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The ADR Institute of Ontario is a regional affiliate of the ADR Institute of Canada. It is a non-profit, private organization established to provide leadership in the promotion of alternative dispute resolution for ADR professionals and users of ADR services. The Institute represents over 600 professionals in Ontario.

**ADR INSTITUTE OF ONTARIO**

234 Eglinton Avenue East,  
Suite 500  
Toronto, Ontario M4P 1K5  
Phone: 416-487-4447  
Fax: 416-487-4429  
Email: admin@adrntario.ca  
www.adrntario.ca

For membership or newsletter inquiries, please call Mena Peckan at 416-487-4447 or email admin@adrntario.ca

# ADR Update Autumn 2008

## Newsletter of the ADR Institute of Ontario, Inc.

ADR Institute of Ontario, Inc.  
#500, 234 Eglinton Avenue East  
Toronto, Ontario M4P 1K5  
www.adrntario.ca

Tel. 416-487-4447  
Fax: 416-487-4429  
admin@adrntario.ca

### Message from the President

**Heather Swartz,  
Agree Dispute Resolution, Inc.**

I trust everyone took some time over the summer months to relax and revitalize. As fall approaches Institute members have a great deal to look forward to.

The Annual National Conference takes place in Montreal on Friday October 17. It is an excellent program with the Attorney General of British Columbia speaking on the impact of British Columbia's new Apology Legislation, justices of the Quebec Court of Appeal explaining leading ADR developments in Quebec and a wide selection of afternoon sessions on everything from 'Getting to Yes in Public Disputes' to 'International and Domestic Commercial Arbitrations' and "Diagnosing and Curing the Toxic Workplace."



Closer to home, on October 31 and November 1, Mel Matthias and Bunny Macfarlane will be hosting the 2nd Annual Retreat at Elmhurst Resort. Whether you have years of experience as an ADR practitioner, or are just starting out, this is a unique opportunity to further your personal and professional development and interact closely with colleagues and leaders in the field. Last year's participants bonded to become the "Special Interest Section Team" that has devoted more than a few Saturday mornings to meeting at the Institute, developing ideas for sections and inspiring new Institute developments with its enthusiasm. This is a unique and not-to-be-missed event so if you haven't

already registered call Mena at 416-487-4447 immediately to reserve your place.

We will also enjoy Section Meetings that are scheduled throughout the fall. Take a few moments to review the sessions set out in the Fall Calendar of events in this issue and mark the dates on your own calendar. These small interactive events on issues of key importance to our members are a great way to develop your contacts, share your opinions and ask your questions.

Our fall line-up concludes with the Annual Meet n' Greet on Tuesday, November 25. I have it on good authority that the program being developed by Michael Erdle and Co. will be a great season finisher.

This is the time to get involved and make the most of your membership. The Board of Directors and Institute staff looks forward to welcoming you to all of these events. We also encourage you to participate behind-the-scenes on the many Committees that make these events possible.

We send Nicole Troster our sincere thanks for her tireless efforts working for the Institute over the past two years and wish her success in completing her Masters and congratulations on her forthcoming wedding. Join us in welcoming Teresa Cappelletto to the position of Program Manager by saying Bonjour the next time you call in to the office. Many thanks to Mena Peckan and our Executive Director, Mary Anne Harnick for their extra efforts during this transition.

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**Heather Swartz** is the President of ADR Institute of Ontario. She is also an experienced team member with Agree Dispute Resolution. She specializes in providing civil, workplace and family mediation as well as customized conflict management and interest-based negotiation training.

**ADR Institute of Ontario  
Board of Directors**Heather Swartz  
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*Secretary*Enzo Carlucci  
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Dawna Borg

Colm Brannigan

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Sander Gibson

Anne Gottlieb

Barbara Landau

Michael Lloyd Lindsay

Bunny Macfarlane

Bernd Weller

Cindy Winer

Joyce Young

**STAFF**Mary Anne Harnick  
*Executive Director*Mena Peckan  
*Office Manager*Teresa Cappelletto  
*Program Manager*

# ADRIO Congratulates the Following Members on Achieving the C.Med., C.Arb., Cert.F.Med. and Cert.F.Arb. Designations



The Chartered Mediator and Chartered Arbitrator designation is Canada's only designation for practicing general mediators and arbitrators. It demonstrates a commitment to excellence in practice and signals considerable training and expertise. It communicates value to members of the public seeking well-qualified neutrals to assist with disputes.

This important designation is bestowed by The Board of Directors of the ADR Institute of Canada (ADR Canada), on the recommendation of the regional and national Chartered Mediator/Arbitrator Committees. The ADR Institute of Canada and the ADR Institute of Ontario congratulate the following members who have qualified for this designation:

**New Chartered Mediators  
(C.Med.)**

Hélène M. Arts, C.Med.  
Dean Benard, C.Med.  
Adam Fox, C.Med.  
Barbara Franklin, C.Med.  
Steven C. Gaon, C.Med.  
Paul Godin, C.Med.

Pramila Javaheri (Pitamber), C.Med.  
Sylvie Lamoureux, C.Med.  
Charles (Chuck) D. Matheson, C.Med.  
Gerry Nera, C.Med.  
Regina O. Thompson, C.Med.  
Esther van Gennip, C.Med.

**New Chartered Arbitrators  
(C.Arb.)**

Richard A. Russell, C.Arb.  
Claude Freeman, C.Arb.

**Provincial Designations:****New Certified Family Mediators  
(Cert.F.Med.)**

David Klegerman, Cert.F.Med.  
Barbara Landau, Cert.F.Med.  
Haideh Mottahedin, Cert.F.Med.  
Heather Swartz, Cert.F.Med.  
Donna Wilson, Cert.F.Med.  
Richard W. Shields, Cert.F.Med.

**New Certified Family Arbitrators  
(Cert.F.Arb.)**

Thomas Bastedo, Cert.F.Arb.  
Terrence W. Caskie, Cert.F.Arb.  
Gregory W. Cooper, Cert.F.Arb.  
Philip M. Epstein, Cert.F.Arb.  
Malcolm C. Kronby, Cert.F.Arb.  
Stephen M. Grant, Cert.F.Arb.  
Barbara Landau, Cert.F.Arb.  
Gerald P. Sadvari, Cert.F.Arb.

# ARTICLES

## ADR Retreat 2007—Not a Silo in Sight

**Bunny Macfarlane and Mel Matthias**

Let's imagine for a minute what an aerial view of our profession would look like. Add to that image different coloured pins marking the location of each and every Mediator and Arbitrator. There would be white markers indicating a scattering of one-person offices, green markers for the team approach offices that would include 2 or more mediators and/or arbitrators, and then there would be a red pin indicating the offices of the ADR Institute located right in the middle of all other markers. Now that you have this image in your mind consider the spacing between all the pins. Undeniably, there would be a considerably higher percentage of white pins on this imaginary board, scattered green markers, and the ADR Institute as the one red marker at the centre of all the others.

The revelation that all of us who are visual thinkers would have, and the reality of our profession, is that even though we are connected in philosophy, beliefs, and goals, we operate in "silos", a term that has been thrown around for many years. Each of us is unto their own for many reasons. Each mediation, each arbitration requires the facilitator / decision-maker to operate independently as a direct result of the nature of ADR. One of the hallmarks of mediation is its confidentiality. One of the hallmarks of arbitration is the notion of a sole decision-maker. Many other factors drive the silo effect. Suffice it to say, that as independents we do our work apart from the whole of our profession.

Now shift your focus to the ADRIO's annual retreat. This article focuses on the 2007 retreat, and is, hopefully, the first of many retreats to come for this writer. The factors needing discussion are the location or backdrop of the event, the logistics of bringing us all together, the pleasure of hearing our guest speaker, the format of our discussions, and a discussion focusing on ADR

practitioners coming together for one glorious weekend.

Have you ever been on one of those drives that takes your breath away? That's exactly what happened to this writer on the drive to the Elmhirst Resort in Peterborough. The beauty of the season and the landscape left a clear, hopefully never diluted, memory. The drive into the resort was an eerie representation of the silo effect referred to earlier, with the main lodge centred amongst the individual cabins. The resort itself, beautiful, sitting on the waters of Rice Lake. Each cabin (remember summer camp!) was a stone's throw from the main lodge, with all the amenities anyone could ask for, even a fireplace for that after-dinner get together on Friday night. Just like a school kid on the first day of class, you scout out the rooms and, hopefully, if you get there early enough, make a very quick choice (in case someone else is right behind you), placing your luggage in the room that would be yours for the next very short 24 hours. Each cabin, situated right on the water, offered an opportunity for us all to take in the spectacular sunset seemingly on a slow, colourful glide into the water.

It doesn't need to be said, but it will certainly be mentioned, that the delightful meals made the weekend a real treat. No dishes for anyone. Oh, did I mention no remotes in any of the cabins. What a relief!

We were all so grateful that Anne Grant was able to join us for an after-dinner speech on the Friday evening, even though a personal crisis took her away from us shortly after her talk. Anne was, as always, engaging and entertaining, giving us some insight into the life of a well-respected, very busy, globally recognized ADR practitioner.

The focus of Saturday's get-together was to bring all ADR attendees together. The use of Open Space Technology (more on that in

the 2008 Retreat introduction) generated excitement. By the end of the day and the end of discussions, armed with flip charts, summaries and the benefit of a closing circle, we were all astounded (I hope that captures the feeling for most) at the outcome of our small groups. Ideas overlapped, they stood out, they surprised, and they gave us all a sense of wonder at how well the process worked. But the great accomplishment of the day was how it brought us all together. You have all heard the phrase, "Great minds think alike"? That is exactly what happened at the 2007 ADRIO retreat. The silos disappeared for that particular 24 hours and all the great minds came together. The result that appeared on paper would create a foundation for moving the ADR Institute forward. The sense of wonder still resides in this writer; such important and necessary work done in a sense of community (not a silo in sight).

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**Bunny Macfarlane** is a Chartered Mediator and presently serves as the Co-Chair of the Restorative Justice Section of the ADR Institute. She is a Roster Member of the Ontario Mandatory Mediation Program, the Sports Dispute Resolution Centre of Canada, Youth Justice Circles Program through Peacebuilders, serves as an Independent Complaints Facilitator with the Community Care Access Centres and presently serves on the Board of the ADR Institute. In her private practice Bunny offers coaching, workplace assessments and mediations, training, investigations and conflict systems design. She has also been an ADR Instructor at Brock University since 2005.

**Mel Matthias** is a Professional Engineer with more than twenty-five years of graduate experience, mostly in the utility industry. He is a Mediator and a Chartered Arbitrator, and he serves on the ADRIO Board of Directors as Secretary. For more information, see <http://mmathias@accglobal.net>.

**HOLD THE DATE!** November 25, 2008 Meet n' Greet, OBA Conference Centre, 20 Toronto St., Toronto, 5:30 pm to 8:00 pm  
**Joint Panel—Construction and Technology/IP Sections**

Partnering and other dispute resolution tools have proven very effective in the construction industry. The information technology industry faces many of the same kinds of disputes, but has been slower to adopt ADR. Leading members of both the Construction and Technology Sections will discuss the dispute resolution challenges of their industries and share best practices for avoiding and resolving disputes. There will also be an opportunity for all members to share similar experiences and new perspectives. **Speakers to be announced.**

# ADR Retreat 2008—Creating Synergies That Matter

## Bunny Macfarlane SYZYGY Resolutions

When you are considering the ADR Institute retreat this year, are you asking yourself what benefits there might be for you, personally? Let's see if we can identify the benefits to you professionally and personally.

By way of introduction, Mel Matthias has been the strongest advocate of the annual retreat and continues to inspire those around him to attend. Mel is hoping, if I may Mel, to create a legacy of good times, productive times, professionally-enriching times and on top of all that, to create an ongoing dialogue for attendees to have a voice in the future of ADR, meanwhile building a strong foundation for the ADR Institute. That's quite a legacy Mel! Judging from the effort and the outcome of last year's retreat, it seems you are well on your way.

The ADR Institute is offering us the opportunity to join forces with like minds, with optimism and hope in our hearts, to create a synergy that will have a lasting effect on each of us personally and professionally. Oft times the body of an organization does not have an opportunity to interact with that organization's Board of Directors. Not so at our retreat. There will be several Board Members at the retreat as was the case in 2007, who are sincerely opening their minds to all the possibilities. What greater opportunity do we have to voice our opinions, our concerns, our successes, our fears, and of course, our interests.

If we build on the theme created for this year's retreat by Mel, "Opportunity, Optimism, and Synergy", it wouldn't be too great a leap of faith to envision the possible outcomes. The beauty of open space technology, however, brings us to the greatest benefit of this year's retreat and that is "having a voice". (Isn't that one of the benefits we espouse to our clients?)

In the first retreat article, we talked about silos. Attending the retreat allows each and every one of us to step out of our individual ADR practices and have a say in what we believe is important, what is or is not working for us, and what we believe may or may not improve the inner workings of our parent association, the ADR Institute. All the while we can hear the voices of other practitioners, possibly more experienced than we are, or less as the case may be, with great "kernels of wisdom" as Mel calls them. Definitely an opportunity for each and every one of us professionally.

The second professional benefit of attending the Retreat is the opportunity to hear Rick Russell, our esteemed after-dinner speaker. Not too many times are we privy to the expertise, wisdom, and charm of a mediator / arbitrator who has given so much to our profession. Rick has kindly offered to share his insights into the synergy we might aspire to as professionals. With his vast wealth of knowledge, Rick will speak about how we can improve as professionals and as a profession. The beauty of the retreat is its informal setting, with Rick open to answering your questions Friday evening or sometime on Saturday. Where else would we have access to such a wealth of knowledge and experience?

When considering the notion of benefits, this writer must refer to a personal experience to allow you to have some insight into the format of our discussions at the Saturday sessions. I was exposed to Open Space Technology (OST) many, many years ago (no numbers offered here) at an ad hoc workshop in Toronto. What drew me into attending, on my own, and not even being from the big City is still a mystery to me, but the day certainly changed my life. You know, one of those defining moments, those 'this-is-amazing' days! So, when I was asked to facilitate this retreat with Mel, I jumped at the opportunity, to some degree, based on my previous experience with OST. I am a fledgling OST groupie compared to many others, but I would like to share some of the highlights of this technology.

If you marvel at the power of words, as I do, let's consider the word 'technology'. What would come to mind instantly would be computer technology, if I'm on the same thought pattern as the reader. However, OST, from my perspective is about the technology of mankind; how we interact and why we engage the way we do or why we don't connect at all. Open Space, as far as wording goes, is much more straightforward. As we did last year in the beautiful surroundings of the Elmhirst Resort, we will all operate in the space of the resort, in the room that will be waiting for us.

I would ask you, however, to pay particular attention to the word Open. Open stands for so many aspects of the technology. The participants of OST are free to open their minds to new ideas, open themselves to new groups and relationships, open themselves up to making choices about what space they could or could not be in, open themselves up to a new way of interacting, of engaging. So, the principles of OST are quite simple. OST says that whoever should be here in this space is here,

whatever is talked about is what should be talked about and whenever our time together starts and stops is when it should stop and start. There is, then, an openness to trust that what is going to happen at the retreat is what is supposed to happen. It may seem somewhat ethereal, but ask anyone who attended the retreat last year, look at the outcomes of one day of interaction, and you will hear and see the result. The day was, for the author, as it was so many years ago, empowering to say the least. I had the right and the responsibility to engage if I so chose, I had the right and responsibility to join a group or leave a group as I so desired and I was capable of anything. What a powerful concept. I was open to anything within that space with these people, that I had never met before or since.

Personally, I would suggest that the 'getaway' component of the retreat experience is as enriching as the professional experience. The beauty of the space, the openness of those at the retreat and spirit of camaraderie worked on so many levels. What was beautiful, however, was sharing a cabin with associates (we used to call them campers, didn't we?), staying up late and 'retreating' to our slumber party days (sorry gents), having another glass of wine and hearing the voice of someone you have not heard before, asking the burning questions you have wanted to ask other ADR practitioners for so long, simply engaging. It was amazing last year to have that experience and enriching personally, enough so, that the majority of those attending the retreat last year are returning for a second year.

Did I mention, no remotes? I could go on, but I might simply say, come to the retreat, create some synergies, and marvel at the magic that happens.

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**Bunny Macfarlane** is a Chartered Mediator and presently serves as the Co-Chair of the Restorative Justice Section of the ADR Institute. She is a Roster Member of the Ontario Mandatory Mediation Program, the Sports Dispute Resolution Centre of Canada, Youth Justice Circles Program through Peacebuilders, serves as an Independent Complaints Facilitator with the Community Care Access Centres and presently serves on the Board of the ADR Institute. In her private practice Bunny offers coaching, workplace assessments and mediations, training, investigations and conflict systems design. She has also been an ADR Instructor at Brock University since 2005.

# A Year in the Life of Family Dispute Resolution

## Dr. Barbara Landau Co-operative Solutions

This has been an exciting year for Family Mediation and the ADR Institute. First, one year ago we decided that the family field needed its own specialty designation and training requirements. As a result of considerable work by Heather Swartz (President), Joyce Young (former co-chair of the Family Section) and me, the Ontario Board adopted the Certified Family Mediator (Cert. F. Med.) and the Certified Family Arbitrator (Cert. F. Arb.) designations. The criteria ensured that these designations met all government requirements for Family Mediators and for Family Arbitrators as set out in the *Family Statute Law Amendment Act*. These specialty designations carry the same level of professional training and skills as the Chartered Mediator and Chartered Arbitrator, but emphasize training and competence in family cases.

Of importance to our members is the recognition by the Ontario Government and the Ontario Association for Family Mediation (OAFM) that the ADR Institute's specialty designations are the equivalent (if not slightly higher) than the OAFM's Accredited Family Mediator. This will allow our members to enter the Child Protection mediation training programs and to apply for jobs at court based family services. As an overview these requirements consist of the following.

### Cert F. Med.

- 40 hr Family Mediation course
- 14 hrs of Screening for Domestic Violence
- 26 additional hours of ADR training
- 10 cases completed (5 under supervision)

### Cert. F. Arb.

- 40 hr Family Arbitration course
- 5 arbitration awards

There is also a requirement of 2 days of Screening for DV and non-lawyers must take 30 hours of Family Law.

Second, this year the Attorney General, Chris Bentley announced an initiative to improve the process for couples going through the difficult hurdles involved in separation and divorce. Representatives of the ADR Institute met with the AG and invited several representatives from the Ontario Bar Association, OAFM, the Community Mediation Services and Toronto Collaborative Family Practice to join the meeting. We were very well received and our submission has been a catalyst for a collaborative initiative to reform Family law. The following is a summary of the key points in our submission to the AG.

### 1. Reduce the burden on the Courts:

Shift the system from case management for court, to case management for ADR.

- set up a high-level advisory panel on Family Law Reform, focusing on systemic changes to increase the use of non-adversarial options

### 2. Improve access to justice for low and middle-income families:

Require and provide early education, intake and referral. Test it as a Pilot Project.

- Strongly encourage lawyers to refer clients to Family Information Sessions at the earliest reasonable time, before an action is commenced (especially where children are involved)
- Create a fund for non adversarial programs and resources to assist separating families, and in particular their children, through a small increase in marriage and divorce filing fees

### 3. Reduce the burden on the Courts from unrepresented litigants:

Shift Ontario Legal Aid Plan funding from litigation to ADR.

- Increase legal aid coverage to 15 hours of mediation
- Issue certificates directly to mediators

### 4. Reduce delays in achieving a final disposition:

- Simplify and streamline forms
- Reduce the number of appearances.

### 5. Provide safety for cases involving domestic violence:

Create a special stream for these cases and ensure that screeners and judges are appropriately trained in domestic violence.

- Provide continuity of judges especially in high conflict cases

### 6. Introduce Apology Legislation:

Adopt the Uniform Apology Act

As a follow up, the Family Section of the ADR Institute of Ontario was invited to join an OBA working committee on their submission to the AG. Our paper was incorporated in the recommendations.

Third, Family Arbitration is up and running! We have the honour of having the most experienced Family Arbitrators join our organization as the cornerstone of a new section. This section is a "who's who" of Family Arbitrators and will raise our profile, create helpful precedents, and model effective and competent practice.

The Family Section holds meetings about every 6-8 weeks and we welcome your participation!!

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**Dr. Barbara Landau**, President, Cooperative Solutions, is a psychologist, lawyer and Cert. F. Med., Cert. F. Arb & C. Med. Barbara offers courses in Family Mediation, Family Arbitration and Collaborative Practice and is the co-author of the *Family Mediation and Collaborative Practice Handbook*, 2005, Lexis/Nexis. For more information, see [www.coop-solutions.ca](http://www.coop-solutions.ca).

# ADRIO Special Interests Sections: Shaping the Future of the Institute

## Bernd Weller BWX Facilitation

Something is happening at the ADRIO Special Interest Sections, and it is not just business as usual. When the ADRIO held its first and very successful ADRIO Rice Lake retreat in early November of 2007, participants spent much of their time discussing what they liked about the ADRIO and then generated ideas for making the membership experience even better. There was a clear consensus that our Special Interest Sections are an excellent forum for members to interact with one another and grow their ADR expertise. They value the opportunities for networking, training and staying on top of trends and developments affecting their own specific areas of interest and practice, and many ideas focused on making the sections even more relevant to a wider demographic of members across the province.

As we all know, ideas are fine, but converting them into actions and results is not always easy. Many organizations never get beyond the idea generation phase and good intentions often sink into a morass of inaction. But this is not the way of the ADRIO. Our members proved that their passions and energies are not just reserved for interesting discussions but ready to be released into tangible activities that will result in lasting benefits.

So it was that on a Saturday morning in December 2007, one month after the retreat, the ADRIO convened a meeting of section chairs to review all the inputs from the retreat and start sorting them into similar themes and categories. This was followed by a strategic planning meeting on another Saturday in January 2008, and attended by a newly formed "Working Group" of Section Chairs, Co-Chairs, some Directors, Executive Director and ADRIO staff. By the end of the second meeting, the retreat results had been sorted into ten distinct categories.

On February 23, 2008, the working group met again to develop specific objectives for each of these categories, which then allowed for a further condensing from ten categories into three:

**1. Section Programs and Feedback**, with an objective of improving the section experience for members in all geographic areas throughout the Province of Ontario.

**2. Ethics, Insurance and Mentorship**, with an objective of developing and maintaining professional standards that would support the ADRIO goal of becoming the recognized Gold Standard for ADR services in Ontario and inspire confidence in our professionalism among potential clients, government regulators and judicial bodies.

**3. ADRIO Outreach**, with an objective of creating a much higher degree of public awareness of the ADRIO and the many services and benefits we offer to potential clients, as well as attract new members to our organization.

A team was formed around each of these three categories to develop plans and recommendations for converting objectives into results. On April 12, 2008, the three teams presented their recommendations to the Working Group, which then agreed to present the following six recommendations to the ADRIO Board of Directors:

**1. The development of a Handbook outlining best practices for managing special interest sections and conducting effective section meetings;**

**2. The development of on-line membership surveys to establish a benchmark for member satisfaction with the section programs and provide a basis for continuous improvement;**

**3. The development of enhanced networking, marketing and business development tools for ADRIO members;**

**4. The development of a framework allowing all sections to pay consistent attention to important issues such as marketing, business development, skills development and ethics, as well as raising awareness of recent ADR trends and developments;**

**5. The utilization of on-line technologies to increase accessibility to section programs for members throughout the province, and**

**6. The development of high quality presentation tools for use by members during outreach activities.**

Additional recommendations beyond the authority and ability of the Working Group were also put forward, including mandatory insurance requirements for practicing members, ethics training, media protocols and mentorship programs.

A presentation to the ADRIO Board on May 27 resulted in an endorsement of the recommendations and giving the Working Group the authority to proceed with the development and implementation of the first six items. In exchange, the Board requested that the Group operate within defined budgetary guidelines and provide regular progress reports to the Board. The Board also agreed to include the additional recommendations outside of the Working Group's jurisdiction and abilities in their 2008/2009 meeting agendas. Following that decision, the Working Group met again on June 14, 2008 and formed a new team around each of the six accepted recommendations. After a well deserved summer hiatus, members of each team will meet again to prepare their initial action plans for a full Working Group review on September 13, 2008. While not every opportunity for improvement will result in immediate changes, members can look forward to the implementation of at least some new practices as soon as early 2009.

The Rice Lake retreat and the subsequent burst of activities proved beyond any reasonable doubt that ADRIO members are a passionate lot who are deeply committed to their profession and willing to put both time and energy into ensuring that the ADR Institute of Ontario continues to grow in relevancy for all of its members from across the province. By accepting their recommendations, the ADRIO Board has sent a strong signal that it not only values the opinions and thoughts of the members, but is willing to work with its executive, staff and members from across the province to ensure a vital, strong and relevant Association that will serve the best interests of members and ADR clients for a long time to come.

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**Bernd Weller** is a facilitator, mediator, coach and consultant with BWX Facilitation and the Workplace Fairness Institute. He works with organizations in Canada and around the globe to develop and implement more effective, productive and harmonious workplace interactions between people and processes. Bernd is co-chair of the ADRIO Employment section and a current member of the ADRIO Board of Directors. He can be reached at [bweller@bwx.ca](mailto:bweller@bwx.ca) or 416-223-6685.

# Peter Bruer: Perspectives on Restorative Justice

## Bunny Macfarlane SYZGY Resolutions

We were fortunate to have Peter Bruer as a Guest Speaker at a Restorative Justice Section meeting. When one reflects on or is curious about the topic of community, Peter's name always comes to mind. Not only has he been a Manager of the Conflict Resolution Service at St. Stephen's Community House for more than 10 years, he has the distinction of having served and been closely connected with the community of Toronto for that same number of years. Within that time period Peter has seen the birth and evolution of restorative practices and has originated and shaped the way our community looks at managing and resolving conflict and its resulting disputes. What better voice of the community than Peter Bruer!

It may serve our best interests for this particular article to look at what questions were asked of Peter and the discussion that ensued from those queries. With 14 attendees, including members and non-members participating in the session, several questions arose around diversion; what does it look like, how does it relate to Restorative Justice and how is St. Stephen's Conflict Resolution Service involved in these programs? Participants wanted to consider how existing charges impacted any diversion program and how do existing programs differ for youth and adults? Those interested in the topic of youth and crime also questioned whether or not there were any training programs in place for youth?

Peter, throughout the ensuing discussion, explained the distinction between classic Restorative Justice (RJ) processes and those that do not fit that 'original' model, even though they may be named and funded under that umbrella. A classic RJ process is one that is connected with the criminal justice system and is an official part of that system, such as a youth justice diversion program. Following the success of these programs, seven pilot projects exist in Ontario dealing with adult court. Programs and processes that are not related to the criminal system should not fall under that umbrella.

Disputes that arise in the community that have no criminal element, such as neighbourhood disputes, utilize processes that are restorative in nature, such as mediation, circles, etc. in that they transform the community by addressing the needs of the members of that community, but clearly do not have a connection to the justice system and, therefore, should not be dubbed Restorative Justice.

Another clear distinction between RJ and Community Mediation, Peter advised, is the notion of accountability. In true restorative practices, when a crime has been committed and harm has been done, the offender must accept responsibility for his or her actions prior to RJ processes being put in place. When a conflict resolution process is offered to disputing parties in a community with no criminal component, both parties must take responsibility for the resolution of the dispute, with the intention of transforming the relationship and the larger community into a healthier environment.

If one looks at diversion programs a similar dichotomy exists. Peter alluded to the fact that diversion programs, i.e. diverting offenders from court to optional, alternative programs, are for the sole benefit of the offender; they do not involve the victim. They can be pre-trial, post-trial, etc. However, true RJ processes should involve the victim directly. So, RJ is "mending the harm caused, the social thing that has been breached, and the relationships of everyone."

Hence, the question, why have alternatives processes sometimes fallen under the umbrella of Restorative Justice? How can we clearly separate restorative processes and community-based interpersonal dispute resolution processes? Do we need to separate the two? What language should we use?

The challenges we face as a community involve much more than language, Peter pointed out. Funding is an ongoing challenge for diversion programs in youth and adult court, for non-justice-related dispute resolution programs, coined Community Mediation. Restorative Justice and Community Mediation

are funded together and even though Peter mentions the fact that there is a danger in doing so, this is the reality of how these programs are funded. He suggests we look to the south as they have been successful in practicing Restorative Justice and Community Mediation for 10 – 15 years. Although, Peter notes the more successful RJ programs are, the more funding that becomes available. "We are still in the early years".

On a final, hopeful note, for those of you wishing to pursue volunteer opportunities, Peter painted a picture of imbalance as there are relatively few opportunities for practical experience. However, the adult diversion program at St. Stephen's Community House requires 10 new people, so 10 new people were brought on board. The key element in being brought on as a volunteer, in Peter's opinion, is being comfortable in your own values.

There's still so much to think about and discuss. Values! Hmmm! Does that sound like another section meeting topic? It certainly does to me!

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**Bunny Macfarlane** is a Chartered Mediator and presently serves as the Co-Chair of the Restorative Justice Section of the ADR Institute. She is a Roster Member of the Ontario Mandatory Mediation Program, the Sports Dispute Resolution Centre of Canada, Youth Justice Circles Program through Peacebuilders, serves as an Independent Complaints Facilitator with the Community Care Access Centres and presently serves on the Board of the ADR Institute. In her private practice Bunny offers coaching, workplace assessments and mediations, training, investigations and conflict systems design. She has also been an ADR Instructor at Brock University since 2005.

### WANTED: YOUR ARTICLES, IDEAS AND FEEDBACK

If you have a great article, including one for the ethics column, have reviewed a book, or want to give some feedback for ideas about the newsletter, please submit them to the editors, Bunny Macfarlane, (bunny@vaxine.com), Colm Brannigan, (colm@mediate.ca) or Lorraine Joynt, (lorrainejoynt@aplaceformediation.ca).

# New ADRIO Section: Technology & IP

## Colm Brannigan and Michael Erdle

On October 29, 2007, the first meeting of the Technology and Intellectual Property Section of ADRIO took place. The new section is driven by the recognition that much of the value of many businesses today consists of intellectual property and the spread of technology has been exponential. Technology and IP companies become involved in many kinds of disputes. However, they are not likely to consider ADR as their first choice in dispute resolution.

When they do, it is usually because of an arbitration provision in a contract. Anecdotal evidence suggests that, apart from those disputes which are actually in litigation and subject to the Ontario Mandatory Mediation Program, corporate counsel and other decision makers in these industries are reluctant to embrace ADR. Generally, mediation is not even on their radar screen even though statistics show that litigation can consume up to 40 percent of corporate legal budgets. Expensive and ineffectual litigation means companies have less to spend on strategic initiatives such as research and development or mergers and acquisitions.

ADR and especially mediation, is ideally suited to be the primary dispute resolution method in Technology and IP disputes. These disputes often involve multiple parties and complex technical and legal questions. Litigation, and even arbitration, often cannot provide the effective, practical and creative business solutions that parties typically seek. There is significant untapped need for appropriate dispute resolution processes in these sectors. We can and should be providing these services.

Our new section aims to bring about a change in the culture of these important sectors and of its professional advisors by clearly showing them the value we can bring to the table – we sell solutions and we are good at it.

We can take heart from recent decisions of the Supreme Court of Canada and courts in Ontario that are supportive of arbitration in areas which were traditionally reserved to the courts. A recent statement by Lord Justice Jacob of the English Court of Appeal provides a ringing endorsement for ADR and basically says it all:

This appeal is about who should own a patent.... Parties to these disputes should realise, that if fully fought, they can be protracted, very, very expensive

and emotionally draining. On top of that, very often development or exploitation of the invention under dispute will be stultified by the dead hand of unresolved litigation. That may be the case here: there has not yet been any exploitation by either side, some 8 years after the original PCT application. It will often be better to settle early for a smaller share than you think you are entitled to – a small share of large exploitation is better than a large share of none or little.

This sort of dispute is particularly apt for early mediation. Such mediation could well go beyond conventional mediation (where the mediator facilitates a consensual agreement). I have in mind the process called "medarb" where a "mediator" trusted by both sides is given the authority to decide the terms of a binding settlement agreement....

Lord Justice Jacob of the Court of Appeal (Civil division) in *IDA Limited and Others vs. University of Southampton and Others* [2006] EWCA Civ 145

In a sector where entrepreneurship, speedy decision-making and action are highly valued, ADR should be an affirmative business strategy. We can help clients reach a realistic, fair, and cost-effective resolution to their disputes and eliminate the uncertainty and expense of litigation with the ever changing laws that govern Technology and IP today. We plan to get this message across by reaching out to industry and professional groups. Come and join us. We welcome new members.

Please contact either of the Section's co-chairs, **Colm Brannigan** or **Michael Erdle** for more information.

**Colm Brannigan** can be contacted by e-mail at [colm@mediate.ca](mailto:colm@mediate.ca) or 905.840.9882.

**Michael Erdle** can be contacted by email at [merdle@dww.com](mailto:merdle@dww.com).

**Colm Brannigan** is a Chartered Mediator and principal of Mediate.ca Dispute Resolution Services in Brampton, Ontario. He can be contacted by e-mail at [colm@mediate.ca](mailto:colm@mediate.ca) or through his website [www.mediate.ca](http://www.mediate.ca).

**Michael Erdle** is a lawyer, mediator and arbitrator in Toronto. He is managing partner of Deeth Williams Wall LLP. He has practiced exclusively in the area of technology and intellectual property law for 20 years, with a focus on information technology and electronic commerce. Michael is a director of the ADR Institute of Canada and co-chair of the technology and intellectual property section. He is past president of the Intellectual Property Institute of Canada and a past chair of the Toronto Computer Lawyers Group. Michael can be reached by email at [merdle@dww.com](mailto:merdle@dww.com).

### Have You Listed Yourself on ADR Connect?

If you are a full member of the Institute please take the time to take advantage of your new complimentary listing on ADR Connect. All full members of ADRIO are now newly entitled to this complimentary listing - and what better way is there to advertise your services to the interested users of ADR services who regularly visit our website as a source of referrals.

Passwords and user names were sent to all members of the Institute via e-mail in July and again in August. If you cannot find the relevant e-mail call Mena or Teresa. Most technological glitches have been worked out, but if you have any difficulty please call Mena or Teresa for assistance with your listing. **Don't miss this important opportunity to gain exposure locally, nationally and internationally.**

Our thanks to the Web Committee (Chair: Allan Revich, Heather Swartz, Dawna Borg, Les O'Connor) for their outstanding work in developing the new ADRIO web site and ADR Connect.

**Future Developments:** The ADR Institute of Canada web site is being redeveloped. ADR Connect will also be available through the National Web Site in the near future.

# Ethics: What Would You Do If . . .

## Dr. Bruce Ally

*In each newsletter, an ethical dilemma will be given. Readers are invited to submit their answers on how they would deal with the cases and the solutions will be presented in the next quarterly newsletter. This is your chance to help others with your ethical thinking.*

In today's explosion in the field of mediation it is relatively easy to find a mediator. Everyone has a life beyond their profession. What happens when personal and professional obligations become entangled? And where can one turn to find these answers?

The following is a real, true life scenario, although the names have been changed to maintain confidentiality. The situation described is your opportunity to analyze and comment on the relevant ethical issues.

Pat and Sam are two mediators who work with a few others in a collaborative mediation practice. They are of the same religious background but attend different places of worship. Sam is very active in his religious community and is quite well known. Pat is more lax.

In March 2006 Pat is approached by a plaintiff in a court action and asked to mediate the following matter.

Some of the members of the executive of a congregation have brought a motion in court to vacate the results of an annual general election. The basis for their concern is six members of the congregation colluded and conspired to fix the results of the voting so as to ensure they retained power for the next term. It is alleged they were able to affect this result by each gathering hundreds of proxies and using them to support their bids at re-election. The congregation, which is also a registered company in the Province of Ontario, is supposed to operate in accordance with the rules of the Province.

One of the operational by-laws allows any member to request a copy of the voters' list at any time. The plaintiff in this action requested a copy of the list prior to and after the election but still has not obtained an official copy from the current re-elected executive. He has however received an unofficial voter's list from one of the six members who has now resigned his position and is supporting the plaintiff's claim that the election was a sham and the re-

sults need to be vacated. The unofficial list includes mostly members who are related to the current group. Some of the members live as far away as Florida. It is based on this information that the Plaintiff has brought the matter to the Superior Court of Ontario which promptly appointed two retired Judges from the ADR Chambers with the following mandate. The First Judge is to mediate the matter for three days, in the event that it does not settle then the second judge is to arbitrate. The wording of the Order, although not specific, seems to imply that all costs will be covered from the substantial funds that the congregation has accumulated.

The plaintiff has contacted the court appointed mediator who requires all parties to be represented by counsel. Given that the defendant has refused to release any funds for the plaintiff to engage Counsel, the plaintiff has been seeking an alternative mediator; hence his reason for approaching Pat to mediate the matter.

Pat agreed to undertake the mediation predicated on being able to see the court pleadings first. After having thoroughly reviewed the documents Pat did indeed agree to mediate and, if necessary, arbitrate the matter. A standard letter was dispatched to the defendants indicating Pat had been contacted and was willing to mediate the matter and requesting a date for a response from them.

While Pat was awaiting the response, Sam, while attending a religious function, met the president of the congregation, one of the defendants. The president commenced a discussion around Pat's involvement in the mediation. He asked questions like how did the plaintiff know Pat, what was Pat's view of the situation, and could Sam help them directly or indirectly with influencing Pat. Sam then attempted to provide Pat with the contents of this discussion but was prevented from doing so by Pat.

Three days prior to the last day Pat was contacted by the defendant's lawyers requesting an adjournment of ten days. Given that Rule 24 permits an extension on consent Pat confirmed that the plaintiff was in agreement, and the date was extended. Three days prior to the last date Pat wrote a standard reminder letter to both sides. The responses were as follows.

The plaintiff provided dates he was available. On the other hand the defendants wrote a curious letter. Firstly they inquired

if Pat had been retained by the plaintiff as a condition to continuing a dialogue. They also inquired whether Pat was a retired Judge, as the court had appointed a retired Judge. Further they indicated their surprise that they were being contacted since they had a prominent member of the community attempting to resolve the issues. They noted their understanding of the gravity of the situation since they had hired Counsel and the other side had not. Finally they requested a further extension since one of the defendants was away at a religious convention.

Pat promptly sent a stern letter to the defendant's Counsel expressing concern at receiving communications from their clients that did not have the benefit of their legal expertise. He also included his resume and educational background in the letter.

One day later at the water fountain Sam revealed to Pat that he had been contacted by Brian a member of the community closely aligned with the congregation and a person whose extended family enjoyed exceedingly close family ties with Pat. Sam stated that Brian has asked him to intervene on the congregation's behalf and try to influence a positive outcome from Pat for the congregation. Again Pat stopped Sam claiming it was inappropriate. One day later Pat received a letter from the defendants' Counsel suggesting that Pat was abundantly qualified to mediate the matter. That same day another Mediator who had overheard the conversation the day before suggested to Pat and Sam that several breaches in ethics appeared to have transpired.

What do you think the Mediator said to Sam and Pat? Please let us know what you would do with this situation...

**Kindly send your comments to [admin@adrontario.ca](mailto:admin@adrontario.ca) by November 1, 2008. Submissions will be sent to Dr. Ally for review. A selection of the comments will be published in the next newsletter.**

## A Place for Mediation

**Bruce Ally PhD., LLM** is a mediator practicing for more than twenty-three years during which he has conducted more than 2000 mediations. Bruce has a subspecialty in ethics and has taught courses in ethics as applied to health care practice at the Michener Institute, CIHS, and in crisis intervention at Naseha. For further information please see [www.aplaceformediation.ca](http://www.aplaceformediation.ca).

# Book Review: The Point of The Deal: How To Negotiate When Yes Is Not Enough

**Colm Brannigan**  
**Mediate.ca Dispute Resolution Services**

The Point of the Deal: How to Negotiate When Yes Is Not Enough

Danny Ertel and Mark Gordon  
 Boston: Harvard Business School Press, 2007. 240 pages

One of the main reasons that clients agree to mediate a dispute is to avoid litigation. Often as mediators we get caught up in our clients' enthusiasm for settlement and do not consider much beyond that.

However, a poorly put together settlement can often lead to future litigation over its terms. There are materials on the legal aspects of drafting clear settlements but most of the literature focuses on the "nuts and bolts" of negotiating the deal or mediating the dispute. Little is said about implementation of the finished product. But that is the important topic covered in detail by this interesting book which is quite different than most of the ever expanding literature on negotiation.

The authors present two basic ideas, first, "There is no point to negotiation 'victories' that cannot be implemented" and further that, "There is a fundamental difference between 'doing deals' and negotiating for implementation". The book provides an overview of the purposes of negotiation within the corporate framework but can be taken beyond that.

It is divided into three parts and 13 chapters as follows:

Chapter 1—Introduction: What's the point?

Chapter 2—The Deal-Making Mindset: Why "yes" is often not enough

**Part I:** The Implementation Mindset

Chapter 3—Treat the Deal as a Means to an End: What do you need beyond a "yes"?

Chapter 4—Consult Broadly: Who do you need to get beyond "yes"?

Chapter 5—Make History: How do you set the right precedent for implementation?

Chapter 6—Air Your Nightmares: How do you discuss risk without risking the deal?

Chapter 7—Don't Let Them Overcommit: How do you help make sure your counterparts can deliver?

Chapter 8—Run Past the Finish Line: How do you stay focused on the real goal?

**Part II:** Negotiating and the Organization

Chapter 9—Managing Negotiators: How do you steer them toward deals worth doing?

Chapter 10—Building an Organization That Does Deals Worth Doing: How so many smart companies get it wrong

**Part III:** Critical Deals in Which Implementation Matters

Chapter 11—Bet-the-Company Deals: Mergers, alliances, and outsourcing

Chapter 12—Bread-and-Butter Deals: Customers and suppliers

Chapter 13—Conclusion: When "yes" is not enough

Apart from being a valuable and realistic resource on the negotiation process in general, many of its ideas can provide guidelines to mediators. We should look beyond the settlement and be an agent of reality for implementation. It is not just about the deal but on getting it done. Chapters 6, 7 and 9 are likely the most easily adaptable for use by mediators.

The authors look at strengths and weaknesses through examples of real negotiation situations. Corporate negotiators and mediators will be familiar with many of the examples in the book. The fundamental point, of course, is that "deals" are not only worthless if they cannot be implemented, but are costly as they take away from real solutions that could have been achieved.

Often negotiators deliberately deceive their negotiating opponents about the risks inherent in the future implementation of an agreement by their own organization in an attempt to get the deal. Or faced with the unknown, the parties may ignore the problem. The deal is done ... and the negotiator or mediator's job is finished.

ADR is really about the investment of resources in an attempt to bring about resolution. We owe it to our clients to carefully consider the viability of the settlements that we help bring about.

You will find a lengthy list of suggestions on and how a culture of negotiating for successful implementation can be implemented. I suggest a similar culture can be implemented in mediation.

*"The Point of the Deal"* is a valuable contribution to negotiation literature. It is a well written book on a very important topic and well worth reading and adding to your library. There is a website and blog available at <http://www.thepointofthedeal.com>.

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**Colm Brannigan** is a Chartered Mediator and principal of Mediate.ca Dispute Resolution Services in Brampton, Ontario. He can be contacted by e-mail at [colm@mediate.ca](mailto:colm@mediate.ca) or through his website [www.mediate.ca](http://www.mediate.ca).

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This two-part correspondence program is designed for those with post-secondary education. Lawyers admitted to the bar in Canada do NOT have to complete Part 1 of the course however a law degree or training in arbitration is not essential. The 27 lessons that comprise the program cover concepts and procedures of contract and tort law, arbitration acts and procedures, evidence and court control of arbitration.

Students must complete one assignment each month. These are marked by ADR Canada members who are practicing and experienced arbitrators. The course culminates in a case study where students must apply their skill and newly acquired knowledge to a practical arbitration problem.

**PART 1**— Part 1 of the program is designed to provide non-lawyers with an understanding of the law of contracts and torts, and an introduction to commercial arbitration statutes. After completing each of the assigned chapters, students must complete and submit an assignment. After all assignments have been completed, an exam must be written.

**PART 2**— Part 2 provides members of the legal profession and graduates of Part 1 with detailed information on the appointment, authority and role of the arbitrator; steps involved in the arbitration process; rules of evidence; and arbitration awards. As in Part 1 of the correspondence program, each lesson is followed by an assignment. After all assignments have been completed an exam must be written.

Those who are not members of the legal profession must complete the first part of the correspondence program successfully before enrolling in Part 2

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## The Commercial Mediation Practice Handbook

The Mediation Handbook is designed to function as a guide for professionals working in the field of commercial mediation. It is a:

- superb primer in commercial mediation;
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- valuable source of information for understanding mediation within a commercial or business context; and
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## The Arbitration Handbook

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- valuable source of information for understanding arbitration within a commercial or business context; and
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# SECTION AND OTHER EVENTS

## ADRIO SECTIONS AND CHAIRS

### **Construction**

Jack Cusimano (905) 891-8666  
Michael Lindsay (416) 429-5508  
Jennifer Bell (416)-927-9606  
Bob Silver (905) 470-1764

### **Employment**

Lorraine Joynt (905) 999-2881  
Bernd Weller (416) 223-1167

### **Family**

Rick Shields (905) 648-5903  
Donna Wilson (905) 910-0048  
Anisa Ali (416) 449-5333

### **Group Facilitation**

Christopher Baines (416)932-1334  
Craig Thompson (416) 471-2105

### **Insurance**

Cindy Winer (905) 640-6239  
Brian Williams (416) 250-5050, ext. 24  
Jamie Dunbar (416) 863-4616

### **IT**

Colm Brannigan (905) 840-9882  
Michael Erdle (416) 941-9201

### **OMMP**

Brian Williams (416) 250-5050, ext. 24  
Leon Freudman (416) 483-4867

### **Public Conflict**

Daryl Landau (416) 763-6205

### **Restorative Justice**

Bunny Macfarlane (905) 945-8968  
Dan Johnson (416) 658-2929  
Helen Lightstone (613)687-9829

## UPCOMING EVENTS

**On October 2, 2008, the Insurance Section will have its inaugural meeting.**

Topic: The Role of Mediation in the Resolution of Insurance Claim Disputes

Location: Fraser Milner Casgrain, One First Canadian Place, 42nd Floor, 100 King Street West, Toronto, 5:30 pm to 7:30 pm.  
Registration required.

### **October 2**

#### *Public Conflict Section Meeting*

Topic: How well is the public protected from bad ADR practice? A discussion that could range across how we investigate complaints, to regulation of the field, to insurance.  
Daryl Landau will act as Facilitator

### **October 7**

#### *Employment Section Meeting*

Guest Speaker: Barbara Hall, Ms. Hall, Chief Commissioner, Ontario Human Rights Commission will focus on the current changes affecting employers and what we should know as mediators regarding the changes. Everyone is welcome.

### **October 17**

#### *ADR Institute of Canada Annual Conference*

Topic: Get on Board, Reap the Rewards and Explore the Benefits of Arbitration and Mediation  
Location: Hyatt Regency Hotel in Montreal. (Registration required)

### **October 20**

#### *IT/IP Section Meeting*

Topic: Roundtable discussion: Where are the ADR business opportunities in IP and IT  
Session will be facilitated by Co-Chairs, Colm Brannigan and Michael Erdle

### **October 30**

#### *Family Section Meeting*

Topic: Domestic Violence Prevention  
Guest Speaker: Antoinette Clarke, Counselling, Consultation & Mediation Services (CCMS)

### **October 31 - November 1**

2nd Annual ADRIO Retreat at Elmhirst Resort, Rice Lake (Registration required)

### **November 6**

#### *Family Section Meeting*

Topic: Child Protection Mediation  
Guest Speakers: Mary Satterfield and Joyce Young

### **November 18**

#### *Employment Section Meeting*

Topic: Marketing Your Mediation Business  
Guest Speaker: Bernd Weller

### **November 25**

#### *Meet n' Greet*

Location: OBA Conference Centre, 20 Toronto St., Toronto, 5:30 pm to 8:00 pm  
Partnering and other dispute resolution tools have proven very effective in the construction industry. The information technology industry faces many of the same kinds of disputes, but has been slower to adopt ADR. Leading members of both the Construction and Technology Sections will discuss the dispute resolution challenges of their industries and share best practices for avoiding and resolving disputes. There will also be an opportunity for all members to share similar experiences and new perspectives. **Speakers to be announced.**

### **November 27**

#### *Public Conflict Section Meeting*

Topic: Dealing with an Angry Public: Handling the Media during Public Controversy  
Speaker: Jeff Ansell, Jeff Ansell & Associate, Inc.



**ADRIO members residing outside of the GTA area can now join section meetings through teleconferencing. Please notify Mena at [admin@adrontario.ca](mailto:admin@adrontario.ca) or at 416-487-4447 in advance of the meeting(s) if you wish to participate via teleconferencing.**

**ing(s) if you wish to participate via teleconferencing.**

**The number of spaces available for teleconferencing is limited, so please contact us early to reserve your spot!**

All Section meetings take place at:

234 Eglinton Avenue East  
Suite 500  
Toronto, Ontario

unless otherwise noted.

**YOUR ARTICLES, IDEAS AND FEEDBACK**

If you have a great article, including one for the ethics column, have reviewed a book, or want to provide some feedback for ideas about the newsletter, please submit them to the editors, (lorrainejoynt@aplaceformediation.ca), Bunny Macfarlane, (bunny@vaxine.com) or Colm Brannigan, (colm@mediate.ca).

Thank you to the Newsletter Committee and all the other contributors to the ADR Update, Autumn 2008 for their enthusiasm in promoting ADR Ontario.

**Newsletter Committee Members:**

**Lorraine Joynt**

**Bunny Mcfarlane**

**Colm Brannigan**

**WANTED: YOUR TALENT AND IDEAS!**

If you have ideas for speakers or topics for future professional development programs, please e-mail Kathryn Munn at kmunn@munnrcs.com.

If you would like to submit an article for ADR Update, please forward it to Lorraine Joynt.



# ADR Update

## Newsletter, Autumn 2008

The ADR Institute of Ontario, Inc.  
#500, 234 Eglinton Avenue East  
Toronto, Ontario M4P 1K5  
www.adrontario.ca

Tel. 416-487-4447  
Fax: 416-487-4429  
admin@adrontario.ca