ADR Update

Fall 2009 Newsletter of the ADR Institute of Ontario, Inc.

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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 ser-vices. The Institute represents over 600 professionals in Ontario.

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Message from the Editors

Message from the Editors

With each newsletter the articles submitted add more texture and in-depth knowledge of conflict resolution from all spectrums. Included in this issue are submissions regarding working with victims, justice for those with disabilities, business mediation in times of recession, information regarding mandatory mediation which is of particular interest to those on the Toronto, Windsor and Ottawa rosters, how the judiciary views arbitration clauses, the future of estate mediation, information on York University and how one mediator views using the web for mediation. There is also information on two delegations, one from Hong Kong and one from Korea, that visited ADRIO to discuss how each views mediation.

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Please note our two new regular columns. Deborah Sword - our conflict doctor - will provide a scenario each month and we invite you to respond to the situation and provide your comments. Your replies should be directed to one of the editors who will forward them to Dr. Deb. We will have the responses in the next issue along with a new scenario. Colm Brannigan will be writing a marketing column. Please forward any comments to Colm for response in the next issue.

We would like to thank all of our contributors. The next issue is planned for late December. Please forward your articles, comments and questions to us for review. Have a great Fall and hope to see all of you at either a section meeting or one of the great events planned for this year.

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Message from the President

The New Year Really Begins in September

For many of us, programmed to the September back-to-school cycle for so many years, fall is still a busy and hopeful time of year.

That is certainly the case at the Institute this year with a fall schedule full of special events, dinner meetings, section meetings and advocacy initiatives that are well under way.

Our November 6, 2009 program “Emerging Trends and Issues in ADR” developed by Professional Development Committee members Katherine Munn, Robert Pidgeon, Mel Matthias, Barbara Benoliel, Bernd Weller, Bunny Macfarlane and Dawna Borg was a great success. Topics included: Non-violent Communication; Approaches to Civil Practice: Evaluative, Facilitative or Transformative? Settling Family Disputes Outside the Courtroom. Our next ADR Update will provide useful information on this important session.

On Saturday, November 28, 2009 Gary Furlong will teach a full-day workshop covering “The Basics of Civil Procedure in Ontario for Non-Lawyer Mediators.” The workshop goes toward fulfilling the civil procedure requirements for the Ontario Mandatory Mediation Program (OMMP) Roster. The session covers the litigation process from start to finish, each of the steps in a lawsuit, cost implications, a glossary of legal terms, and what mediators need to know about the process; civil procedure for contract & employment claims and civil procedure for tort & insurance claims. If you have not taken this session and wish to practice in this area, this is a must.

We also invite our members and friends to visit www.adrontario.ca and review the section meetings posted as Events under the Member Resources section of the web site. These are excellent events that will provide important information in key areas and will help you “connect” with the Institute and network with others with similar interests.

Our Advocacy Committee (Colm Brannigan, Heather Swartz, Barbara Benoliel, Frank McLean, Bunny Macfarlane and Barbara Landau) has also been working hard on your behalf on many fronts:

- Protesting the imposition of HST on mediation and arbitration fees;
- Pursuing recommendations to the Attorney General on Family Law Process Reform in meetings which occurred in 2008 and 2009 through the development of an important “Home Court Advantage” summit in cooperation with the Ontario Bar Association and Ontario Association of Family Mediators (Yes. Barbara Landau is moving mountains once again!);
- Reviewing cancellation of the adult court diversion program in Ontario and the implications for restorative justice and other opportunities for ADR in government programs and;
- Looking for opportunities to have an impact on proposals to amend the Mining Act, Bill 173 and influence the ADR regime that may result from it.

We welcome the following members to the rank of Chartered Arbitrator and congratulate them on this achievement: Kathryn Munn, Michael Erdle, Genevieve Chornenki.

Soon we will be able to announce our first Qualified Mediators.

If you have not applied for these designations and feel you have the qualifications please visit our web site and begin your application. This recognition is a tremendous boost to one’s practice and well worth the effort. Also, please remember that if you have not already listed yourself on ADR Connect this is a must, not only to ensure optimal marketing of your practice but if you wish to apply for any of the Institute Rosters.

As always, many thanks should go to our tireless Board of Directors, our hardworking Committee and Section Chairs, numerous volunteers and our dedicated staff of Mary Anne, Mena, and Janet.

Yours truly, Heather Swartz
President.

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Section Meetings

Employment Section Meeting

Tuesday, November 10, 2009 from 5:45 pm to 7:15 pm

PROGRAM:
Round Table Discussion with Bernd Weller, Lorraine Joynt, Chairs
1) Should the Employment Section be renamed to become the Workplace Section, or is there room for two separate sections?
2) Should the Employment Section Objective be expanded from strictly Professional Development to include Marketing and Promotional support for section members?

Employment Section Meeting

Tuesday, January 12, 2010
ADRIO Location

Construction Section Meeting

Chair, Clive Thurston
Wednesday, November 18, 2009 from 5:45 to 7:15 pm
AGENDA:

- Past Minutes
- Review and feed-back of the October 7th Presentation, "ADR Clauses – Are they effective and how can they help?"
- Survey Results
- Member Feedback
- Columns
- Postponement of Dinner Meeting from November 11 to Spring 2010
- Future Meetings and Spring Dinner Meeting

Construction Section Meeting

Wed., December 9, 2009 from 6:30 pm to 8:30 pm
Ontario General Contractors Association, #703, 6299 Airport Rd.
Topic:
"Responsibility Transfer Clauses - Lessons Learned"
Speaker: Dr. Richard Beifuss, C.Arb.

Family ADR Section Meeting

Tuesday, November 24, 2009 from 5:45 pm to 7:15 pm at ADR Institute offices

TOPIC:

"Preparation of Memorandum of Understanding by Mediator to Lawyer"
Speakers: Heather Swartz, MSW, C.Med., Cert.F.Med., Agree Inc. and Richard W. Shields, LL.B., Ph.D., C.Arb., C.Med., Cert.F.Med., Cert.F.Arb.

PUBLIC CONFLICT SECTION MEETING

Thursday, November 26, 2009 from 5:30 pm to 7:00 pm at ADR Institute offices

TOPIC:

Ernie Tannis Reminisces About His Public Conflict Initiatives
Chair: Daryl Landau

Civil Procedure Workshop for Non-Lawyer Mediators

Saturday, November 28, 2009 from 9:00 am to 5:00 pm
ADR Institute Location
Gary Furlong, Instructor

Heather Swartz

Meeting with Mr. Wong Yan Lun

On Wednesday, October 7, 2009 the ADR Institute of Canada and the ADR Institute of Ontario hosted a visit by the Secretary for Justice (SJ), Mr. Wong Yan Lung, SC, JP, Department of Justice, Government of Hong Kong Special Administrative Region of the People's Republic of China. In attendance were Randy Bundus, President of ADRIC, Master Don Short, Heather Swartz, President of ADRIO and Mary Anne Harnick, Executive Director of ADRIC and ADRIO. Accompanying Secretary Wong were Elizabeth Tai, Administrative Assistance to SJ, Christine Leong, Press Secretary to SJ, Maureen Siu, Director, Hong Kong Economic and Trade Office in Canada (HKETO) and YC Chan, Deputy Director, HKETO.

Secretary Wong was on a three-day visit to Ottawa and Toronto to strengthen ties and promote Hong Kong as a dispute resolution centre for the Asia Pacific, in particular, Hong Kong's role as a regional centre for international arbitration.

He called on the ADR Institute to obtain first-hand information on best practices on arbitration and mediation. In Hong Kong Secretary Wong heads a cross-sector Working Group on Mediation set up in early 2008 to look at ways in which mediation can be more effectively and extensively applied to resolve both commercial disputes and disputes at the community level. He was interested in learning about the Institute's public education strategies for mediation and arbitration in Canada, our accreditation and training standards, as well as any national or provincial legislation related to ADR. He discussed the "Mediation First Pledge" that has been embraced by 90 corporations in Hong Kong and the Civil Justice Review which resulted in 150 recommendations to improve the cost-effectiveness of the civil justice system. A Practice Direction, commencing in April 2010 will require lawyers to sign a certificate indicating that they have advised their client of mediation and will provide for an adverse costs order against parties that refuse or fail to attempt mediation. He mentioned pilot programs in mediation, in the areas of matrimonial, neighbour and building management disputes.

Secretary Wong presented the Institute with a crystal skyline of Hong Kong and graciously accepted a silver Inuit art sculpture. Other groups and individuals that Secretary Wong visited during his trip included the Hong Kong-Canada Business Association, Canada-Hong Kong Parliamentary Friendship Group, the Minister of Justice and Attorney General of Canada, Mr. Robert Douglas Nicholson, Chief Justice Beverley McLachlin of the Supreme Court of Canada, the Canadian Council of International Law, the Legal Adviser to the Department of Foreign Affairs and International Trade, the Canadian Club of Toronto, the Canada Business Association, the Attorney General of Ontario, Mr. Chris Bentley, representatives of the Ontario Bar Association and Law Society of Upper Canada and St. Stephen's Community House Mediation Services.

Blaine Donnais

Thanks from the Korea Labor Institute

On behalf of the Korea Labor Institute and the Workplace Fairness Institute we would like to thank the ADR Institute of Ontario and Canada for meeting the delegation from the KLI in August. The members of the KLI, were:

- Hoon Kim, Senior Fellow, Director of the Advanced Labor-Management Relations Program for the KLI;
- JaeHoon Kim, Professor of Law, Sogang University Law School; and
- Hee-Jin Lee, of the Korea Certified Public Labor Attorneys Association

They were hosted by Blaine Donais, President and Founder of the Workplace Fairness Institute.

The delegation was interested in public and private forms of conflict management in Canada. In addition to the ADR Institute, the delegation met with:

- the Ontario Human Rights Tribunal
- the Ontario Labour Relations Board
- the Workplace Safety Insurance Appeals Tribunal
- the Federal Mediation and Conciliation Service
- the Ontario Bar Association Labour Section

The delegation reported that they learned a great deal in their discussions with the ADR Institute and the other agencies they met.

The Workplace Fairness Institute would again like to thank Bernd Weller, Bruce Ally, Lorraine Joynt and the other board members who took the time to meet with the international delegation.

Jeff Morris and Gary Furlong

Mandatory Mediation - Changes and Update 2010

On January 1, 2010, significant changes to the mandatory mediation Rule 24.1 will come into force. These changes come out of a recent Civil Justice Reform Project review conducted by the Honourable Coulter A. Osborne, Q.C., with a focus on issues of access to justice for all Ontarians. The review's central recommendation was that the time and expense of any proceeding should be proportionate to the amount in dispute and the importance of the issues at stake. In other words, it should not cost $50,000 for each party to litigate a $40,000 matter. To that end, many of the changes are intended to keep the costs and process steps in proportion to the size of the matter itself.

In general, the mandatory mediation rule has been kept largely intact, even though Rule 78 (the old Toronto Civil Case Management Pilot Project) has been repealed. Mandatory mediation is now governed by the new Rule 24.1, with the most significant amendments being focused around a change to the timeframe within which a mandatory mediation must be conducted, and the ability for parties to extend the time, on

consent, when they actually conduct the mediation.

Other noteworthy changes to the Rules include an increase in the limit for Simplified Procedure Rule cases from $50,000 to $100,000; an allowance for up to 2 hours of discovery on Simplified Procedure Rule cases and a limit of 7 hours of discovery on standard cases; and an increase in the Small Claims limit from $10,000 to $25,000. In addition, there has apparently been significant discussion in the Ministry about the possibility of making mediation mandatory in all Small Claims cases as well, but it isn't known how that would be accomplished, or who would be mediating.

This article answers some key questions about the amendments that you may have as a mediator or as legal counsel.

What cases are subject to mandatory mediation?

the new Rule 24.1 applies to all actions governed by the previous rule, and continues to apply to all new actions commenced in Ottawa, Toronto or Essex County after January 1, 2010, with certain exceptions.

What cases are not subject to mandatory mediation?

The following types of cases continue to fall outside of mandatory mediation, as clarified in The new Rule 24.1:

(1) actions to which Rule 75.1 (Mandatory Mediation Estates, Trusts and Substitute Decisions) applies:

(2) actions in relation to a matter that was the subject of a mediation under section 258.6 of the Insurance Act, if the mediation was conducted less than a year before the delivery of the first defence in the action;

(3) actions placed on the Commercial List established by practice direction in the Toronto Region;

(4) actions under Rule 64 (Mortgage Actions);

(5) actions under the Construction Lien Act, except trust claims; and

(6) actions under the Bankruptcy and Insolvency Act.

What about actions under the Class Proceedings Act, 1992?

Rule 24.1 applies to an action commenced under the Class Proceedings Act, 1992 only if certification as a class proceeding has been denied. The Rule does not apply to actions certified as class proceedings under the Class Proceedings Act, 1992.

Then must a mandatory mediation be held?

For existing actions in Toronto commenced prior to January 1, 2010 that were subject to mandatory mediation, the mediation must be completed within 180 days from January 1, 2010 as per the new rule.

For existing actions commenced in Ottawa and Windsor prior to January 1, 2010, the requirement to mediate within 90 days of the filing of the first defence continues to apply if the 90 days expire prior to January 1, 2010. If the 90-day clock expires after January 1, 2010, it is the authors' interpretation of the Transition Rule (24.1.09 (2.1)) that in this case, parties will have until June 30, 2010 to complete their mediation.

For all new actions commenced in Toronto, Ottawa and the County of Essex on or after January 1, 2010, the mediation must take place within 180 days after the first defence is filed, unless some action is taken to extend the time, as described below. This is a significant change from the system in Toronto under Rule 78 (repealed on January 1st, 2010), where the rule stated that mediations could be held "at the stage at which the parties agree that mediation is most likely to be effective."

It should also be noted that all other former mediation timelines in Rule 78 in Toronto have been revoked, including the 150 day timeline for wrongful dismissal and Simplified Procedure Rules cases. These deadlines will no longer be in force as of January 1, 2010.

The new rule has given parties a right to extend the time for mediation beyond the single 180 day deadline. To do so, however, they must have written consent of all parties, they must have a specific date (not a generalized "later time"), and they must file this consent with the mediation co-ordinator. Generally speaking, parties will continue to be required to have completed mediation in order to set the matter down for trial.

What happens if the parties do not take any steps to proceed to mediation within the 180 day period?

If the mediation co-ordinator does not receive a Court order or a consent signed by the parties extending the time for the holding of the mediation within 180 days after the first defence has been filed, or a Form 24.1A stating the name of the mediator and date of the session, or a mediator's report, or a notice that the action has been settled, then a mediator from the roster list shall be assigned to conduct the mediation, unless the court orders otherwise.

Likewise, if the parties do not file appropriate paperwork or conduct a mediation and the action is set down for trial, a mediator from the roster list shall be assigned to conduct a mediation. It should also be noted that the system currently in place prevents matters from being set down for trial unless a mediation has taken place, so it remains to be seen

whether any matters will be set down for trial without having been mediated.

When must an assigned mediator hold the mediation?

The assigned mediator must fix a date for the mediation session within 90 days after appointment unless the court orders otherwise.

Does an insured party have to attend the mediation, if an insurer is involved?

Unless the court otherwise orders, an insured party is not required to attend the mediation session, but a representative of the insurer is still required to attend.

What must be filed before the action can be set down for Trial?

One of the parties must file with the mediation co-ordinator either (a) a notice (Form 24.1A) stating the mediator's name and the date of the mediation session; or (b) a mediator's report under subrule 24.1.15 (1) indicating that the mediation has been concluded.

Is the Court going to continue to send Status Review notices under Rule 48.14 at the 2 year mark if a matter has not been set down for trial?

According to the Mediation Co-ordinator, this practice will continue as a backstop to ensure parties are moving cases forward. If mediation has not been conducted by the time a Status Review notice has been sent, it must be included on the timetable for the matter.

What has changed for Simplified Procedure Rules cases?

Rules for Simplified Procedure Cases have changed. As noted, the limit has now been raised to $100,000 from $50,000. In addition, the ban on oral discovery has now been lifted, allowing parties each a maximum of 2 hours of oral discovery (regardless of the number of parties to discover). In addition, the courts have allowed limited examination and cross-examination of witnesses in Simplified Procedure Rules cases, meaning that trials under these rules will likely take a bit longer and cost a bit more, given that the limits, and stakes, are now higher.

What other changes have been made that might affect mandatory mediations?

One other possibly significant change is the use of experts and expert reports. Currently, parties may retain experts and file expert reports as they see fit. This has frequently lead to the practice of experts essentially working for one side or the other, contravening the concept that experts should not be on either "side". To change this, a new rule, Rule 4.1.01, has been added as follows:

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

The goal of this rule is to ensure the expert's duty is to the court, not the party retaining them. It will remain to be seen what impact this rule will have on the use of experts and quality of reports, but mediators should be aware of this change in order to work effectively with these reports at mediation.

In summary, while the changes from a mediation point of view are not dramatic, they will affect how and when parties mediate, and that will have an impact on the mediations themselves. Mediators should become familiar with the changes to help the parties get the most out of the mediation.

Gary Furlong is a mediator with Agree Dispute Resolution, and can be reached at gary@agreeinc.com. Jeff Morris is a Toronto mediator, and can be reached at jeff.morris@rogers.com.

The Conflict Doctor

Do We Practice on Ourselves What We Teach to Others?

Recently, I created minor controversy in the online conflict resolution world with an article posted on mediate.com (http://www.mediate.com/articles/swordL7.cfm).

The editors of mediate.com called the article Professionalization of Conflict Resolvers. In the article, I asked what evidence we have that credentialing is the right answer to whatever question is being floated, and where that question arises. By credentials, I refer to the push among conflict resolution organizations to trademark some initials that can then be purchased by conflict resolvers after passing a test as 'proof' of competency. The organizations are local, national and international, meaning a mediator has to interpret the credibility of the credential granting organization and decide which offers testing and initials that will most boost the mediator's credibility. The testing and initials that come from passing are usually expensive, so having credentials from multiple conflict resolution organizations is not a solution that's optimal for everyone.

Rather than participate in this decision-making process, I argued that credentials are the answer to a question that might not have been asked or, if it has been asked, might possibly be the wrong question. Further, I attempted to understand the interests of those organizations and members who are arguing for universal conflict resolution credentials. There were 16 comments to the article posted publicly and I received another dozen messages privately. Almost 100% of the comments agreed with the article. If the majority of the responders do not favour credentialing, where does the push for credentials originate? While that might be an interesting question, of more interest to me are two other issues: 'what question(s) should we be asking/answering and how should we be conducting the inquiry?'

I'm not suggesting that proponents of credentialing ask the questions that generate an answer they prefer, which is that we need credentials. It's clear that those proposing credentials are genuine and sincere in their opinion that credentials are a universal benefit. On the other hand, I wonder what answers other questions might yield. Where are those alternate questions being posed, discussed and researched? That sounds like stages 2 and 3 of mediation. Aren't we in the business of brainstorming before a definitive, easy or favourite solution is reached at stage 4?

Here's a scenario that we can put into the four-stage model as a simulation, which is our traditional teaching tool. Two people, called He and She, are having a conflict about whether or not to credential. It doesn't take long to hit impasse. Enter our protagonist Mediator, who wisely gets to interests. He says his interest is protecting the public and thus all mediators must be licensed. She says her interest is the same, so the public must be educated. "Wait," cries Mediator, "you're mixing up positions, interests and outcomes. Let's brainstorm possible options before arguing which position is correct on the basis of interests."

So they brainstorm. After they have a long list of interests with protection of the public at the top, Mediator asks three questions: is there evidence that the public is suffering harm from which it must be protected? If so, what are the various mechanisms that would address the public weal? Who represents the public in this discussion? She and He fall silent. They know their Circle of Conflict and that Mediator has just moved them to Data.

"Well," He says tentatively, "I hear stories of mediator incompetence. And I've co-mediated with colleagues I'd never recommend to paying clients." She rises to this perspective; "Heck, there are times I'm having such a bad day I wouldn't even recommend myself to paying clients. And I've got a great reputation as a mediator. That isn't evidence."

He offers another argument: "I've given evaluation forms to my clients after mediations and various conflict resolution organizations have too. We have those results." "Wonderful," says Mediator, "what are the results?" "Well," He says, "people said they were pretty satisfied with the process." She adds, "That's true. When we want to promote ourselves we

point to how satisfied the users are, and when we want to justify credentialing, we point to how unsatisfied the users are."

"Are we back where we started," Mediator inquires? "We began to brainstorm and we just keep getting back to either credentials are the solution or not, depending on what you each believed when we started talking."

"Well," He again started off tentative; "There are other interests such as getting work, funding our professional organizations, marketing ourselves, and being taken seriously as a profession – especially for those who don't have professional degrees." "Right," She agrees with He, "But those interests are about us and our financial stake, which is important, don't get me wrong. Some of us have done this work for decades without credentials and we're making a decent living, which is everyone's legitimate goal. So, how might credentialing address any of those interests beyond helping our conflict resolution organizations collect fees?"

"I'm sorry," Mediator looks sheepish. "You only retained me for a two hour mediation and it's time to wrap up. I'm going to suggest some homework to do on your own. You have a long list of interests, and the beginning of a brainstorm about the various ways to meet those interests. Without arguing positions on the two sides of the credentials debate, come up with other ways that your common interests might be met. If you want to have another mediation session, I'd be happy to find out what you've come up with."

In other words, are we engaging in a positional debate about credentials when, in fact, we have the opportunity to have an interest-based dialogue? Imagine that we're stuck in our positions, and Mediator has asked us to brainstorm options. That's classic stage 3. What should He and She do next? What are the right questions to ask to stay in interests long enough to test the possible solutions against objective criteria? Isn't this what we tell our mediation clients? Is there a reason we haven't applied this knowledge and our beloved model to ourselves?

© L. Deborah Sword, PhD

If you have ideas for this conversation, please join in. Send your comments to the editor please.

Igor Ellyn, QC, CS, and
Evelyn Perez Youssoufian,
Ellyn Law LLP, Toronto

Litigation Over Arbitration Clauses: Judicial Deference to Arbitration is Alive and Well But Legal Battles Still Loom

Canadian courts have repeatedly held that arbitration agreements should be broadly interpreted and if a dispute could arguably fall within the scope of an arbitration clause, the court should refer the parties to arbitration. At the very least, the court should permit the arbitrator to determine whether the claim falls within the scope of the arbitration clause. Further, Article 8 of the UNCITRAL Model Law in the Ontario International Commercial Arbitrations Act ("ICAA") requires the court to refer a matter to arbitration where an action is brought in a matter which is the subject of an arbitration agreement. In local arbitrations, s.7[1] of the Arbitration Act requires a court to stay the action of a party to an arbitration agreement except in the limited circumstances in s. 7[2].

Despite this apparent judicial and legislative clarity, the scope of arbitration clauses spawns a great deal of litigation. This is probably because arbitration clauses tend to be drafted either to maximize the drafter's juridical advantage or as a hard-fought compromise between parties of equal bargaining power. The recent Ontario cases reviewed in this article are just the tip of the iceberg in helping to understand the current state of the judicial landscape.

In Greenfield Ethanol Inc. v. Suncor Energy Products Inc.,1 Justice Spence of the Ontario Superior Court applied the oft-cited decision in Dalimpex Ltd. v. Janicki 2 to conclude that an arbitration clause was intended to include all disputes between the parties. In the Dalimpex case, the Ontario Court of Appeal held that even oppression claims could be the subject of arbitration unless the language of the arbitration clause clearly excluded them. To the same effect is the Ontario Court of Appeal's decision in Woolcock v. Bushert.[3]

In the recent decision of Dancap Productions Inc., v. Key Brand

Entertainment, Inc.,[4] the Ontario Court of Appeal again applied a deferential approach to arbitration. The case involved Key Brand's acquisition of the Toronto Canon and Panasonic Theatres and their management by Dancap. A "Term Sheet Agreement" was silent on arbitration but a shareholders' agreement provided for mandatory arbitration and exclusive jurisdiction of the California courts. Dancap sought to restrain alleged violation of the Term Sheet Agreement. Key Brand wanted a stay of the action because of the arbitration clause in the shareholders agreement.

Justice Sharpe of the Ontario Court of Appeal held that "[w]hile the issue of whether the dispute between the parties is covered by the [agreement] is by no means free from doubt... it is at least arguable that the arbitration clause governs the core issue raised in the action." The Court of Appeal directed that the arbitrator should determine the scope of the arbitration and the Ontario action was stayed.

When claims in an action clearly fall outside the scope of the arbitration clause, the Court will not grant the stay. For example, in Patel v. Kanbay International Inc.,[5] the Court of Appeal refused to stay a wrongful dismissal and negligent misrepresentation action under Art. 8 of the Model Law under the ICAA. Wrongful dismissal claims were not covered by the ICAA and the arbitration clause in the shareholders' agreement was only intended to resolve disputes over "transactions." As the action did not deal with transactions, it was clearly outside the scope of the arbitration clause.

In Pandora Select Partners LP v. Strategy Real Estate Investments Ltd.[6] the plaintiff sought relief from oppression under the Ontario Business Corporations Act. ("OBCA") and the defendant sought a stay under Art. 8 of the ICAA. Justice Joan Lax refused the stay on the basis that "the arbitration clause would need to have much more explicit language" to encompass the determination of the statutory obligations and remedies under the OBCA. Similar conclusions were reached in Bouchan v. Slipacoff,[7] and in Lansens v. Onbelay Automotive Coatings Corp.,[8] both involving shareholder disputes in which OBCA remedies were sought. In both cases, the defendant's delay in seeking a stay was a relevant consideration.

Jean Estate v. Wires Jolley LLP,[9] is a very recent decision of the Ontario Court of Appeal which again emphasizes the deference given to an arbitration agreement. The case involved a fee agreement between the beneficiaries of an estate and their lawyers in which there was an agreement for a "success fee" to be determined by arbitration. The motions judge held that the Court had jurisdiction and that arbitration could not usurp the court's jurisdiction under the Solicitors Act. Justice Weiler, writing for a unanimous Ontario Court of Appeal, held that a judge could decide whether an arbitrator had jurisdiction to decide a contingency fee dispute, but that it was open to the parties to contract out of the statutory scheme under the Solicitors Act and agree to have their fee dispute resolved by arbitration.

In Smith Estate v National Money Mart,[10] the Ontario Court of Appeal declined to stay a class action which claimed improper day loan charges in favour of a mandatory arbitration clause in the loan agreement, upholding a decision of Justice Perell of the Ontario Superior Court. The decision was the culmination of a three-year litigation saga. Sections 7 and 8 of the Consumer Protection Act, 2002, which permit consumers to participate in a class action even if the contract contains an arbitration clause, were applicable.

Litigants understandably look for juridical advantages whenever possible. The forum where the dispute is determined, be it the Court or the arbitral tribunal, may significantly impact on its eventual result. Therefore, parties to arbitration clauses, especially those seeking equitable or statutory remedies, will continue to institute court actions if there is any potential advantage. Conversely, defendants will continue to bring motions to stay in favour of mandatory arbitration. However, the basic principles still apply. Ontario courts will defer to arbitration clauses unless there are inescapable reasons not to do so.

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1 2007 CanLII 33118
2 2003 CanLII 34234
3 2004 CanLII 35081
4 2009 ONCA 135
5 2008 ONCA 867
6 [2007] O.J. No. 993
7 2009 CanLII 728
8 2006 CanLII 51177
9 2009 ONCA 339
10 [2008] OJ No 4327

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T.D. Brodie

Removing the Victim Cloak

The Merriam-Webster Dictionary describes victimization as "adversity resulting from being made a victim."

While it might be unseemly to portray one's self as being susceptible to dominance or in any other way weak, it is the act of surviving assault from which some may draw pride and, in that pride, strength. The danger in that perspective is that it is a false sense of pride which feeds off of negative action. In order to have the feeling of dignity replenished the individual must be continually dominated, or be seen as such. This negative perspective demands that the "victim" deny themselves opportunity for self-realization and fulfillment in the name of maintaining a façade, actual or forged, of helplessness.

This sense of doom can be difficult to shake. How can we, as Conflict Resolution Practitioners, help our clients shift from this negative perspective to something more positive and forward moving? Perhaps we can help our clients consider the notion of resiliency. During his lectures on Combat Operational Stress Management Dr. David Foy of Pepperdine University described the notion of resilience as the ability to not only survive physical and emotional trauma but the ability to draw from that event some sort of constructive meaning. Positive examples of individual resiliency abound in our modern history.

Victor Frankl gives a most compelling example of this notion of resiliency, as opposed to victimization. A long-time prisoner in the concentration camps of WWII, Frankl's entire family, with the exception of his sister, died in the camps or was sent to gas ovens. And yet even in the face of monumental degradation and misery he found a way of choosing a positive attitude and spiritual well-being. With astute wisdom Frankl was able to understand that those who had nothing to live for were the ones who perished most quickly in the camps. In his book, Man's Search for Meaning, Frankl wrote: "… for the first time in my life I saw the truth as it is set into song by so many poets, proclaimed as the final wisdom by so many thinkers. The truth--that love is the ultimate and the highest goal to which man can aspire. Then I grasped the meaning of the greatest secret that human poetry and human thought and belief have to impart: The salvation of man is through love and in love. I understood how a man who has nothing left in this world may still know bliss, be it only for a brief moment, in the contemplation of his beloved. In a position of utter desolation, when a man cannot express himself in positive action, when his only achievement may consist in enduring his sufferings in the right way--an honorable way--in such a position man can, through loving contemplation of the image he carries of his beloved, achieve fulfillment. For the first time in my life, I was able to understand the words, "The angels are lost in perpetual contemplation of an infinite glory."

Frankl's example of resiliency is stirring and powerful. Even in the most painful and dehumanizing situations he concluded that life has potential meaning and that, as a result, even suffering is meaningful.

Another example of this notion of resiliency took shape in Rwanda in the person of Immaculée Iligabiza.

> How can we, as Conflict Resolution Practitioners, help our clients shift from this negative perspective to something more positive and forward moving?

She spent three terrifying months hiding in a four foot by three foot bathroom with seven other women while the majority Hutus tribe members committed ethnic genocide in their attempt to eradicate all members of the minority Tutsi tribe. Iligabiza's entire family was murdered. In fact, while hiding in the bathroom, she repeatedly heard Hutu tribe member's searching the house she was hiding in with an attempt to find her specifically and to hack her to bits. As she wrote in her book, Left to Tell, her three months of starvation, deprivation of humanity and abject misery was a journey of spiritual dimension in which she grew far and beyond the notion of victimization. In the book's foreword Dr Wayne Dyer wrote that "she emerged from her bathroom

hideout having truly discovered the meaning of unconditional love – a love so strong that she was able to seek out and forgive her family's killers."

Yet another example of extraordinary resilience comes to us from Nelson Mandela. He spent over a quarter century in federal prison subjected to hard labour and dehumanizing treatment, so much so that he was even refused permission to attend the funerals of his mother and son. Rather than spend his 27 years in prison nurturing feelings of resentment and victimization he prepared himself physically, mentally, emotionally, philosophically and morally for the task he was ultimately destined to accomplish. Although there were overwhelming reasons for him to be a bitter and aggressive person, the years in prison and his personal wisdom had changed him completely. On emerging from prison, he defined the task he had set himself as one of "reconciliation, of binding wounds of the country, of engendering trust and confidence."

In his book, Long Walk to Freedom, Mandela reveals a deep sense of self-worth comprised of pride and humility. He combines this with a "stubborn sense of fairness" in which he sees all of humanity on an equal footing and never in terms of inferiority or superiority. His philosophy on reconciliation is based on his staunch belief that all people, even the most cold-blooded, have a core of decency and that we are all capable of changing if only our hearts can be touched. To have emerged from ill-treatment at the hands of a white minority with the notion of reconciliation and communal love founded on the belief that all people are born equal, regardless of race, colour or creed is extraordinary and shows that erspectives of profound value can be nurtured in even the direst of situations.

Clearly Frankl, Iligabiza and Mandela's stories can be deeply understood as examples of resilience and forward motion as a result of victimization. Their message is strong and clear. Victims need not wallow in their situation. There exists great learning in the most dire of situations (in fact the darker the moment the more profound the learning). There is great value in forgiveness, which need not be preceded by apology. The act of forgiveness benefits the one offering it on a more profound level than the one receiving it. Most importantly, the wearing of the victim mantle diminishes opportunities for growth and brilliance.

How can these messages be applied in our real world situations?

An example came up recently in an individual session I had with a client involved in a workplace conflict. The conflict event was taking a huge toll on him and he just couldn't move beyond the trauma of the experience. Like most of us, he simply wasn't being resilient.

For some reason we started to discuss personal relationships. When I asked him about love I saw his eyes tear up and he shared with me the story of his first deep relationship as an adult. It was during his university days when he had fallen in love for the very first time. The relationship lasted for two and a half years. When they parted it was difficult.

She was from Newfoundland and was going home for Thanksgiving. He remembers well the moment that she leaned in through his car window and kissed him goodbye. The image of her walking away is something that he carries deeply inside. She never returned from that holiday. She was killed in a car accident. As he told me the story his eyes overflowed. His love for her was still deep and the memory still painful.

I asked him what meaning he could draw from such a painful experience. His answer came quickly. He said that he never plans for a future with more than just himself in mind. I was astonished. "So," I commented, "this woman was born, lived, loved and died so you could learn selfishness." His gaze at me was intense and burning.

"That doesn't sound right does it" he questioned before going deeply into thought. "No, that's not right. I learned from her that we need to live for the moment because it's all we've got. The past and the future are not real."

"Only now is real."

This was the profound truth that led this fellow from tragedy to triumph. If he could pull such a profound and beautiful truth from such a sad past, what meaning would that have for his present conflict situation? The process went forward at lightning speed.

The lessons that Frankl, Iligabiza and Mandela teach us are clear. A position of victimization can lead to a quagmire of despair that will destroy a person as surely as a bullet. However even in the darkest moments there can be positive growth and powerful meaning. From the bleakest of situations the strongest will move forward with gratitude, forgiveness, reconciliation and love for not only their friends but their opponents as well.

As a wise man said to me not so long ago, "only now is real." Removing the cloak of victim allows our clients to realize the creative and resourceful entities they are and, in doing so, fully enjoy their "now."

Charles (Skip) Brooks,
Jim Turner, and Ernest Tannis

Equality In Practice (with a focus on persons with disabilities) The Rule of Law, Justice and ADR for Canadians.

As professionals, we are all engaged in a common quest to reduce the human and economic cost of conflict.

Collectively we strive diligently to do our part, contributing as individuals and within institutions. The impact may not be immediately obvious, but will eventually become apparent. How do we proceed? What continues to give us hope? Ernest Tannis, came up with an encouraging adage to keep, "Each ripple can be like a wave which can wash away unresolved conflict from the shores of injustice." The ADR Institute of Ontario, and the ADR Institute of Canada, are such ripples, as is every member.

This "ripple" involves Reach, a charitable organization incorporated in 1981 during International Year of Disabled Persons. Reach provides pro bono legal referral-services and educational programs for Canadians. Its formal name is "Reach-Equality and Justice for Persons with Disabilities/ Egalite et Justice pour les personnes avant un handicap." Seeking 'just' solutions is just much more challenging when people involved are in a more vulnerable position. AS GORDEN HENDERSON ADVISED, UPON BECOMING THE FIRST HONORARY CHAIR OF REACH (1985-2004): ' WHAT IS THE POINT OF HAVING A JUSTICE SYSTEM IF THERE IS NO ACCESS TO JUSTICE"? It behooves us to be particularly attentive to those issues of Access to Justice, as they relate to such marginalized segments of our population. It is not simply a matter of separating (ghettoizing) out a group or creating special laws and dispute resolution procedures.

"Equality" is a fundamental premise of our social norms. The phrase "an eye for an eye and a tooth for a tooth" was not meant to result in a kind of "revenge by proxy" This "tit for tat" thinking, or "getting even" just doesn't work. Everyone, no matter their status in life, must be treated equally before the law and in the community.

As part of this reaching out for equality, in 2006, Reach embarked on a multi-year project called Equality In Practice (EIP). The next phase will be launched later in the Fall, with funding support from Canada's Department of Justice as well as many others. The project enjoys the expertise of a twelve-member Advisory Group, and generous corporate support. There will be a national 'roll-out' of a diverse variety of materials for lawyers, consumers and service-providers, all available for free on a new dedicated website (www.eip.reach.ca). Reach has partnered with the Canadian Paraplegic Association and Independent Living Canada. These organizations will help distribute the information through their many affiliates across Canada. There are plans for radio PSA"s (thanks to the kind efforts of Sound Venture Productions in Ottawa), visits to various cities, and a self-sustaining currency of information. The web site will feature plain-language interaction for lawyers and citizens generally. It is fortuitous that this ADRIO Fall/Winter newsletter coincides with this EIP project. Reach is grateful for this opportunity to tell you about this initiative and invites input from any interested individual.

The project goal is to develop processes & resources to help law professionals, particularly those in the ADR field, and consumers work collaboratively in the interests of equality in the justice system. The Rationale for this project stems from the Canadian Charter of Rights and Freedoms, especially Section 15 on rights of disabled persons. As we all know, laws alone do not create equality. Equality results from the attitudes, behaviour and values of citizens and their community leaders. However, it is well established that, even with the many improvements made over the past quarter century, obstacles to equality remain. There is an inequality and lack of access to justice for Canadian citizens with disabilities, whether as witnesses, employees, or disputants/litigants. At present, there is no pan-Canadian effort to counter this. This inequality has been noted from time to time by such organizations as ARCH, the John Howard Society and the

Learning Disabilities Association of Canada, as well as leading authorities within the Justice system itself.

In an earlier report on discrimination, for example, the Law Society of British Columbia found that many in the legal profession equated disability with incompetence — a prejudicial attitude that fosters pervasive negative images. This concern over an increasing gap between rhetoric and practice in the administration of Justice also has been significantly noted by Madame Justice Beverley McLachlin of the Supreme Court of Canada. According to studies undertaken by the Disabled Women's Network (DAWN), the Canadian Paraplegic Association (CPA) and Independent Living Canada (ILC), "consumers" (persons with disabilities) have become increasingly discouraged and unwilling to participate in most legal processes. Cost is only one of the factors. Each of the following objectives is critical in achieving the goal of the EIP.

- to produce a professional development education component for everyone involved in the administration of Justice, to avoid real or perceived lack of access
- to help better understand the duty to accommodate
- to develop a national Information Database Service (dedicated web site),.
- To help persons with disabilities participate with confidence, in theCanadian legal/judicial system. Firms have not fully tapped the potential of law and other graduates with disabilities, who can bring to bear, their own experiences and expertise to the practice of law and applications of ADR.

By working with the various organizations and leaders within and outside the Legal System and, at a number of significant entry points, we can change the critical policies and practices that undermine equality. Here, the ADR community, with their specializations in conflict resolution, can play a crucial role in achieving equality and access to Justice, for all Canadians. This includes citizens with low literacy skills, persons with disabilities, the elderly and those who live in poverty. To sum up Reach's historical mandate and future aspirations, the following is a quote from their website:

"Since 1981, Reach has successfully brought public and private sector forces together to address equality and Justice issues that have been identified by community members who have a disability. Reach offers a process for change that builds partnerships, mobilizes community resources, and empowers individuals to work together in a spirit of inclusion."

Right Honorable Ramon J. Hnatyshyn P.C., C.C., C.M.M., C.D., Q.C. (1934-2002) (Honorary Chair of Reach 1998-2002)

Reach looks forward to collaboration with those engaged in ADR so that persons with disabilities can secure A Dignified Resolution … ADR personified.

As of September 11, 2009, we are most grateful to announce that the new Honorary Chairperson for Reach is The Honorable John D. Richard (former Chief Justice of the Federal Court of Appeal of Canada)

For further information on Reach, please go to the website at www.reach.ca.
The Reach Equality In Practice Team: Charles (Skip) Brooks, Project Manager,
Jim Turner, Information Manager, and Ernest Tannis, National Spokesperson and Honorary Officer

Joel Cohen, C.A., Senior Partner
Audit, Dispute Resolution and Mediation, RSM Richter LLP

Business Mediation in a Recovering Economy

This fall is a precarious time for businesses. Canada's leading economists continue to debate whether the recession that has gripped the country — and the world — for the past 18 months has finally ended. There is less debate about the timing of the turnaround — the consensus is that it will be slow.

Before the recession, when revenues were strong, company owners could afford to postpone tough decisions. Good times often cover mistakes and inefficiencies. As the economy slowly recovers, owners need to get their companies back on course as soon as possible if they hope to emerge intact, and ideally, well positioned to profit when the upturn comes. However, differences among stakeholders can result in delays in making crucial strategic decisions. As tensions rise, people may be further distracted from the task at hand, increasing the risk of business failure. Early intervention with a financial mediator can be the answer.

Critical issues which companies can't postpone until the "good times" return include:

- Defining the business's value

proposition and establishing a compelling product position in the market place.

- Analysing expenses and reducing or eliminating costs that don't benefit the company.
- Evaluating the management team and making hard decisions to eliminate or upgrade personnel.
- Reducing uneconomic shareholder or management burden on the business.
- Determining whether or not the business has sufficient capital to achieve its objectives. If not, attracting additional capital to strengthen the balance sheet.

The "right" business mediator

As professional mediators, we know that successfully applying our skills and experience can prevent lengthy legal battles that can take a damaging emotional and financial toll on any business even in robust economic times. In the current economy, it is more important than ever to begin resolving conflicts among stakeholders as soon as possible. In disputes that are financial in nature, a mediator with a strong business background can improve the speed and efficiency of the mediation process. A financial mediator with the right combination of business and financial expertise, interpersonal skills and mediation experience can make the difference in a business surviving.

What is the right combination of skills and experience for a financial mediator in these situations?

Most important, the financial mediator has to have the overall business skills to understand what drives a company and how to measure the business.

Also necessary is the financial expertise to be able to look at financial statements and other documents and quickly identify the issues that are impacting the financial metrics of the business.

An effective financial mediator has soft skills, too. He or she knows what motivates people and what de-motivates them; understands how to manage differences of opinion before they degenerate into conflict; recognizes what causes conflict and knows how to manage conflict when it arises.

Begin with a high-level session

Often, the efficiency of mediation can be improved by starting the process with an informal interview between principals and the financial mediator. The mediator's initial tasks are to facilitate dialogue and to tease out the real concerns as personal agendas may cloud judgment and cause stakeholders to express firm positions that have nothing to do with the strategic business issues.

Picture a manufacturing company with two shareholders who presented two diametrically opposing views. The company had grown to need more capital, more modern technology and access to more markets. The older shareholder, a man in his early 60's, wanted to sell the business; the younger shareholder, a man in his 40's, wanted to develop the business by buying new technology and hiring more staff. However, he couldn't afford to buy out his partner.

During mediation sessions, the mediator explored each person's objectives through the use of structured questions. The older stakeholder was asked to identify his goals: When do you want to retire? How much money do you need? When do you need it? Can we develop a five-year plan to achieve your goals?

When the answers to these questions were quantified, the senior stakeholder realized that he didn't need to sell right now. Meanwhile, the mediator helped the younger stakeholder quantify how much capital it would take to get the business to where it needed to be and how much time and risk would be involved.

Through mediation, the shareholders explored ways to acquire skills and technology to keep the company competitive. Both sides came to see that a strategic alliance with a multi-national firm in the same industry through the sale of a significant minority interest would resolve their issue.

> Canada's leading economists continue to debate whether the recession that has gripped the country – and the world for the past 18 months has finally ended

Helping parties see that the best solution for the business is the best resolution for them is the crux of financial mediation. In good economies, the faster a resolution is achieved the better. In today's slow economy, a timely resolution is more important than ever.

Joel Cohen, C.A., is a senior partner in the audit group at RSM Richter and leader of the firm's dispute resolution and mediation practice. Joel specializes in providing consulting services, including strategic business advice, refinancing and reorganization and special accounting and financial projects. He also has extensive experience in financial mediation and alternative dispute resolution. RSM Richter is the ninth largest independent accounting, business advisory and consulting firm in Canada. The firm has offices in Calgary, Montreal and Toronto and is part of a strong international affiliation covering all major markets around the globe.

Cinnie Noble

Conflict Coaching: A New ADR Technique

Karen was promoted to a management position four months ago. In the past month, three staff members complained to her boss, saying Karen's micromanagement was stifling them and that she argues with them when they ask for more autonomy.

The boss conveyed this to Karen who reacted strongly, pointing out the staff's bad habits require her to "manage them tightly." Karen is concerned that her response to her boss may be career-limiting and she wonders what to do about this situation and her style of management.

James and Margarite separated a year ago and both are reluctant to hire lawyers because they fear the cost. Margarite read about collaborative family law and mediation, but she anticipates James will resist her efforts to move things along, even in these ways. Margarite may want to see a coach to explore these options and prepare her to communicate with James in a way he may best receive her suggestions.

Caroline is the CEO of a major retail store. She is about to enter into major negotiations with the competition about a possible merger. A skilled negotiator, Caroline knows a lot is at stake and, although she has had much experience to date, she finds herself inordinately concerned about the upcoming discussions. Caroline may want a coach to help her prepare for these negotiations.

Mediators reading the above scenarios will likely consider how mediation may benefit the parties. Coaches are likely to consider the advantages of coaching. The forum used, mediation or coaching, depends on several factors, including the preferences and objectives of the person seeking assistance. For instance, Karen may want help on how to structure a conversation with her boss to rectify matters. She may also want some coaching on how to improve her management style to avoid similar problems in the future. Margarite may want to see a coach to explore her options and to help prepare her to communicate with James in a way he may best receive her suggestions. Caroline may want a coach to help address her concerns and prepare for these negotiations.

Growth of Coaching

Since the early 1990s, there has been an exponential growth in the field of coaching and its range of categories, including executive, organizational, life, and business coaching. There also has been an increase in coaching specialties, ranging from career coaching to weight loss coaching to parent coaching, and so on. In the ADR field, conflict coaching is fast emerging as a specialized technique, and this article provides a perspective on some of its applications.

A Definition of Conflict Coaching

Conflict coaching is a one-on-one process for helping individuals improve their conflict understanding and skills, to manage conflict and disputes more effectively. This definition, and variations of it, are used to describe a technique with the fundamental objective of coaching people to better engage in their interpersonal conflicts in both their personal and professional lives.

Assisting individuals with their interpersonal conflicts is not a new concept. Indeed, one of the many roles of organizational ombudsmen is to assist staff members on a one-on-one basis. In various ways others, such as union representatives, counselors from employee assistance programs, managers, supervisors, and HR professionals, routinely assist individuals with conflict situations in the workplace. Similarly, therapists, psychologists and other human services professionals assist people with conflict in their personal and professional lives. The word "coaching" however, is being used by many professionals and practitioners in these various groups, although their practices may not necessarily fit within the definition of coaching according to one of the coaching field's main organizations, the International Coach Federation (www.coachfederation.org.)

Since the early 1990s, there has been an exponential growth in the field of coaching

The following is part of a general definition of coaching, as stated by the International Coach Federation:

Coaching is partnering with clients in a thought-provoking and creative process that inspires them to maximize their personal and professional potential. Coaching is an ongoing relationship which focuses on clients taking action toward the realization of their visions, goals or desires. Coaching uses a process of inquiry and personal discovery to build the client's level of awareness and responsibility and provides the client with structure, support and feedback.

Coaching is an ongoing relationship which focuses on clients taking action toward the realization of their visions, goals or desires.

Unlike sports coaching, conflict coaching, as many other types of coaching, does not entail advising people what to do to improve their actions and reach their goals. Rather, one of the cornerstones of the field of coaching is self-determination and one of the main skills of trained coaches is the use of powerful questions that increase insights and awareness that help people, to help themselves.

Applications of Conflict Coaching

Currently, conflict coaching as a distinct technique appears to be growing mostly in workplaces as an additional option for employees and tool for mediators, whether or not there is an Integrated (Informal) Conflict Management System. This technique may be used instead of, or in tandem with, mediation and other ADR processes. In addition to helping individuals improve their conflict management skills in any context, some other applications of conflict coaching include:

- as a pre-mediation or pre-other ADR process to help individuals anticipate and prepare for any challenges and to effectively participate in the process;
- to prepare clients to actively and effectively participate in collaborative law meetings;
- as a post-mediation or post-other ADR process to help individuals with the aftermath of any unresolved matters and ways to manage ongoing interactions;
- to help managers, supervisors and others focus on aspects of their conflict conduct requiring improvement;
- to help people enhance their negotiation skills;
- as an integral part of conflict management training, to provide individualized ongoing assistance with participants' specific challenges; and,
- to facilitate self-reflective practice of conflict management professionals and others who work in any capacity, with people in conflict.

Summary

As an additional tool for ADR professionals, conflict coaching represents a multi-faceted process that is adaptable to the specific conflict management goals of the individuals who seek coaching. Although there are a number of similarities between some aspects of conflict coaching and mediation (and other ADR processes), there are a number of significant differences, besides the one-on-one nature of coaching. For instance, the types of goals an individual may bring to a coach are not necessarily about resolving issues. Objectives often include the desire to gain strategies for changing non-productive behaviours, or to manage situations without assistance of another person. While similarities also exist in some of the skills and steps used by both coaches and mediators, there are also differences that warrant appropriate training.

Creative ADR practitioners will undoubtedly develop more applications of the conflict coaching process. These may be used in any context in which people want individualized assistance to be able to engage in their interpersonal conflicts more effectively. Standards of practice will inevitably develop within our field in the foreseeable future and conflict coaching will increasingly establish its place in the ADR continuum.

Cinnie Noble, ACC, CM, LL.M. (ADR), is a lawyer-mediator and ICF certified coach who created the CINERGY® model of conflict coaching. She chairs the ACR Workplace Section's new Conflict Coaching Subcommittee and is co-chair of the ICF's Special Interest Group on Conflict Coaching.

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Colm Brannigan

Marketing Solutions

The title of this short article reflects what we as dispute resolvers actually do. We market solutions to our client's problems. But we cannot do that if no one knows about us. Marketing an ADR practice takes planning, and a commitment to the process.

Many years ago when I took my first family mediation training, Judy Ryan, who gave the course, provided the following tips. Some are now a bit dated as this was before the internet became the primary marketing tool for many of us. They are, however, still worth repeating.

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Judith P. Ryan, M.S.W., LL.B., LL.M.

The Top Ten Tips For Marketing Adr

1. Network, Network, Network

Every person you meet represents a potential business opportunity. Tell everyone you meet what you do and what ADR services you offer, including friends, family, neighbours, real estate and insurance agents, doctors, dentists, accountants, bank managers, hairdressers, church groups, colleagues, professional and voluntary associations, children's teachers, little league parents, other tenants in your building, etc.

2. Always Carry A Business Card With You

Your card should look professional (not homemade on a computer). Exchange your card for the card of your new contact and jot down any relevant information on the back of the card before you file it systematically for future reference.

3. HAVE AN UPDATED CURRICULUM VITAE ON HAND AT ALL TIMES

Keep it short and to the point and highlight your experience and activities relating to ADR. For example, training programmes, memberships, professional experience. A one-pager with a photo insert is a good idea.

4. DEVELOP WRITTEN PROMOTIONAL MATERIAL ABOUT YOUR SERVICES

For example, a kit containing your curriculum vitae, business cards, general information about ADR, a brochure about your services, newspaper clippings and articles (preferably written by and about you). Choose an attractive colour-coordinated format for your written materials and leave lots of "white space" around your written text. Above all, do not overstate the benefits of ADR, eg. that it is faster, cheaper, more satisfactory than litigation. Such claims may later come back to haunt you.

5. Seek Out Free Publicity Wherever Possible

Make yourself visible in your community by offering to speak about ADR at meetings of community organizations and professional associations. Write letters to the editor in response to ADR related topics and offer to write a free column or series of articles about ADR in your local newspaper. Phone in your views to "talk ratio" programmes on relevant topics and better still, make yourself available as an "expert guest." Offer your assistance to your local cable TV station to prepare a programme on ADR. If you can provide a newspaper columnist or radio interviewer with a timely and interesting idea for a "story line" you may be able to obtain extremely effective promotion for no cost. In the words of a friend, Susan Perloff, "Advertising is what you pay for, public relations is what you pray for."

6. Advertise

If you are going to spend money on advertising, do it carefully and creatively. Advertising in newspapers and magazines is generally very expensive and tends to be most effective if done regularly. Be brief and to the point—one punch line, plus your name and telephone number—every week. For cost savings, try advertising in a community or professional newsletter, church bulletin or shopper's news. Post a notice on shopping centre billboards. Get more "bang for your bucks" by joining forces with other ADR professionals and advertise as a group. Buy space on park benches, buses or even large billboards.

7. Become An Author With A Unique Message

Write a book about ADR or write articles for professional and trade journals relating to unique aspects of ADR practice. Be creative. Try to fill a niche that combines your

ADR skills with your own professional background and special experience, e.g., a nurse might develop expertise in health care mediation; an accountant, in financial valuation issues. Capitalize upon your contacts from your

previous professional or work experience.

8. Offer Something Free

Offer a free consultation for your services or arrange free refreshments while you make a presentation. Sponsor either a league basketball or hockey team who wears your logo. Arrange a demonstration for a potentially large client. Leave the client with coffee mugs, pens, pencils or bumper stickers bearing your corporate name, logo and telephone numbers. Every time they pick up the item, they will be reminded of you. Think about installing a 1-800 number.

9. Be Proactive

Foresee potential conflict situations and be the first to offer your services. Read your newspapers and trade magazines regularly and identify possible business opportunities. Make a personal contact with a key person to discuss possibilities and follow this up with a personalized letter and your written promotional materials.

10. Good Service And Follow Up

Your best marketing tool is giving good service and follow up with both potential leads and clients. One satisfied customer will spread the good word about you, but one who is dissatisfied will have a much more significant impact. Timely follow-up is essential. Write a note to all potential contacts with whom you may have exchanged business cards. Thank all referral sources (a phone call or one-liner), and follow up with all clients to let them know that you have their interests at heart.

If all else fails, take an established eediator to lunch. Most are willing to give you some free advice—but not by returning long distance phone calls at their own expense or chatting at length during business hours.

Building on this, I would like to develop a series of marketing tips and invite you to contribute your ideas to the newsletter. We can help each other by sharing this type of information so please take a few minutes of your time and let us know what has worked for you, and if you are brave enough, what did not work! We can all learn from each other and build stronger and sustainable practices.

Rosaleen Leslie Dickson

Anonymous "Arbitration" on the World Wide Web

Intergenerational problems were to be the focus when "Creative Retirement Manitoba" http://www.crm.mb.ca/ asked me to organize an "Ask Great Granny" column, http://www.crm.mb.ca/granny/index.html . Early in the experiment, it became apparent that most people's worries in this category relate to mother-in-law vs. daughter-in-law disputes. A few ask "what to do about grandpa" and how to deal with "teen aged children" and even "why are teachers so unfair" etc ... but most are about "in-law" dilemmas.

They usually consist of lengthy complaints against the younger, or the older, woman. My responses were brief and clear, and often brought warm and effusive thanks. I would never have thought that anonymous advice would actually be of help to people with serious problems. Now, 16 years later, the same sad stories flow into my Inbox and I manage to provide uplifting, much appreciated advice. It's not "arbitration" - it's just friendly help. There is no fee involved and I am told that whatever is free has no value. In my books, that's moot.

People with problems will still seek, find and welcome help from strangers on the Internet. In most cases, they have already been aware of the answer, and receiving it from a stranger just helps their resolve to do what they already knew they should do.

Mothers and wives generally learn early to live and let live, for the benefit of the men they care for. But also sprinkled profusely about the population are those who can't manage the generosity of spirit needed for such co-operation. These are the people about whom the tired old "mother-in-law" jokes are written, and who send letters to "advice columnists" for help.

The "Ask Great Granny" letters come from mothers and wives who haven't yet figured out how to manage their delicate relationship. They may not agree with all the suggestions in the replies to their letters, but they are free, so they have nothing to lose. The replies are not intended as directions or rules of procedure, just well-considered ideas to help troubled people think through their own problems.

Many alternate solutions will come to their minds, and in thinking through these other ideas, the best for each individual case might be found. With the current evolution of electronic influence on our daily lives, I have to wonder how long people will continue to seek advice from strangers on the Internet. As an ADR member, with an enquiring mind, I intend to continue this experiment for another 16 years. In my books, at 88, that too is moot.

From the desk of Rosaleen Leslie Dickson
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Tonio Sadik

"Addressing the Power Imbalance in Indigenous-State Relations"

Although there is little doubt that ADR has already found a place within the context of indigenous-state relations / dispute resolution, the focus of this article is based on the proposition that there should be much more. There are a number of circumstances that lead me to this conclusion and I would like to use this opportunity to briefly set out a few of them.

There are two distinct starting points: one finds itself in the recently published book by John Ralston Saul ("A Fair Country" 2008) that relates to the place of aboriginal peoples within the context of what may be termed the "Canadian national identity"; the other in the practical, hands-on world of First Nation-Crown relations.

Ralston Saul argues that much of what is "Canadian" finds its roots in an aboriginal (as opposed to European) world view. To do so, he identifies a number of unique "Canadian" traits or attributes, many of which distinguish us from Americans, one of which is a penchant for negotiation over confrontation – and in so doing, provides us with a compelling narrative for self-reflection (whether or not we agree with his conclusions).

The second starting point emerges from what has been the better part of two decades of work that I have carried out on behalf of First Nations, often in their engagement with the federal Crown. The most significant observation that I want to convey in this regard relates to the dramatically skewed power imbalance that characterizes First Nation-federal Crown relations. This power imbalance is so heavily skewed in favour of the Crown that, at times, the parties to a negotiation accept this imbalance (however begrudgingly) as an inevitable characteristic within this context of engagement. It is this context of engagement that requires mitigation.

This is to say that – short of resorting to the courts where the position advanced by the Crown is often characterized by a complete denial of the existence of a respective First Nation despite whatever other negotiations might have preceded litigation – negotiations between First Nations and the federal Crown typically begin and end within parameters that are almost exclusively set by the federal government.

This power imbalance is so heavily skewed in favour of the Crown that, at times, the parties to a negotiation accept this imbalance

The specific origins of this profound inequity may be debatable, but there are a number of sources that can be readily identified to be sure. These include the Indian Act and the powers that it confers to the federal Crown / federal minister to the exclusion of First Nations themselves, as well as many other policy documents that serve to limit federal engagement regardless of the context (e.g., Comprehensive Claims Policy, Inherent Right Policy, Specific Claims Policy, etc.). More significantly, despite the fact that these legislative and policy tools operate to circumscribe federal engagement at the front end, they often fail to ensure that the federal government lives up to its corresponding legislative and policy obligations at the back end. For example, treaty implementation (whether historic or modern-day) is characterized by a litany of commitments that the federal Crown has failed to live up to – and there are countless other such examples. The federal bureaucracy is replete with sympathetic and apologetic individuals who are, nonetheless, the gatekeepers and enforcers of a system that is patently unfair and unbalanced.

In a short article such as this it is true that my argument is scant on concrete examples, but hopefully the essence of what I am describing retains its meaning with or without a reader's necessary agreement. To this end, my primary point is to call for greater third party engagement in indigenous-state relations – not as a means to resolve the source of the problem alluded to above (which, regrettably, will require far greater federal engagement than is currently at hand), but rather, as a means to mitigate the disastrous consequences of failing to meaningfully address the underlying consequences of an essentially racist and colonial system of government as it relates to indigenous peoples.

More specifically, the argument being made here is that third party engagement – most likely in the form of a mediator – could contribute to a leveling of the field. The challenge being that this policy field is so severely skewed in favour of the federal Crown that

it is unlikely and, indeed, rare, that it ever feels compelled to accept this as a condition of engagement (never mind the prospect of arbitration). Practitioners of ADR, however, can take it upon themselves to familiarize themselves with this legal and policy context, ensuring that they are aware of the range of issues that inform it. A good starting point, as I began to describe above, is to read John Ralston Saul's most recent book and, with this, to gain a greater appreciation of a situation that is not only tragically unfair, but that brings with it countless lost opportunities – not only for practitioners of ADR, but more precisely, for First Nation citizens and all Canadians alike.

This call to arms, so to speak, is not just about bridging a significant divide that has long shackled First Nations, but is also a call to all of us working in the field of indigenous-state relations to break down old barriers in order to nurture the full human potential of First Nations as a distinct, vibrant and net contributor to Canada as a whole. We cannot afford to continue to repeat the mistakes of the past (perhaps we never could?), but surely the prospect of further federal tutelage has outlived its usefulness – whether or not it had any in the first place.

Tonio is Senior Director of Strategic Policy, Planning and Law at the Assembly of First Nations, and teaches in the Faculty of Social Sciences at the University of Ottawa. He has worked within the context of negotiations and dispute resolution since the mid-1990s, focused primarily on First Nations issues. He completed his PhD (anthropology) at Simon Fraser University in 2008. Tonio lives on the outskirts of Ottawa with his wife and three children.

Maralynne A. Monteith, WeirFoulds LLP*

Looking to the Future – Mediation of Estate Disputes

Anyone who practises in the Estates arena knows how highly charged the issues can get. Even contentious family law matters can be overshadowed by the emotional complexities involved with trying to resolve a disputed estate matter. Once mired in these complexities, it is all too easy for the disputing parties to lose sight of the actual issues that need to be resolved.

This is why alternate dispute resolution is so well suited to estate matters. It seems almost immediately obvious that a resolution facilitated by a mediator is to be preferred to the adversarial process of litigation: mediation does not impose a solution on the parties but allows the parties to explore the possibilities of a common ground solution. Mediated solutions are more likely to be successfully implemented; and, they give a better opportunity for the disputing parties to reach a solution that improve the chances of the parties (usually family members) having a positive on-going relationship once they leave the room.

Unique to estates disputes is the inherent problem that one of the critical individuals in the piece is no longer there to speak. In addition, there are many parties' rights and interests that have to be taken into consideration in formulating a resolution that may be implemented successfully. More often than not, some of those interested parties will not be present in the mediation.

Therefore, it is important to assess the skills a mediator in an estates dispute may require to best facilitate a successful result.

If the dispute involves interpreting a testamentary document or trust arrangement, an important skill for the mediator will be a firm grasp on the interpretation of such documents and testamentary capacity issues. Where litigation looms, experience with estate litigation will be important. In virtually all situations, the mediator will have to be aware of to the various parties whose rights may be impacted by the dispute and its resolution – such as dependant's relief candidates, minors, or disabled persons. Estate disputes involving a family business will need skills such as familiarity with corporate documentation, contracts and shareholders' agreements. Sophisticated estate disputes with complex and varied estate assets will benefit from mediation skills that include an understanding of complex financial information and analysis.

And let us not forget the ubiquitous impact of taxation issues to which the dispute and the options to resolve it give rise. It won't be a successful resolution if its implementation results in an unintended tax consequence.

With the variety and complexity of issues that may arise in an estate dispute, mediation offers a very appealing alternative to litigation. It offers a better chance of a successful resolution with a process that is far more economical. The chances of a successful and efficient result will be markedly improved if the right skills can be brought to the mediation.

**Maralynne is the Senior Tax Lawyer at WeirFoulds LLP and a member of the Estate Dispute ADR practice which also includes Lori M. Duffy and Clare E. Burns.*

Daryl Landau

York University Administration Should Accept the Recommendations of the Task Force

York University, like other campuses, has been struggling to find a balance between free speech and respectful peace.

Too often, aggressive speech by some has provoked aggressive actions by others. A task force has now offered wise recommendations that could change the existing culture and systems, and we will see what the Administration plans to do differently.

In February, 2009, Toronto Police had to investigate possible hate crimes at York University – including calls of "dirty Jew" - and the University penalized several student groups for improper actions:

- Students against Israeli Apartheid was suspended for 30 days and fined $1000.
- The same penalties apply to Hasbara Fellowship, an Israel advocacy group, and Hillel@York was fined $500.
- The York University Tamil Students' Association was suspended for 15 days and fined $500.[1]

These penalties are merely highlights of the public rancor that has existed on campus. Reports from others indicate that many have felt intimidated by the conduct of these groups and also outside protesters.

The mandate for the task force, chaired by VP Patrick Monahan, was to develop "principled recommendations that reflect this university's unwavering commitment to fundamental values of free expression, free inquiry, and respect for genuine diversity of thought and opinion."[2] One of the central questions to explore was "How should the University respond to incidents or behaviors that do not meet the community's expectations with respect to tolerance of and respect for diversity of views of members of the York community?"

These are some of the key recommendations[3]:

- The creation of a Standing Committee on Campus Dialogue (SCCD) to foster genuine debate and dialogue on important public issues from the widest possible range of perspectives.
- The development of an Intergroup Relations program at York to promote dialogue and social engagement between students from different groups, similar to successful programs in US and Canadian universities.
- Creating an annual Award to recognize a student who demonstrates a strong commitment to fostering intercultural awareness and constructive dialogue.
- A comprehensive review of student space on campus and a plan to develop more student space in the future.
- Ensuring that access to space is not used to prevent discussion of controversial topics.
- The Student Code of Conduct be amended to include certain fundamental student rights including the right to free expression and association, the right to be free of discrimination, and the right to procedural justice.
- That a student ombudsperson be appointed who could advise and advocate for students.
- Reduce the time required to adjudicate complaints under the Student Code, and ensure independent decisions.
- Create an officer that is charged with issues around cultural awareness and anti-racism training.
- Anti-oppression training for all members of the community including students, faculty and staff.

Finding a balance between free expression and responsible dialogue can be difficult, but these recommendations achieve this by distinguishing rights from preferred conduct. Yes, students should have a right to express their views, but we would prefer them to express those views with some care and concern for others. We don't want self-censorship of ideas, but we do want self-censorship of vitriol.

As broad as the recommendations are, they may not go far enough. Universities are both mirrors of society, and the seed beds of our future. We ought not to foster an adversarial "Argument Culture," but rather a culture of respectful dialogue. As Deborah Tannen points out, universities promote "the assumption that challenge and attack are the best modes of scholarly inquiry."[4] Frank Dukes also highlights the difference between these forms. "We all know the characteristics of an all-out, knock-down, drag-out debate…Nobody ever admits wrong or uncertainty…Deception and deliberate distortion of the opponents' words are also often accepted as part of the game…."

We need to create "forums and processes where individuals and organizations can be forceful advocates without being adversarial…and where communities can come together rather than split apart when faced with tough problems and divisive conflicts."[5]

York's Administration deserves praise for setting up this task force, and ensuring a fair and strong representation of students on it. Now it needs to either accept these recommendations, or explain why it will not. Perhaps the task force has recommended too many new positions and committees. The Administration will have to decide whether they can work together effectively with existing bodies. Then all universities should take a closer look at what it teaches students about "critical thought." Still, this marks a step in the right direction, and hope for campuses in this city and beyond.

Daryl Landau is a conflict resolution consultant and a counsellor. He chairs the Public Conflict Section. Visit www.common-ground.ca for more information.

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Robert Pidgeon

June 10 Joint ADRIO-OBA Program

The June 10 joint ADRIO-OBA program brought together 6 expert panelists, and a full room of participants from the ADR community (including a number of ADR students) to explore ways to build and enhance ADR practices. The panelists began with passionate and diverse presentations drawing on their own paths to success. This was followed by all participants engaging in small group discussions, each facilitated by one of the panelists.

This program resulted in a great depth and range of ideas around building and strengthening a practice in ADR. The following sketch was prepared and presented to the full group as an attempt to reflect the richness and range of the day's discussions. I reproduce it and discuss it briefly here to help recognize the value of the day. The spirit created was one of colleagues sharing and helping each other to succeed in their practices. There seemed to be a recognition that by helping other ADR practitioners succeed we help ourselves, and we further the development of the ADR field in general.

BALANCED APPROACH

The collective voices of the panelists and the wisdom of the small group discussions seemed to suggest that an ADR practitioner should pay attention to and balance extremes in two areas.

1) Leverage What We Know — Learn What We Don't

First balance leveraging innate ADR practitioner strengths with recognizing and attending to the need to learn new skills/tools around marketing.

It was noted that as practitioners we do two things exceedingly well. Mediation and Arbitration requires we listen well and communicate effectively. It was suggested that we apply our listening skills to those around us, to media and friends and colleagues and particularly to prospective clients, to hear their needs, and to identify potential opportunities. Similarly, since we already possess the ability to communicate effectively, it was suggested we make the most of this ability to let people know who we are and what we do, again potentially increasing the opportunities available.

On the other hand a number of panelists and participants noted that we too often ignore the business and marketing skills and processes that are necessary for success. We were encouraged to explicitly focus on areas including business planning and marketing, embracing these new skills as part of our practices.

2) Be Aware of Short Term — Plan for Long Term

The day's discussion equally highlighted short and long term considerations in enhancing a practice. The present economic situation, current events and trends (such as increase in intellectual property activity) were all highlighted as import to be aware of and act upon in finding work opportunities. The purchase of ADR training was noted as decreasing in some areas while mediation work increases. Others noted an increase in certain kinds of specialized training. The overall message is to be sensitive to short

term dynamics around us.

At the same time there was a strong message to not forget about long term planning. To determine the kind of practice we want, and to plan steps that will help move us towards that long term vision. Honing in on our natural markets (those in which we have contacts and experience) was noted as important in building a practice.

WHY WE DO IT

At the centre of the entire discussion seemed to be a passionate message around the importance of commitment to your vision, confidence in achieving it, and the immediacy to take charge and begin now with bold steps.

HOW WE DO IT

It would be impossible to list all of the great suggested tools and techniques and approaches raised during the day. And it was clear that in the time available the panelists and small-groups were only able to scratch the surface in this effort. Still there was an inspiring number of specific ideas shared around building and strengthening an ADR practice. They included suggestions around writing and speaking about ADR, maintaining ongoing contact with clients, raising one's visibility amongst our ADR colleagues and within our client systems, gaining accreditations and taking advantage of technologies.

Overall the June 10 2009 Joint ADRIO-OBA program served to demonstrate one of the central benefits we leverage every time we work with our clients. That parties communicating and co-operating together can satisfying important goals while at the same time strengthening relationships.

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