator from the arbitrator in a med-arb would naturally produce similar benefits to reducing a perceived bias of an arbitration award.

A common argument against separating the mediator from the arbitrator in med-arb is that it defeats the cost-savings benefits of med-arb. Using the same neutral as mediator and arbitrator eliminates the need for the parties to identify and appoint another neutral, allowing the parties to continue to arbitration without having to educate another neutral on the facts and legal arguments of the litigation.<sup>52</sup>

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<sup>51</sup> Supra note 48 at 1259.

<sup>52</sup> Supra note 39 at 219.

Richard Fullerton's paper titled "Ethics of Mediation-Arbitration"<sup>53</sup> provides some additional creative alternatives from a standard med-arb that could alleviate concerns of a biased arbitration award. These include the following:

- ***Overlapping Neutrals***: Two separate neutrals act as mediator and arbitrator. The arbitrator attends the mediation as an observer during the plenary exchanges, hears joint exchanges, and reviews shared documents. The mediator, however, is the only neutral that engages in private communications with each party.
- ***Plenary Med-Arb***: There is only one neutral, who is forbidden to privately communicate with any party, and must rely exclusively on plenary communication and document exchange.
- ***Arbitration-Mediation***: A neutral and impartial third party receive evidence and testimony provided by the parties and write a decision that is not disclosed to the parties. Then, the neutral mediates the dispute between the parties to attempt to secure an agreement, failing which the neutral releases the arbitration decision.

This is not to state that the above-noted alternatives are not without their own issues. Indeed, aside from plenary med-arb, these alternatives do not alleviate concerns of costs, however significant they may be. They may also present additional concerns and challenges irrespective of costs. However, faced with the real risk that an arbitration award may be tainted with bias, parties should seriously consider whether med-arb is worth the costs and, if it is, how it may be structured to minimize concerns of natural justice.

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<sup>53</sup> Richard Fullerton, "The Ethics of Mediation-Arbitration" (2009) Colo. Law., online: <[http://cedires.be/index\\_files/FULLERTON\\_Richard\\_The%20ethics%20of%20mediation-arbitration.pdf](http://cedires.be/index_files/FULLERTON_Richard_The%20ethics%20of%20mediation-arbitration.pdf)>.

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