



ADR Update

Spring 2010 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 services. The Institute represents over 600 professionals in Ontario.

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Barry Leon, Andrew McDougall and Daniel Taylor

The CEDR Rules for the Facilitation of Settlement in International Arbitration: An Important Advance in International Arbitration

In 2007, the London-based Centre for Effective Dispute Resolution (CEDR) formed a Commission on Settlement in International Arbitration, under co-chairs Lord Woolf (author of the Woolf Report that led to significant reform of English court procedures a decade ago) and Gabrielle Kauffman-Köhler (a leading Swiss arbitrator).

The Commission was formed in response to concerns about the time and cost of international arbitration. These concerns emanated from corporate counsel, the "users" of international arbitration, and threaten to undermine its acceptability and growth.

Commission members included arbitration practitioners from a wide range of jurisdictions and several corporate counsels. An author of this article, Barry Leon, is a Commission member.

Research suggests that settlement rates in international arbitration are significantly lower than in many national courts, particularly courts using early

settlement and ADR techniques.

The Commission considered several approaches to encourage settlement in arbitration including mediation and conciliation techniques used by arbitrators in China and Hong Kong and the approach in Germany and parts of Switzerland where arbitrators are generally willing early in proceedings to provide their preliminary views in order to encourage, and provide focus for, settlement discussions.

In November 2009, CEDR held a conference to launch the Commission's Report. The Report includes the CEDR Rules for the Facilitation of Settlement in International Arbitration. The Rules are designed to be incorporated by agreement into the procedures adopted in arbitration. Significantly, Article 5(1) provides that the arbitral tribunal may – at its discretion:

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Message from the President

Greetings to all members... and hoping that spring has been an opportunity for a new beginning in some aspect of your ADR journey.

The Advocacy Committee and Board of Directors continue to monitor the Ministry of the Attorney



General's initiatives under the 4 Pillars of Family Law Reform, consult with the Ministry of Northern Development, Mines and Forestry

on the Mining Act Regulatory development and have provided input into a potential Uniform Commercial Mediation Act which would provide uniformity in rules to domestic and international commercial mediations.

The Marketing Committee is creating a Focus Group of Accountants to inform a marketing strategy to this sector.

Section meeting attendance is up, including some standing room only events that included presentations on "Changes to the Rules of Civil Procedure" with Gary Furlong and David Bristow and "Introduction to

Referral Success 101" with Cindy Mount.

I urge members to participate in these 'without charge' sessions. The valuable information delivered and the opportunity to interact with colleagues in an informal setting, make it a worthwhile investment of time. For those outside the GTA who cannot attend in person, call Mena to arrange participation by telephone.

In addition to the sections on Restorative Justice, Facilitation, Workplace, OMMP, Family and Construction we are honoured to announce that Tom Bastedo, an esteemed family lawyer will be chairing a new section on Family

Non-Lawyers.

Our AGM is being held on June 1st at the Ontario Bar Association Conference Centre. Be sure to attend or send in your election ballots for the election of Directors to next year's Board. The AGM will be followed by an excellent program, organized by our dedicated PD Committee, with two important panels that will deal with "Building Successful Client Relationships for Long-Term Success."

Many thanks to our Newsletter Committee: Lorraine Joynt, Colm Brannigan and Bunny Macfarlane for their work on this very noteworthy issue.

As I come to the end of my two

Call Mena for registration details for Gary Furlong's upcoming one-day course on Civil Procedure for Non-Lawyers.

Arbitration with sessions starting this fall.

Call Mena for registration details for Gary Furlong's upcoming one-day course on Civil Procedure for

year term as President, I wish to thank the Board of Directors, the members and the staff of the ADR Institute of Ontario. I have been honoured to participate with you to develop and expand our thriving professional organization.

— Heather Swartz, President.

Notes from the Editor

Message from the Editors

Thank you all for your wonderful submissions - it is exciting to review the material. In this newsletter there are articles on arbitration, the new rules for workplace harassment, employment law, child welfare, family law, sports, being a conflict resolution intern, partnerships, and restorative justice. Dr. Deb gives another scenario to make us think about

how to handle a mediation situation and Colm Brannigan gives some tips on marketing. Ernie Tannis gives a perspective on Negotiating in Good Faith.

Please enjoy the newsletter and if you have any comments feel free to forward your comments and questions to anyone of the editors.

Also we do encourage you to

attend the annual general meeting in June.

Have a great summer and may you have interesting mediations.

Bunny, Lorraine and Colm.

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ADR INSTITUTE of ONTARIO AGM, LUNCHEON and SEMINARS

YOU NEVER STOP MARKETING!

BUILDING SUCCESSFUL CLIENT RELATIONSHIPS FOR LONG-TERM SUCCESS

Tuesday, June 1, 2010 | AGM 9:00 a.m. Program 9:45 a.m.

OBA Conference Centre, 20 Toronto Street, Suite 200, Toronto

You have successfully marketed yourself to the point where you have clients. Well done! The next step is just as critical. Some of Ontario's foremost practitioners will provide crucial information to ensure your ongoing success and expansion. You will learn how to:

- Provide your clients with short-term and long-term value that will keep the work flowing in your door
- Develop relationships that are your best form of advertising
- Encourage your clients to recommend you to others
- Extend your services based on the client's needs
- Provide ongoing value added so they will not forget you (newsletters, updates, seminars and more)

Agenda:

9:00 am ADRIO Annual General Meeting

9:45 am Panel Presentation:

You've Got the Client – Now How Do You Build
A Lasting Relationship?

Moderator: Bernie Morrow

Speakers: Genevieve Chornenki

Barry Fisher

Barbara Landau

Coffee Break

11:15 am Practical Tips on Drafting Mediation and Arbitration
Agreements that will Strengthen (Not Undermine)
Your Relationship With Your Clients

Moderator: Kathryn Munn

Speakers: Barry Leon

Kathleen Kelly

Blaine Donais

12:20 pm Luncheon and Presentation of the OBA Award of
Excellence in ADR to **The Honourable Mr. Justice Robert N.
Beaudoin**, Superior Court of Justice

Luncheon Keynote Speaker:

Ceta Ramkhalawansingh,

1:30 pm Sessions Conclude

CIVIL PROCEDURES WORKSHOP FOR NON-LAWYER MEDIATORS

June 12, 2010

9:00 am to 4:30 pm

ADR Institute, 234 Eglinton Ave. E., Suite 405, Toronto

Instructor: Gary Furlong, LL.M. (ADR), Chartered Mediator, Fellow,
International Academy of Mediators

The ADR Institute of Ontario is pleased to present 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. See attached document for registration details.

Register early to avoid disappointment. Space is limited.

ADR INSTITUTE of CANADA ANNUAL NATIONAL CONFERENCE

September 23, 2010 to September 24, 2010

Calgary, Alberta

continued from page 1

1. provide the parties with its preliminary views on the issues in the arbitration,
2. provide the parties with preliminary non-binding findings of law or fact on key issues,
3. offer suggested terms of settlement (where requested by the parties in writing),
4. chair settlement meetings (where requested by the parties in writing).

Article 4(2.4) ensures that the tribunal and the parties discuss and agree in advance on the techniques from Article 5 that will be utilized.

Key premises of the Commission's work are that first, parties generally want their commercial disputes resolved cost-effectively and efficiently, and second, often this can be achieved best through an agreed settlement rather than an award. In turn, arbitrator involvement in the settlement process, in a manner acceptable to the parties, often is helpful, and perhaps necessary, to the parties reaching a negotiated settlement.

However, the idea that an arbitrator should do more than adjudicate the dispute is controversial in some quarters, particularly in some common law jurisdictions.

From the arbitrator's perspective, there may be a concern that engaging with parties in the substantive issues or providing preliminary views may lead to an allegation of bias. To alleviate such concerns, the Rules provide (in Article 3(3)) that the parties agree that the tribunal's facilitation of settlement shall not be asserted as a ground for disqualifying the tribunal or for challenging any award rendered by it.

From the parties' perspective, there may be a concern that an arbitrator learning information or

forming perceptions through mediation or other settlement activity could colour the arbitrators' perception of the case if arbitration resumes. To address these concerns, Articles 3(4) and 3(5) of the Rules stipulate that the arbitral tribunal shall not:

1. take into consideration for the purpose of making the award any substantive matter discussed in the settlement meeting or communication, unless the matter has already been introduced in the arbitration,
2. judge the credibility of any witness based on anything revealed during settlement negotiations.

Some commentators worry that even if an arbitrator is capable of abiding by this directive and remaining impartial, the parties may not be convinced of that ability, so that the inclusion of the neutral decision-maker in settlement negotiations will have a counter-productive chilling effect on candid negotiations.

Another concern is that many international arbitrators are not trained mediators. It may be naïve to assume they will be able to perform effectively the very different role of facilitating settlement.

Being an effective arbitrator requires different skills and attributes than being an effective mediator. Mediators will often listen to an outline of the dispute and then meet (caucus) with each party separately – shuttling between the parties – trying to persuade them to moderate their respective perspectives and positions, and trying to identify compromise grounds. Many mediators believe that this process is essential to their work. However, the CEDR report recommends that an arbitrator “not meet with any of the Parties separately, or obtain information

from any Party which is not shared with the other Parties...unless the Parties explicitly consent to this approach and its consequences.”

The Commission recognized that an arbitrator meeting privately with each party “carries significant risk to the integrity of the arbitral process and hence to the enforceability of any arbitral award in the event that settlement is not achieved in the mediation phase.” While the Report does not recommend a “med-arb” process, it lists a number of safeguards (at Appendix 2) that can be used in order to minimize the risks involved with such an approach.

One important technique in the Rules is the use of a built-in period for the parties to discuss settlement during the arbitration. Article 5(3.1) provides that the arbitrator shall insert a Mediation Window in the arbitral proceedings when requested to do so by all parties. This Rule should be considered appropriate in most legal cultures as the arbitrator is not facilitating settlement directly, through active participation, but simply enforcing a pre-planned meeting with a mediator (who is not an arbitrator in the case).

Though controversial, the CEDR Report is not a revolution. The use of “mediation, conciliation or other procedures” in arbitration proceedings has long been acceptable in Ontario under section 3 of the International Commercial Arbitration Act. The Rules are not rules but rather a set of tools available to increase the prospects of settlement in arbitration. The Commission's work will be successful to the extent that the participants in international arbitration perceive that these tools strike a proper balance between increasing the tribunal's power to facilitate settlement and preserving its duty to remain impartial. ❁

Melanie Facchini B.A., CHRP

Bruce Ally B.A., M.A., Ph.D, LL.M, DRE (York U)

Is the Change Process in Employment Law Stymied by Bureaucratic Policies Rendering the Rules Unconscionable?

It is no surprise that in today's current economic climate many companies are challenged with the fiscal reality of survival.

There are numerous hurdles facing companies from an organizational perspective. Often, when faced with the day-to-day realities of financial survival the issue of entitlement, as codified in the law, raises its head. This poses many challenges to Mediators.

This article does not in any way seek to dispute Common Law entitlements, but rather questions, in light of the current catastrophic climate, whether special accommodations should occur in the law. If the answer is no then that would alleviate any existing concerns. However, if the answer is yes, we then seek to explore if the

alternate amicable resolution. It would appear that more and more companies are opting to avoid their responsibilities because of their inability to modify their ESA requirements. However, the use of this strategy places an undue burden on employees' families and a direct strain on the Canadian economy. One would think that in the mediation process a resolution could be arrived at; unfortunately, this is not so given the stringent ESA requirements. According to Statistics Canada, employment decreased by 43,000, following two months of moderate growth. This drop con-

we recognize that the recession has impacted the international business community as well. In the United States business bankruptcy has risen to a high not seen since 1975, while the UK's economy is expected to shrink by 4.2 percent in 2009. Moreover, throughout Europe the trend has been to implement a car scrappage initiative to help revive the weakening motor industry; which could be considered a mediative process in itself that amends the employment requisites. No comparable process can be achieved in mediation in Canada. Therefore we are lucky that the Canadian economy has other factors that bolster the Gross National Revenue and as such did not decline to the same extent during this recession. Despite these avoidant techniques, thousands of Canadians are unemployed as a result of the current crisis.

As we see it, the problem facing many companies today in the global economic crisis is a cash crunch in which companies cannot make their fair contributions, thus impacting the population in the area of payments be they EI, HST, or WSIB. This leaves them with three alternatives, to declare bankruptcy, to secure government bailouts, or to mediate an agreement that would work which would not be legally permitted since it would violate the ESA. Clearly there are

It is our opinion that government bailouts have led to the creation of a two-tiered system.

system has the ability to react to crisis, as we are faced with today, in a quick and meaningful process such as Mediation aimed at resolution.

Philosophically, the underlying question would be: *Is it better for the employee to get lesser entitlements, or should the company cease operations and declare bankruptcy, leaving workers left in the cold with no entitlement?* In the current economic crisis, the latter alternative allows the organization to escape its contractual responsibilities to staff, despite their desire to achieve an

sequently pushed the unemployment rate up 0.2 percent to a high of 8.6 percent. The burden on individuals and their families is so heavy that while total business insolvencies declined by 7.6 percent in Canada, total consumer insolvencies increased by 37.2 percent. Thus clearly demonstrating the significant impact on the Canadian employee that is our primary focus and area of concern; this is especially true within the context of the mediation process.

The downturn does not apply on the Canadian economy alone;

ADR INSTITUTE OF CANADA, INC.

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for **MEDIATORS**
and **ARBITRATORS**

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Application Fee

A one-time Application Fee is payable to your regional affiliate (fees vary by region) to cover the costs of administering the accreditation process.

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Application Forms

Application Forms for these designations may be downloaded from your regional affiliate website or call your affiliate to have a copy sent to you. Please see contact information on the reverse.

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numerous sides and complexities to consider in this equation. An example would be the situation with General Motors, should the government have supported GM or allowed them to declare bankruptcy leaving the employees in the cold? In Europe, the German Chancellor opted not to offer the European GM division, Opel, a chance for a government bailout. Instead the company was forced to look for alternative answers. Interestingly, what emerged has been a marriage between the private sector and the auto industry, an option never before considered. This in itself was

Even though statistical evidence suggests that business bankruptcies are down there is a perception that more businesses are opting for insolvency.

a mediative solution which although violating the ESA rules was permitted since it created a new market dynamic that has led to stabilization. Unfortunately such a solution cannot currently be arrived at in mediation in Canada.


It is our opinion that government bailouts have led to the creation of a two-tiered system. Some would argue that this new system is hampering rather than helping and exposing the vulnerable marketplace to new and unplanned influences. Therefore, one must question what would have happened if General Motors had not been given a bailout. Would they have found their own Stronach? Thus creating their own successful hybrid solution in violation of the ESA. Given that GM did

receive a bailout raises the question should the government do the same for smaller companies? If not, why not? The Canadian Minister of State (small business and tourism) explained that small businesses make up 98 percent of Canada's economy. As of 2008, small businesses accounted for over two thirds of employment in five industries, health care, construction, forestry, food and accommodation. By and large, small industry has not been the recipient of the many tax breaks and incentives handed out to the large corporations now being bailed out. One must, it would seem, question not only the structures that allow for the bailout, but also the equity or lack thereof for the non-recipients and the restriction on alternative creative solutions. On the other hand, we must examine what happens with an organization that chooses to close up shop. How do we ensure that employers keep their contractual obligation to their employees? Even though statistical evidence suggests that business bankruptcies are down there is a perception that more businesses are opting for insolvency. It is our opinion that most companies would prefer to find a way to stay in business, even if this means minimizing their obligations. This would allow them to stay operational, even with a much-reduced work force, until the economy stabilizes or recovers. This can only be achieved if the ESA rules were relaxed and the company chose to mediate. One must question if the employee who receives reduced entitlements, although frustrated, would not find this a preferable solution to being stranded without any payout.

It is not rocket science to comprehend that during an economic downturn, it is important for companies to look into cost saving initiatives prior to opting for insol-

veny. "Businesses are consolidating their financial positions and they do that by laying-off workers". Rather than utilize this approach, one suggestion would be to explore alternative cost saving initiatives. These options may include partial/ rotating layoffs, reduced workweeks, and job sharing. These are all viable options, although they do not ensure that contractual obligations are met, they are preferable alternatives to closing a factory.

In order to avoid litigation by violating the ESA, employee buy-in is crucial to successfully launching any type of cost saving program. In the event that this is an area being pursued by a company, it must be thoroughly researched to avoid any unscrupulous employer taking advantage of their employees. Having the employees involved in the decision making process, the employer opening their books to scrutiny, and independent legal representation for all parties can go a long way towards ensuring the survival of a company. This can only be achieved in a neutral setting such as mediation providing that the government provides exemptions to the ESA.

As we have clearly recognized many of these options would violate the ESA as we know it today. That said, given the current economic state of our country we need to ask: should we allow more companies to close and not meet their obligations to their hard working, loyal workers just to stay in line with current legislation? Alternatively, would it be more beneficial for organizations to involve the employee in modifying their current employment structure while maintaining a job? We propose the latter is a better option. Therefore, there should be changes made to the ESA to allow for such innovative programs to create viable work in an economic downturn. 

Paula Loube, Mediator
Quality Response Coordinator
The Children's Aid Society of Brant

Mediation in Child Welfare Complaints Process

On December 1, 2006, new Client Complaint and Review Procedures were implemented for all Children's Aid Societies and at The Children's Aid Society of Brant, the Client Complaints Policy was reviewed and amended. Until that time, in my role as Executive Assistant I had responded to service complaints from clients and had made the appropriate arrangements for the internal complaint review process. The Executive Director wished to respond in a less litigious manner to the new complaints process (including any involvement with the Child and Family Services Review Board). The goal was to mediate, where possible, complaint calls in an effort to first address concerns with our management staff giving us the opportunity to solve the concerns where possible and reduce the extensive time involved once a complaint is in writing and the formal process has begun.

In 2007, in order to prepare for this position, I completed the Alternate Dispute Resolution; Applied Alternate Dispute Resolution and Advanced Alternate Dispute Resolution courses with the Stitt Feld Handy Group. In 2009, I completed the Family Mediation Skills: Theory and Practice Course with Dr. Barbara Landau. I am a member of the ADR Institute of Ontario.

Now, our Agency is the only one of the 53 Children's Aid Societies in Ontario to utilize a mediator for the complaints process. Most agencies utilize their legal departments, especially when meeting with a client and the Child and Family Services Review Board. Mediation training has been

utilized in all levels of the complaint process – handling client telephone calls, meetings with clients, meetings with the staff involved as well as complaints coming through our MPP's office and the Ministry. Sometimes you have as much difficulty "getting to yes" with staff as you might with complainants!

Client complaint calls are responded to in a modified mediation process. Many times, the client is quite angry or upset and you must set the tone by listening and responding calmly – actually allowing the client to feel a little more empowered towards resolution. Questions are asked to determine what resolution might be and later, with staff, discussion occurs to determine what kind of plan could be offered.

If the client is not before the courts and wishes to proceed in their complaint beyond a meeting with their worker and manager, they may access an Internal Complaint Review Panel. An impartial committee is formed comprised of a manager, director and board member – not currently involved in their case. As the facilitator of this level, the mediator can set the tone by allowing the client to tell their story and in so doing, identify their concerns and establish what resolution would look like. During the first year of the new process, this level was utilized successfully. Since that time, resolution occurs early as Managers and front line staff have become more open to suggestions that may resolve a complaint without compromising child safety.

If a complaint goes to the CFSRB (Child and Family Services Review

Board) I prepare the summary with the necessary information gathered by the Manager and caseworker and even at that point, mediation comes into play as we prepare for Facilitation with the Child and Family Services Review Board. We are usually aware of what the issues are and in preparation; we discuss possible resolution that does not interfere with child safety or risk.

At a Child and Family Services Review Board Facilitation Meeting, the complainant often leaves the meeting with more resolution than they anticipated. We have endeavoured to respond to human situations with more compassion and we are willing to consider options – of course – as long as child safety is paramount.

Workers and Managers do not like to be involved in the complaint process. It implies that they have not utilized their skills and engaged a client or that an extremely difficult client cannot be helped. I think that I can illustrate my point by the following quote from one of our workers – "Assessments/decisions/interactions with families involve so much more than the 'legal' aspects of what we do and while I have a great deal of respect for our team of lawyers, the reality is that it is often the 'other' factors that give rise to complaints.

As a worker, I am aware of the legal responsibilities that I carry and if I am not sure about something, I will ask for a legal consult. I take the legal rights of the families I work with very seriously even if they do not have a lawyer. However, it is the other factors such as mental health issues, conflicts

between family members, and sometimes even how I do my job that seem to have a greater impact on whether or not someone chooses to move forward with a complaint and I believe that mediation brings something to that process that is different from the legalities, you seem to recognize that there are times when we have to make a deci-

sion in order to ensure the safety/well-being of a child or to support a parent or family member that may then lead to a complaint. You are able to consider and assess all of the information and how it relates to the complaint. Lawyers may not understand how these factors interact to influence a situation. Just as I cannot know all the legal ins and outs of what I

do, lawyers cannot be expected to understand all the factors that influence and impact on our work.

One of the things about the complaint system that I have been concerned about is that workers could begin to make decisions differently in order to avoid getting a complaint. The reality is that workers worry about how that will affect them at work if it will influence performance evaluations-or be held against them. Having a complaint made against you is very stressful but it cannot be a factor in assessment or planning with the family. Having someone that understands the human aspects of what we do is important in this process. ❁

Complaint Method	April 07 to September 07	October 07 to March 08	April 08 to September 08	October 08 to March 09
MPP Office	4	0	4	1
Ministry	4	3	1	2
Direct Additional Complaint Calls	5	11	13+	10+
Written	6	6	8	2
Eligible Complaints	3	3	2	1
Resolved Prior to ICRP	1	2	2	1
Resolved at ICRP	2			
Resolved at CFSRB	2	1	1 at hearing stage	2

Dr. Barbara Landau, Tom Dart, Heather Swartz & Joyce Young

Creating a Family Law Practice That Works

It is wonderful to have the opportunity to summarize a truly successful joint venture.

For more than 2 years, a dedicated team consisting of members of the ADRIO, the OBA, and OAFM, with the support of Collaborative Practitioners, has been preparing submissions and meeting with Chris Bentley, Attorney General of Ontario. Our goal has been nothing less than a complete paradigm shift in the way Family Law is practiced in Ontario. We agreed that family law was too adversarial, too expensive, took far too long and exacerbated conflict between parents – which was harmful to children.

The team leaders were co-chairs, Tom Dart (then Chair of the OBA, Family Section) and Dr. Barbara Landau (Director, ADRIO.), along with Heather Swartz (President, ADRIO), Joyce Young (President-

Elect, ADRIO) and Judith Huddart (Chair, OCLF). In the Fall, 2009 we decided to rally support from a broad base of our respective memberships and from the public. We created a 2-Day think tank or Summit held on Nov 22-23, 2009:

Home Court Advantage: Creating a Family Law Process that Works.

The purpose of the Summit was to discuss our proposed Family Law Reforms ¹ as well as reforms that been proposed earlier in the Mamo, Chiodo, Jaffe Report ² and innovations from other jurisdictions. Our final goal was to reach consensus on Reforms for Ontario – and provide our best recommendations to the Attorney General.

Attendance at the Summit was by invitation and care was taken to invite a broad spectrum of family

law professionals, including Judges, lawyers, mediators, mental health professionals, as well as members of the public who had experienced the family system first hand. Over 120 attendees came from across southern Ontario as well as from New Brunswick. We included representatives of the AG's staff, the Minister of Justice and members of the Law Commission of Ontario.

Prior to the Summit, the Attorney General accepted our premise that the process of Family Law needed to change and he requested specific recommendations under the following 4 Pillars:

1. Providing early information for separating spouses and children
2. Assessing parties and directing them to appropriate and proportional services using a triage approach

3. Facilitating greater access to legal information, advice and alternative dispute resolution processes

4. Developing a streamlined and focused family court process.

The Summit was kicked off with an inspiring line up of speakers. Justices Coulter Osborne, George Czutrin, Raymond Guerette, Craig Perkins, and Robert Beaudoin (on video-conferencing from Ottawa) unanimously agreed on the urgent need for change in the process for separating families. The participants were then divided into diverse teams with 2 facilitators and a scribe in each team. They spent the rest of the first day discussing each key recommendation in turn. A summary of each groups' ideas was presented by a facilitator at a plenary session to ensure a sharing of reform proposals.

On day two, the Honourable Chris Bentley was introduced by Senior Family Justice, Mary Jane Hatton. Both joined the chorus of speakers underlining the need for reforms, in particular, early information about options for cooperation rather than court, easier access to legal advice, and triage so that families were referred to resources that were proportional to their needs.

Again, the small groups met to discuss additional proposals for reform and reported to a plenary. At lunch, Grant Gold, the National Family Law Section Chair, introduced the Honourable Chief Justice Heather Smith, and both echoed the refrain of the need for reform and the efforts currently being made by the Superior Court. A panel of 3 members of the public highlighted the reality of systemic problems and spurred on our reform efforts.

Throughout the 2 day Summit, Professor Nick Bala and Phil Epstein, among the most respected family law specialists in

Canada, attended small group meetings, gathered ideas presented by speakers and at plenaries and created their own Summary Report at the end of the Summit. Their efforts were much appreciated and acted as a guide for our Interim Report to the Attorney General, as did a summary by Alf Mamo.

On December 12, 2009, we delivered an Interim Report setting out our specific recommendations under the Attorney General's 4 Pillars. On December 17th, 2009, he held a press conference accepting our recommendations and pledging to implement all 4 Pillars across the province in a roll out over the next few years – starting in March 2010.

Set out below is the Executive Summary of Recommendations. Please see the ADRIO and OBA website for the full Interim Report. Our Final Report is expected in February 2010.

Interim recommendations under each pillar arising from the consensus achieved at the Summit are as follows:

Pillar 1:

Providing early information for separating spouses and children

- i) **Awareness** campaign, through enhanced Ministry website, brochures, advertisements and Help Lines, to provide legal and process information regarding separation and increase the public's knowledge of services available.
- ii) Mandatory **Family Information Sessions (FIS)** on Separation and Dispute Resolution and on Parent Education offered in courthouse and community locations. To be implemented in all OCJ/SCJ co-located sites

across the province beginning in 2010 and completed by 2011. FIS to be implemented in all remaining court locations by 2012.

- iii) Appropriately resourced **Family Law Information Centre (FLIC)** to service every courthouse, with **trained Court Registrars** and **counter staff** to redirect people to FLIC.

Pillar 2:

Assessing parties and directing them to appropriate and proportional services using a triage approach

- i) **Case Assessment** Coordinator(s) (CAC) providing intake, screening and referral to potential litigants prior to commencement of action. To be appointed in all OCJ/SCJ

A panel of 3 members of the public highlighted the reality of systemic problems and spurred on our reform efforts.

co-located sites across the province beginning in 2010 and completed by 2011. CAC in all remaining sites by 2012.

- ii) **Provincial standards** of practice, qualifications, description of role and responsibilities, and training established for CAC position to ensure effective triage.
- iii) A **provincial and local management structure** established to effectively support the role of the CAC.

Pillar 3:

Facilitating greater access to legal information, advice and alternative dispute resolution processes

- i) Advice counsel, duty counsel

and on-site mediation services provided at every courthouse.

- ii) **Rosters** of qualified private mediators, collaborative lawyers, parenting coordinators and family arbitrators compiled and made available.
- iii) **Increased access to independent legal advice** available through issuing of Legal Aid certificates prior to filing of application, facilitating access to certificates for ADR processes, adjusting the financial eligibility criteria and unbundling legal services.

Pillar 4: Developing a streamlined and focused family court process

- i) Develop and implement **court processes**, and **review and improve the Family Law Rules** to simplify forms and streamline proceedings. This can be accomplished by reducing the number of court appearances and implementing cost consequences for abuse of court resources.
- ii) Support appropriate **case management** to provide for

case continuity of judges under the principle of “**one family, one judge**” with **family law specialist judges** assigned to remaining high conflict or complex cases.

- iii) Provide a **Support Recalculation Service** to facilitate variation without use of court and judicial resources.

References:

1. Barbara Landau, Tom Dart, Heather Swartz, Joyce Young, Antoinette Clarke, Seema Jain, et al: *Supporting Families to Support Their Children*, 2009.
2. Alf Mamo, Debbie Chiodo and Peter Jaffe: *“Recapturing and Renewing the Vision of the Family Court”*, 2007.

Helen Lightstone

Yonge & Eglinton Mediator Gives Up City Life for CFB Petawawa Contract

In the summer of 2008, I accepted a contract as a conflict management practitioner at CFB Petawawa.

I couldn't pass-up the opportunity, jumped at the chance feet first, and with a great deal of enthusiasm I packed my little blue Yaris, threw my dog in the back seat and headed east on the 401. I waved goodbye to Toronto as I watched the skyline disappear from the rear view mirror. Now, one and a half years later, I look back and think; “wow, what a great experience!”

Within a few short weeks on the job, I noticed my downtown Toronto civilian life-style was coming to a slow halt. I could not understand why my parking spot hosted an electrical outlet. I had visions in the summer of me sitting on a deck chair in my spot with a frothy drink in my hand, and my radio

plugged into the conduit, blaring my favourite music. My first winter told me that I was wrong and



electrical outlets in parking spots were used to start cars when it hit -40 outside, which it did. My co-workers wore shades of green or tan, sported jaunty matching berets and were trained to kill if

necessary. I'm not sure if any of that was a prerequisite to become a member of ADRIO, but I was pretty sure it was not. It was not uncommon to drive down Petawawa Blvd and see a tank in my rear view mirror, usually with a “student driver” sign hanging from the barrel of its gun. The language changed as well; I worked for DND for the DGADR, on the CCMP, located at the DSC, in the SSCC, at CFB Petawawa, I taught the ACE course, hoped to one day become a SME, and have a good PR. I will translate; I worked for the Department of National Defence for the Director General Alternative Dispute Resolution, on a Pilot called the Community Conflict Manage-

ment Pilot, located at the Deployment Support Centre, in the South Side Community Centre, at Canadian Forces Base Petawawa. I taught the Approaching Conflict Effectively course, hoped to one day become a Subject Matter Expert and have a good Performance Review. Acronyms were the word of the day, so to speak.

Many community issues revolved around noise disturbances, gossip, pets, parking spots, and business deals gone wrong. The concept of the Community Conflict Management Pilot (CCMP) was to provide the military community and their families with consultation, conflict coaching, training and facilitation so disputants at home could resolve their own issues without troubling their deployed partners. In many instances a disputant wanted to tackle the situation on their own, so my co-worker and I would coach them on basic communication skills. If that approach did not work for them, we were then brought in to facilitate. In addition, we provided a 12-hour communication course, which included role-plays. We developed a home study course of the same.

Marketing this new pilot was a necessary part of our job. We needed to get the word out for our free service to the military members and their families. Our marketing concept began with a simple idea; "Never take a 'no' from a person who is not in a position to give you a 'yes'" and we left no stone un-turned. We developed a CCMP website, created PowerPoint presentations, and went to Base units, met with the Padres, Base Mental Health, and many other services who could possibly refer us. We tapped on 1600 doors in the Permanent Married Quarters (PMQ'S) (housing), and introduced our free services to whoever answered, we did this twice! The Pilot was very well received.

In May of 2009, CCMP merged with the Dispute Resolution Centre (DRC) and the focus was now workplace and community conflict -- surprisingly, the conflicts at CFB Petawawa were not dissimilar to conflicts in the private sector. I was involved with teaching the DRC's conflict resolution course, and gave pre-deployment briefings to troops so that they could better handle conflict and maintain mission focus while away.

So, working on the Base? Things I observed: Mode of transportation; tank or helicopter, dress code; Cadpat (Canadian Disruptive Pattern) green or tan, major dining; a place called "the mess." It is easy to say the experiences I had with DND were unlike any other I would find in the civilian world and despite the tough military exterior of my new environment, I was deeply moved by things that had become not "used to" but "accepted" by the soldiers and the families that I met. For example, just before the first pre-deployment briefing I was to give to troops, a padre I knew came over to me and asked me when I was deploying. It took a second for me to realize that she had no idea I was presenting, but believed I was participating in the briefings because I was on my way to Afghanistan. I did not honestly think I was fitting in *that* well.

The Dispute Resolution Centre shared an office building with another unit on the Base. After I had lunch with a number of soldiers one day, they began fixing their hair, and straightening their uniforms, they were getting ready for mandatory photographs that were to be taken shortly after lunch. I asked what the photos were about, a Captain replied; "these are our death photos," or, the photos we see on the television when yet another soldier is lost. I tried to imagine what that

would be like, but had difficulty wrapping my mind around the thought. When I worked at the South Side Community Centre, a memorial table, a condolence book and a "death photo" was set up whenever a soldier was lost. People would drop by and sign the book which was ultimately sent to the soldier's family. I was about to sign a condolence book, and took a moment to read the remark just before mine, it went something like this; "... I am so sorry for your loss... You are in our prayers.... little Johnny and Suzy still miss their daddy..." I looked around the hallways to see who had written in the book. The hallways were empty, but I knew somewhere in the building was a woman without a spouse and she had children without a father. Months later another series of death photos, four, were placed on a memorial table, but one soldier looked familiar. Several weeks later, I learned that years ago when I was a wedding photographer, I had photographed him in a wedding party. I thought of his family and the different meanings and emotions those contrasting photographs represented.

I am looking at the notes I have written in my draft copy for this article, and realize I have many more memories to share, but I have not the word-count. I will sum up; working at CFB Petawawa was truly a remarkable experience leaving me with lifelong memories that very few will experience. So, CFB Petawawa Conflict Management Practitioner returns to city life for a new contract. She is bringing with her more acronyms, a respect for Cadpat, and the hope that there will never be another Death photo on a condolence table anywhere. 🌸

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George W. Taylor Q.C.

Mediation in Sports

Alternate Dispute Resolution by mediation and arbitration gains acceptance in sports.

The Sport Dispute Resolution Center of Canada (SDRCC) was created by federal legislation in 2002 for dealing with disputes at the national level of Canada's sport system using facilitation/mediation and arbitration rather than litigation. This will upset our litigation friends but the axiom too slow, too expensive, too unpredictable applied to the historical sport litigation. The converse is true for the Centre. It was set up to resolve quickly and efficiently through ADR particularly situations where an athlete's short competitive span, funding and imminent competitions are at stake.

Under federal legislation to promote physical activity, sport education and sports, the Center was created by a stellar board of people such as mediator Alan J. Stitt and Bruce Kidd, the famous distance runner and Richard MacLaren. The mediation roster contains leading counsel and people involved in sport, the most famously known would be Richard "Dick" Pound of WADA (World Anti-Doping Agency) and Olympic fame.

The Center provides parties an opportunity to reach a favourable outcome by way of resolution facilitation/mediation, mediation/arbitration or arbitration processes in both official languages. Its total mission is to provide education to the (NSO's) national sports organizations, their key players, the sport community, the athletes involved in sports at the elite level including universities, coaches and medical practitioners through its facilities.

Further to assist, the athlete and the national sports organizations the SDRCC web site www.crdsc-sdrcc.ca provides recent decisions, academic research, agreement templates, databases of mediation/arbitration disputes as well as links to many other related databases such as the Court of Arbitration for Sport in Lausanne, Switzerland and WADA.

The head office of the dispute resolution Secretariat is located in Montreal where a small group of officials, administrators and volunteers work on behalf of the elite athletes, the national sport organizations and with the (CCES) Canadian Center for Ethics in Sports. www.cces.ca Although the Center's facilities are primarily for athletes in Canada's national sport systems, for mediating disputes it is also the educational

Drug offences by athletes make interesting reading so check the web site legal decision database.

arm, so close attention is paid to the international, provincial and local sport related issues.

The ADR procedure starts when a claim is made thus an initial amount of discussion via resolution facilitation/mediation has to be conducted (up to three hours) before it can move on to mediation/arbitration or arbitration. The claimant, an athlete or a sport organization or the Canadian Center for Ethics in Sport, (generally where it is a drug related

matter) files a claim with the Center's Director. The process manager oversees movement of the case and assigns it initially to one of the roster resolution facilitators/mediators located in every region of the country who have received training and are well equipped to deal with circumstances unique in the world of sports. Some of the mediators do come from Olympic sport backgrounds; some are presently actively engaged in representing major professional athletes as well as the carded elite amateur athletes. The claimants can choose their facilitator/mediator or mediator/arbitrator from the roster or if they do not the Center assigns one.

Since many of the athletes and the national sport organizations are geographically distributed throughout Canada the mediation or arbitration can be done by telephone or combination of telephone, teleconferencing or video /communications or through the Center's computer communication system designed for mediation, therefore, not always requiring the parties or representatives physically to be present before the mediator or arbitrator.

The procedure is governed by rules of the SDRCC (see the web

site) so that the mediators have to follow a prescribed procedure for the parties before them. Similarly, specific rules govern the Canadian Center for Ethics in Sport (the anti-doping program) coordinated with the Canadian Sport Dispute Resolution Code.

A sample dispute might mean interpreting the NSO qualifications for an athlete to attend a sporting event so that the NSO's procedurally qualified athlete and not somebody's favourite athlete. An aggrieved athlete can file a claim that starts the potential resolution through facilitation / mediation. If that is not satisfactory it can move further to a med/arb. In some instances, NSO athletes are told to unpack their bags as they were not chosen by the proper procedure and other

athletes are told to pack their bags and go. The roster facilitators/mediators are required to be ready quickly as often the resolution is required to be done quickly with pending events on the horizon.

Drug offences by athletes make interesting reading so check the web site legal decision database. The list of areas of mediation or arbitration is quite extensive. Some issues that can be heard by the dispute resolution Center are a national team selection for international events, an athlete's elite funding card, harassment situations, discipline situations, eligibility to participate, the interpretation of a contract, doping issues, and any decision basically that is handed down by a national sports organization that affects

one of its members.

One major reason for the success of the program is the involvement of the CCES, the national sports organizations, but more importantly the elite carded athletes since their funding comes from the government of Canada. Without that, funding most of the athletes could not continue competing so they must sign agreements to follow the procedure of the Sport Dispute Resolution Center. The mandate of the center is working to provide the sporting community with information and the tools to resolve any disputes quickly through ADR and not litigation. 🌱

For those interested in the field check the web site <http://www.crdsc-sdrcc.ca> as the center also maintains a roster of qualified people to assist athletes in the procedure.

Margot Hallman

The Power of Partnership in Mediation

As a mediator who has provided internships in mediation to both legal and mental health professionals for many years, I frequently come across a common assumption that interns from both professions tend to make at the onset of their training

Initially, interns from both backgrounds would only choose to work together in mediation when there is a need to combine different areas of knowledge. For example, mediators who have a legal background assume that they would only involve a mental health professional to help with a parenting plan. Alternatively, mediators with a mental health background assume that they would only involve a lawyer mediator to assist with the financial aspects of mediation. However, there is so much more that partnering can offer to the parties in the mediation process. A co-mediation partnership can

be useful in high conflict cases where parties struggle to accept and work with the neutrality of the mediator. When parties are locked into a dynamic of attempting to get the mediator to align with them, two mediators allow for parties to be supported by one mediator at any given time without a rigid alignment forming. Thus the mediation team as a whole can preserve its role of neutrality as between the parties and yet the parties feel individually supported when necessary.

A mediation partnership also allows the mediators to double caucus so as to contain the volatility between the parties in

the room. With this kind of dynamic, it is helpful not to leave either party alone for an extended amount of time. Each mediator can debrief with clients and coach them to return to a joint session in order to voice their views in a way that opens further dialogue.

Often these kinds of high conflict mediations are so exhausting that partnering in the process allows for each mediator to take a necessary pause to gain perspective while the other mediator does the work. It is also helpful for the co-mediators to occasionally caucus alone together in order to regroup and make meaning of

any new developments that have emerged in the room, which often can happen.

Each mediator can also share the responsibility to take notes, allowing the other mediator to do the work. The process of note taking is especially important in open mediation, when the summary notes of the mediation could be admissible in legal proceedings.

Partnering as co-mediators can be most powerful in assisting mediating parties to develop insight into how to have a constructive conversation with one another.

The essence of my mediation style is to assist the parties to have a constructive conversation together. If they are unable to do so, mediation often devolves into a negotiation where the mediator brokers a deal in a very directive way, similar to what a Pre-trial judge would tend to do. The parties have abandoned their willingness to struggle if necessary, to communicate directly with one another and at some level they have abandoned their control of the process.

If the parties are committed to having that "difficult conversation" together, two mediators can

provide intense coaching for the parties to relearn how to communicate in a way that allows their dialogue to open into further dialogue as opposed to shutting it down. This approach requires the parties to take a reflective stance on the nature of their earlier conversations together and to take personal responsibility to change their part of the dialogic process.

Two mediators can model this kind of respectful dialogue together; they can actively listen to one another, reframe what the other has said and even model respectful disagreement.

I have had the good fortune to work with three very talented and competent social workers over the last fifteen years who have not only played the role of child consultant in parenting mediations with me but they have also partnered with me as co-mediators on many occasions.

In all cases, we have developed a deep partnership that has been built on spending a lot of unbilled hours together, debriefing after mediation sessions and preparing for those challenging sessions ahead. We work together reflectively, taking the time to

understand how a session went and how we might have handled it differently. We work to maintain clarity about the roles we intend to play in a session but we work not to be enslaved by them.

In this way, we continue to work toward implementing a seamless flow of work in the room where each co-mediator trusts what the other is doing and where either mediator can move spontaneously in a new direction if necessary.

Developing partnership in this way immensely broadens the repertoire of skills that you can offer to parties in mediation.

You move beyond simply combining your different areas of expertise and you begin to tap into your complementary strengths as people. This possibility is what I hope to leave with my interns as they go out into the world to mediate. ❁

Margot Hallman has a fulltime mediation practice and she provides mediation internships to students with appropriate academic background and experience. Ms. Hallman has provided training practicums to students in the family mediation program at McMaster University and to students at York University taking their Masters in Law in Alternative Dispute Resolution (ADR).

For further information on any of the below designations, please contact Mena at 416-487-4447.

ADRIO Warmly Congratulates the Following Members on Achieving the Chartered Arbitrator, Chartered Mediator, Certified Family Mediator and Qualified Mediator Designations.

Michael Erdle, C.Arb.

Robert Néron, C.Arb.

Nayla Beaudry, C.Med.

Mary Margaret Biedermann, C.Med.

Timothy D. Brodie, C.Med.

Rick Brooks, C.Med.

Vance H. Cooper, C.Med.

L. Leslie Dizgun, C.Med.

Ian V.B. Johnson, C.Med.

Kelly J. Lewis, C.Med.

Philippe Patry, C.Med.

Robert W. Pidgeon, C.Med.

Sue Vandittelli, C.Med.

Donna Wilson, C.Med.

Richard J. Moore, Cert.F.Med.

Donna M. Broome, Q.Med.

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Judy Cohen, Q.Med.

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Catherine R. Downer, Q.Med.

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Bernd Weller, Q.Med.

Rosemary E. Wells, Q.Med.

Herbert L. Wisebrod, Q.Med.

Susan Kivlichan
Robert Bird

Practice Makes Permanent Observations of a Conflict Resolution Intern

Robert Bird and Susan Kivlichan are working as Conflict Resolution interns at Scarborough Conflict Resolution Services, an agency operating out of Warden Woods Community Centre in South Scarborough. The Centre is supported by funding from United Way. We arrived as interns to put into practice the mediation skills we had acquired at York University last year. We discovered that we had entered a complex and fascinating community, which would provide stimulating challenges and memorable experiences.

We found ourselves in a new environment. It differed from our previous working environments as we were exposed to the social issues that characterize the lives of some of the Scarborough community. Previously Susan had worked in the claims department of insurance companies, while Robert's background was in teaching. Both of us found the challenges of our new environment invigorating and eye opening. We found that our new environment enriched our lives, expanding our horizons and giving us access to a different world.

Scarborough Conflict Resolution Services' mandate is to provide community mediation, training and other dispute resolution services to the Scarborough community. Community mediation responds to neighbourhood disputes, landlord and tenant issues, conflicts in schools, the home, within the workplace or arising out of personal relationships.

An example of the type of dispute that we dealt with would be an interpersonal conflict between two neighbours. The dispute had initially developed after a contractor working for one party parked his van partially on the other neighbour's still-unsodded and very muddy front yard in a new subdivision. Further bad blood developed over the placement of snow on a mutual driveway during snow-shovelling activities. Eventually the relationship between the two neighbours devolved into a cold war in which they no longer acknowledged the presence of the other.

Police were called on more than one occasion and eventually charged one neighbour with harassment. Once charges were laid the police referred the file to Scarborough Conflict Resolution Services for mediation.

Along with conducting intake interviews and mediations, we were also faced with the challenge of preparing presentations on conflict resolution to

other community centres and not-for-profit employers within the Scarborough neighbourhood. We wrote scripts and created role-playing activities to be enacted by the participants and ourselves. These scripts and role-playing scenarios illustrated the conflict resolution skills that we were demonstrating and that the participants wished to acquire.

At the end of each presentation the participants filled out an evaluation survey that allowed us to assess whether our methods met their needs. We collated the results and the findings were enlightening.

We learned from our evaluation surveys that most participants in conflict resolution workshops do not wish to be the passive recipients of a lecture; rather they prefer to be involved in an interactive hands-on process in which they learn by enacting role-playing scenarios that are relevant to their personal or employment situations. On the other hand, they wish to develop and enact their own scripts and role-playing activities. They found it helpful to have their performance critiqued, so we developed a method whereby we evaluated their communication skills such as paraphrasing, summarizing, reframing, and active listening in front of the group, for the benefit of all.

We were encouraged by the enthusiasm and energy that the participants brought to the role-playing activities. Not only did the participants quickly demonstrate the skills of paraphrasing and summarizing, but also they were clearly enjoying every moment of the activity, and having fun while learning. Who knew that the Scarborough community contained so much untapped theatrical potential?

Interestingly enough, our evaluation surveys revealed that most participants believed that one of the major causes of conflict was people failing to listen to each other. However the participants did not believe that the root of the problem rested with them but with the "other party." What led to this? The foibles of human nature!

Another issue which arose was caused by the resistance of the participants to use the new skills and methods that they had learned. Even in instances where the participants were given detailed instructions on the skills and methods they were to employ, we found in observing them as they worked that much of the time most fell back into old habits and

past behaviours, and had to be prompted and reminded of the purpose of the exercise.

Upon reflection we devised a method of positive reinforcement whereby participants who used the new skills performed those skills in front of the entire group as an example to the group and were applauded and recognized for their accomplishment. Inspired by the movie review program, "Ebert and Roeper," we also developed a routine whereby we would critique the role-playing performances of individual teams, congratulating them on their use of the appropriate tools, or observing, diplomatically, how their performance could have employed the skills to better effect.

Results Generated by the Evaluation Survey* (of Not-for-Profit Managers)

I understand conflict to be:

a) Having difficulty with an employee	35
b) A disagreement with a client	32
c) A dispute with my superior	20
d) Dealing with a bullying boss	19

e) Having a problem with a fellow manager 19

In your opinion most conflicts are caused by:

a) Misunderstandings or miscommunications	137
b) People not listening to each other	126
c) People jumping to conclusions about each others' intentions or motives	124
d) People misusing their power	96
e) People playing mind games	76
f) People competing in turf wars	76

Tell us what kind of conflict resolution skills you would like to learn:

a) How to manage strong emotions, yours and theirs	32
b) How to respond without escalating the conflict	24
c) How to be aware of incidents when the conversation threatens your self-esteem	18
d) How to listen to and how to understand another's point of view	14

*Thirty seven participants were asked to rate each item on a scale of 0-5

Colm Brannigan

"Why Do I Need a Mediator to Settle My Case?"

This is a question mediators used to hear a lot. As mediation has become a more accepted part of the litigation process in Ontario, this question is less frequently asked, but remains a live issue.

Although there are many ways to answer this question, the most useful process-oriented response is that mediation allows counsel to make the shift between "litigation advocate" to "settlement advocate," while still preserving the relationship with their client.

Your client hires you with the expectation that you will win the case. However, in most cases, a time comes when it is appropriate to make some compromise to settle the dispute. To settle the dispute the lawyer must shift from a zealous advocate to problem-solver. It is sometimes difficult for your client to appreciate the necessity of your shift in emphasis. By using a mediator, you remain the advocate for the client and the client's case, and the mediator can be the advocate for settlement.

Much like mediation, there are stages to litigation. When a client brings a new case (either plaintiff or defence) to his lawyer, typically, the first thing the lawyer does before accepting representation is conduct a detailed analysis of the strengths and weaknesses of the case. The evaluation usually

includes an analysis of the law and facts, the availability and reliability of witnesses, costs, and time likely to be expended on the case and the impact of litigation on both the lawyer's practice and on the client's life and business.

After the case starts, lawyers often forget their initial evaluation and jump headfirst into the battle, litigating the case as zealous advocates of their client's position. By time mediation comes around whether under the Rules of Civil Procedure or the consent of the parties, both sides are firmly set in their respective positions and often, although they want to settle, they do not know how to remove themselves from the case they have so painstakingly constructed.

In order for the client to settle, the lawyer must become an advocate for settlement. Part of the job of the mediator is to help the lawyers and the parties see beyond the legal case they have built. For a dispute to settle, a negotiated settlement must meet the legitimate interests and needs of the parties to the dispute.

The good news for lawyers and clients is that in 80% of cases mediated, settlement is achieved on the day of mediation or shortly afterwards.

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Marcelo J. Sagel

Restorative Justice for Young Offenders

Mediators volunteering to help our Community

Restorative Justice (RJ) is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. As an alternative to an adversarial and punitive system, RJ works with all stakeholders in pursuing a resolution that will permit the parties to put the issue behind and move on.

Since the offenders have to take responsibility for their actions, no time or energy is spent dealing with allegations of blame, evidence or proof. The victims are usually involved in the process as well, allowing them to follow-up and get closure. A harmed person calls the police, makes a statement and normally never hears about the case again. Through RJ, the victims get a chance of being actively involved in the process, stating how the events affected their lives and confronting the person that caused them harm.

Toronto, as an example, has several organizations that deal with RJ. Just to name a few, St. Stephen's, PACT and Peace Builders all use different methods and a vast array of volunteers to help offenders get back on track. Most have programs unique or dedicated to young offenders (12-17 years old.) Although financing by the Crown has been reduced to almost nil over the last years, many of these programs still operate, funded by private organizations and individuals. Generous members of our communities understand the importance of helping young offenders and donate money, time and expertise to keep these programs going strong.

As a parent, probably the worst day of our lives would be to see

the police handcuff and take away one of our kids. Generally, families have never been through this situation before and are at a loss when they realize the wheels that have been set in motion by their child's actions. The emotional and financial drain can be overwhelming. Lost wages, days in court, retainer fees and dealing with police and courts can strain these families for months.

On the other hand, these boys and girls usually realize how silly their actions were and how what happened can reshape their future lives. Having a criminal record will now affect their careers, employment possibilities, future travel and earning potential. Taking this away from these kids does not help the community in the vast majority of situations. Since RJ approaches the wrongdoing as being perpetrated against the community and not the Crown, it strives to work with offenders to have them accept their errors and return as productive members to their respective communities.

For that reason, Crown Attorneys will look into the case and, should it pass a strict assessment criterion, offer the accused an RJ option. By doing so, they give the offender a chance to repair the harm he or she has done while granting them a second opportunity. It also helps

unclog the courts, saving time and resources for handling crimes that are more serious.

Once these organizations receive the referral, the accused and the victims are contacted and the whole course of action is explained to them. It is emphasized that this is a voluntary and confidential process. With very few exceptions, nothing mentioned in the meetings ever goes back to the courts. A conference is then set up with the accused, victim and mediators or facilitators from the organization. The victims have the option of not attending if they feel that the process may not help them or they do not want to relive the events. With young offenders, the parents or legal guardians must be present. This requirement also assures that the families get involved in the process and that underlying relationship issues, if relevant, come to the surface.

Once the conference starts, emotions run very high. It is the role of the mediator to handle the meeting so that everybody gets to say what happened and how he or she feels in a way that does not cause any more harm or impair the objective of the process. The mediator will also make sure that all facts are provided, that responsibility is taken and that the victims have a chance to tell how their lives were affected by these events. Most victims will use this opportunity to ask any lingering questions they may have about the event. Usually the most common question the victim will have for the accused is: Why me? Parents also get to listen to all these facts and support their children throughout the process.

Very often, they will realize that their kids did what they did due to bad company, peer pressure or the need to feel “cool” in their schools or neighbourhoods. Most parents recognize that supervising their kids a little more closely, knowing who they hang out with or what they do in their free time could have prevented this from happening all together.

Once everybody has had a chance to talk and the offenders understand the consequences of their actions, a restitution agreement is drafted, where the accused has to make amends. This agreement could include verbal or written apologies, substance abuse treatment, community work, restitution, anger management courses or other requirements appropriate to the offence. The agreement is shaped so that it helps the victim and becomes a learning experience for the accused. The purpose of RJ is not to punish, but to help the accused understand the consequences of their actions and avoid recidivism. If the offender complies with the agreement within the timeframe stipulated in it, the Crown will, in most cases, withdraw the charges and close the file.

As mediators, we deal with different issues every day, but seldom do we get the opportunity to change the life of a young person and make a lasting difference in our community. It is very rewarding when we see right in front of our eyes how this young person understands what he or she did wrong, makes amends and gets a second chance to become a productive member of society. All thanks to this Alternative Dispute Resolution process called Restorative Justice and its many volunteers.

Marcelo J. Sagel is a bilingual English / Spanish Mediator who also volunteers as a facilitator for Restorative Justice programs helping young offenders. He can be reached at mediator.ontario@gmail.com.

Jim Cameron, FCIP, CRM, C. Arb.

Reinsurance Arbitrations Part 1

This article originally appeared in the June 7, 2006, issue of *The Lawyers Weekly* published by LexisNexis Canada Inc.”).

What is Reinsurance?

Reinsurance is the insurance of an insurer. The reinsurer will provide indemnity to the insurer predicated on the liability of the insurer to indemnify insured persons under policies it issues. The insurable interest in the contract is the insurance liability of the insurer. Reinsurance is extensively utilized in the life, health, and property and casualty insurance industry.

The Reinsurance Market

Out of more than 100 reinsurance companies operating in Canada, there are no active Canadian domiciled reinsurance companies. The global spread of risk

Reinsurance companies have the right to but rarely will take an active part in discussions or settlement negotiations of a claim by a policyholder or a third party claim against an insurance company policyholder.

lends itself to multinational reinsurers, most with head offices in Europe, the UK, Bermuda and the U.S. However, any reinsurance of business written by Canadian insurance companies falls under the supervision of the provincial or federal insurance regulators.

Difference between Insurance and Reinsurance

The most significant difference between Insurance and reinsurance from a legal perspective is the contractual nexus between the parties. Reinsurers do not deal directly with the public and cannot issue policies to individuals or corporations. Their “policies” can only be purchased by insurance companies, other reinsurance companies or certain entities such as insurance reciprocals or risk retention groups.

The obligation to pay under a reinsurance contract is always predicated by payment for loss incurred under a policy or policies issued by the insurance company. The original policy issued by the Insurer to its insured is not abridged, modified, strengthened or altered in any way by the existence of or access to reinsurance. The insurer ceding (submitting) a claim to the reinsurer has to prove that their loss was paid in good faith within the terms, limitations, conditions and exclusions of the policy or policies issued to its insured(s). After satisfying this condition precedent, it must then prove that the loss paid falls within the terms of the reinsurance contract in order to be indemnified.

The existence of reinsurance is invisible to the original Insured. The original insurance company is under no duty to advise, and usually will not disclose to policy holders, whether any or all of their liability to the policy holder is reinsured. There is no privity of contract between a public policy

holder and the reinsurance company.

Good faith

On the other hand, Reinsurance companies, like the 800-pound gorilla sleeping in the back seat of a car, cannot be ignored by the driver of a settlement (the insurance company). Reinsurance companies have the right to but rarely will take an active part in discussions or settlement negotiations of a claim by a policyholder or a third party claim against an

tract specifies that any dispute arising out of the agreement shall be submitted to binding arbitration. This is why you will find little jurisprudence globally on reinsurance. What you will find are citations on judicial review of the arbitration decision or process. Almost without exception, courts refuse to interfere in the dispute resolution process contracted by the parties.

Honourable Engagement

There are no standard form

Follow the Fortunes

This concept is also contained in most reinsurance contracts. The contract wording stipulates that the reinsurer will follow or honour settlements made by the insurer, which are properly within the terms of their insurance policy *and* fall within the terms of the reinsurance contract. Application of the principle could be argued to expose the reinsurer to any decisions of the ceding insurer without recourse. In practice, however, the arguments of whether the original policy applied, the loss was properly settled, and that the loss was covered under the reinsurance still stand.

Arbitration

With all the foregoing issues and myriad others, it is little wonder that arbitrations in reinsurance are on the increase. In the next segment, we will explore the reinsurance arbitration process in detail, what to expect, and how to better prepare your client's case. 🌱

Part 2 will be continued in the next newsletter.

Jim Cameron, experienced in reinsurance arbitrations, is the president of Cameron & Associates Insurance Consultants, based in Toronto. He is a certified as an arbitrator by the ADR Institute and by ARIAS-US and can be reached at james@cameronassociates.com.

The global spread of risk lends itself to multinational reinsurers, most with head offices in Europe, the UK, Bermuda and the U.S.

insurance company policyholder. How the original claim is paid out and the judgement, settlement or compromise of liability, and the quantum determinations, can significantly impact the ability of the insurer to recover all or a portion of the paid settlement under their reinsurance. Both parties to a reinsurance contract expect good faith and fair dealings in all facets of the performance of the contract.

Primary, Excess and Reinsurance

All policies issued to an Insured are considered primary policies, regardless whether they are excess of other policies issued to that Insured. Policies within a tower or layer of policies may be provided by different insurance companies and each of these may be separately reinsured to any proportion or amount excess of an attachment point within that layer.

The Contract

The relationship between the parties is governed by the reinsurance contract. The con-

tract specifies that any dispute arising out of the agreement shall be submitted to binding arbitration. This is why you will find little jurisprudence globally on reinsurance. What you will find are citations on judicial review of the arbitration decision or process. Almost without exception, courts refuse to interfere in the dispute resolution process contracted by the parties.

Occurrence Clause

The most contentious area for disagreement is what constitutes a loss or claim to the reinsurance contract. Most contracts contain "event" language under which a loss occurrence or series of loss occurrences, arising out of one event, can be aggregated for purposes of a reinsurance claim. The undefined term "event" is interpreted on each fact situation within the language of each contract applying customs and practices of the insurance and reinsurance community. World War II was an event, as was the invasion of Normandy.

L. Deborah Sword

The Conflict Doctor

The question in issue – when conflict resolvers have a dispute

Recently, a mediation colleague consulted me about a former partner suing her over a business deal gone badly. She was stunned to get a Statement of Claim naming her conflict resolution practice and herself personally as defendants. What bothered her most was that the plaintiff declined several offers to mediate the dispute before opting for the formal legal route.

That set of facts generated the questions I was consulted about: Do we, as conflict resolvers, have any responsibility for being role models, and informal conflict management trainers through our example? Is it okay if we lose our tempers, negotiate badly and sue those we allege have caused harm, while telling others they would be better off not doing those things? Can we be just like other distressed people and be mediators at the same time? How closely do our professional and personal lives have to align?

Some assumptions informing the discussion

We assumed the answers to these questions were significant to more than just her case. During our discussion, she and I also assumed that conflict resolution is a diverse field of professional practice, and a discipline with codes of conduct that apply in our processes. For the most part, practitioners strive to meet the highest level of ethics and competence in this work. But is it fair to expect more? Can we “impose” that code of conduct on mediators when they go home at night. Should mediators not get “time off for good behaviour”?

A conflict analysis of the issue

To some extent, any decisions on these questions might depend on

whether we view our conflict management work as a calling or a job. Those who think conflict resolution is a calling, perhaps tend to see every mediation as an opportunity to make the world a better place and each client as a co-learner on the journey. However, if it is a job, then after the mediation, the mediator is an ordinary person who goes home with no higher duty to be a peaceful person than his or her litigious neighbour. The arguments superficially line up to suggest a forced choice: that either we should act according to our training no matter where we are and who is paying us, or, our behaviour after work is nobody’s business.

We considered the beliefs underlying the two opposite ends of the range of opinion. One far end of the scale was that our words and deeds in both our private and public personas should exemplify our beliefs that conflict management and resolution are preferable to being in a conflict. The first reason that informs this opinion is ethical. We should *know* what we are talking about and expecting of others. The parties are signing an agreement to behave themselves in and out of the mediation room, so we should as well. The second reason is more philosophical. We are more credible as peacemakers if we practice peace. The third reason is in the logic of the work we do. When we coach parties to manage their reactions, it makes sense that we are consistent in showing the client what that looks like because we have done it and know it works.

However, the other end of the

scale of argument is also persuasive. To paraphrase the late Prime Minister Trudeau, should we not stay out of mediators’ bedrooms? The practice of conflict resolution will not be brought into disrepute simply because two mediators are in a lawsuit with each other. Folks, including our clients who have been in that situation, will understand the motivation to sue.

Tentative conclusion

With both options having arguments in support, what might be left to propose? Compromise seems unsatisfactory: e.g. sometimes be peaceful at home and sometimes not! Is there an integrative alternative? Perhaps it is cinema that offers an insight: Every good movie has a conflict at its core. The conflict can be subtle internal angst or cars blowing up in a plotless serial display of special effects. Hollywood knows that conflict drives the story, and we are, after all, the sum of our stories. A totally peaceful life is not all that interesting.

Perhaps we can do the drama, and the venting, and exhibit our righteous indignation over the unfairness or injury. Then, we can process the information before taking a moral and ethical high road. In other words, maybe we can be both. We can have the full range of ‘normal’ human emotions and reactions. Then, before we react the way those human emotions and reactions are driving us to do, our conflict resolution side can slide like a veil back in front of our faces.

What do you think? Is it either one way or the other? Is there another option, or a completely different set of questions that would reveal “the answer”? 🌱

Mary Beth Currie

Legal Perspective – Workplace Issues to Consider before June 15, 2010-Bill 168

June 15, 2010 will be here soon. For employers in Ontario who employ at least five employees, steps will need to be taken before June 15, 2010 to ensure compliance with Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009*, which becomes the law on that date. How much work will be required will depend on the nature and size of the business, but every provincially regulated employer in Ontario will need to take steps prior to June 15, 2010 to bring itself into compliance by that date. There is not a lot of time left.

Although the workload may be significant for workplaces such as healthcare, educational and retail establishments where interaction with the public is significant, compliance will still be process-based. Employers will still be required to address the potential hazards identified in Bill 168 in the same way they address physical hazards at the workplace — with the development of safe work procedures confirmed in writing, and with training and communication at all levels within the workplace.

To whom does Bill 168 apply?

It applies to all provincially regulated employers in Ontario with five or more employees, including the Crown.

In considering the application of the required policies and programs to the workplace parties, employers need to consider workers who work alone (including those who travel on business, salespersons who drive from client to client and those who work remotely). Additionally, in light of the statutory definition of who is a “worker” under the *Occupational Health and Safety Act* (OHSA), these requirements will apply to contractors who perform work at

the workplace, and the contractor’s employees.

Bill 168 clarifies that where a worker may be harmed by the violent actions of a *person*, the OHSA now applies. This is significant because it means that employers must now take steps to protect workers from persons who are not workers but who may interact with workers at a workplace. This is a significant change (or clarification) to the legislation, which will now apply to any encounter with a member of the public, such as residents in healthcare institutions, students at educational institutions, patrons at bars and restaurants, and shoppers at retail operations.

What does Bill 168 require?

Generally, at a high level, Bill 168 requires employers to implement both a violence policy and a harassment policy and to implement a violence program and a harassment program designed to protect workers from those hazards at the workplace. Additionally, the amendments include:

- new definitions of workplace violence and workplace harassment

- a requirement for employers to assess the risks of workplace violence based on the nature of the workplace and type or conditions of work, and develop measures and procedures to control them
- a right for workers to refuse work if they believe they are at risk of physical injury due to possible workplace violence
- a requirement for employers who are aware of the potential for domestic violence in a workplace to take reasonable precautions to protect the workers who are at risk of physical injury
- a requirement for employers and supervisors to alert certain workers of the risk of workplace violence from persons with a history of violent behaviour. Employers and supervisors must provide workers who may encounter such persons at work with as much information, including personal information, as needed to protect the workers from physical injury, and
- a requirement for the workplace’s joint health and safety committee (JHSC) and others to be notified if a worker is disabled or needs medical attention due to workplace violence.

Issues in implementation — policies

The legislation requires written violence and harassment policies.

Before drafting stand-alone policies, it is prudent to consider what other policies you may already have developed which apply to the workplace, and carefully consider if you wish to supplement those policies, or to

craft “stand-alone” policies directly in response to Bill 168.

The other policies or documents which may already exist at the workplace, and which may intersect with the workplace violence and harassment policies, may include:

- workplace health and safety policy
- contractor health and safety policy
- *Human Rights Code* harassment policy
- employee privacy policy
- collective agreement.

In creating the policies required by Bill 168, consider:

- Will the new OHS policies supplement or be in addition to existing workplace policies?
- Will you have one policy or two to address the requirements of Bill 168?
- Will you need to amend any other policies so there is no conflict among the various policies, which may exist?
- If you have multiple operations across Canada, will you have one policy for all operations or multiple policies that track the specific requirements of the applicable legislation in each province in which the operations are located?

How to start implementation — developing the programs

Bill 168 requires that employers implement a program in support of the policies. This will likely require the greatest focus and attention of the workplace parties.

a) Program — workplace harassment

The legislation specifies that the employer must implement a program to address workplace harassment, which must

- include measures and procedures for workers to report incidents of workplace harass-

ment to the employer or supervisor, and

- set out how the employer will investigate and deal with incidents and complaints of workplace harassment.

Review the procedures that have been developed for the *Human Rights Code* harassment policy. Does it make sense to suggest that the same procedures be adopted for the Bill 168 harassment? Do you need to tweak the Code harassment procedures?

One issue that will likely be adjudicated is whether the employer is required to disclose to the JHSC the identities of those employees who make the complaint of harassment, and those who are the named respondents.

Typically, in all harassment investigation procedures under the Code, employers will undertake to receive the complaint in confidence, and to the extent possible, investigate it in confidence. However, the OHS operates on a completely different basis than the Code. The internal responsibility system is the underpinning of the OHS. Basically, it specifies that each workplace party is responsible for the safety of himself or herself, and others. It fosters open communication of workplace hazards. Bill 168 identifies workplace harassment to be a safety risk. What amount of information must be communicated to the JHSC? What is the timing of the disclosure if the employer develops procedures to communicate the nature and findings of the complaint? Consider developing a protocol with the JHSC about the extent of information to be provided, if any, if there is a complaint of OHS harassment.

Additionally, employers should consider if they will entertain a complaint and conduct a single investigation or whether they will permit employees to make parallel complaints under both the

Code process and the OHS process, if the procedures to investigate the complaints are not the same. Bill 168 does not specify that a government authority will consider a harassment complaint involving the same parties and factual basis only once (either under the OHS or under the Code but not both). While an employer can never contract out of a statutory right, if a single investigation process is used, there should be some indication in the governing documentation that, generally, only one investigation will be conducted, absent unusual circumstances. The goal should be to investigate and resolve all outstanding issues if a complaint of harassment is made, regardless if it is filed under the Code or the OHS process.

Those developing procedures must also take into account privacy issues for both types of hazards. In the context of workplace harassment, how much personal information (or personnel information) about co-workers must be disclosed outside the team of investigating officials when a complaint has been received? Employers will need to consider this issue.

Adding to the complexity of intersecting statutes that employers need to consider in developing the harassment procedures is whether privacy statutes are applicable. For employers in the public sector, the privacy protections outlined in the provincial *Freedom of Information and Protection of Privacy Act* may apply. Employers in the private sector are not subject to any privacy statutes, at least with respect to the personal information collected from employees and used in the course of employment. This may provide some flexibility in designing the various procedures to be implemented to address workplace harassment. Most employers would indicate

that personnel information is treated confidentially, and is not disclosed generally.

The final other document to consider is the collective agreement, if one has been negotiated. Does it have any provisions that may affect the terms of the policy or how the program is developed?

Lastly, if the person complaining about harassment is a member of a union complaining about a co-worker who is also a union member, then that raises representation issues and additional disclosure issues that need to be considered when developing the harassment program. Similarly, if a worker complains about the conduct of a manager, how much (if any) information should be disclosed about the nature of remedial action, should the harassment allegation be founded—either to the person complaining or the team who conducted the investigation? Each of these issues will need to be considered as workplaces move forward to implement workplace OSHA harassment policies that are specific to their operations.

b) Program — workplace violence

Prior to developing a workplace violence prevention program, an employer must carefully analyze and evaluate the current risks of workplace violence. Once the risk assessment has been conducted, then risk management and prevention strategies need to be developed and implemented. While an employer has flexibility in determining how to develop a policy (unilaterally or with the JHSC or by the JHSC only), there is no question that the risk assessment should involve employees. They are the ones who will identify potential areas of improvement to the physical and administrative procedures in a workplace.

Once the hazards are enumer-

ated in the assessment, then procedures can be developed to reduce or protect against the potential hazards.

Bill 168 says a workplace violence program must include (at a minimum) the following:

- measures and procedures to control the risks identified in the assessment as likely to expose a worker to physical injury
- measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur
- measures and procedures for workers to report incidents of workplace violence to the employer or supervisor, and
- how the employer will investigate and deal with incidents or complaints of workplace violence.

An employer's workplace violence program should designate the personnel who will be specifically responsible for overseeing the workplace violence policy and responding to workplace violence. Generally, such teams will include representatives from security, human resources (HR), and union representatives in a unionized environment and perhaps, if a large enough company, legal and public relations (PR) departments.

The program must also include measures to deal with domestic violence that may erupt in the workplace. Bill 168 says that if an employer "...ought reasonably to be aware, that domestic violence...may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker."

As well, the program must address new disclosure requirements where there is a risk of violence from a person with a history of violent behavior. This obligation will exist if a worker can be expected to encounter such a

person in the course of his or her work and, accordingly, may be exposed to the risk of physical injury. This disclosure obligation may include personal information about the person with the violent history.

The law contains no guidance on how such persons are to be identified. The reference to persons in this context will apply to co-workers, patients, customers or any other members of the public with whom a worker may come into contact. The section goes on to say that, an employer should not disclose more confidential information than is reasonably necessary to protect the worker from physical injury.

Clearly, there will be litigation in future to clarify the interpretation of this obligation as there is a clear tension between privacy and safety rights.

In the face of this statutory requirement, employers who do not currently undertake pre-employment criminal records checks probably should consider doing so.

In addressing workplace violence prevention, there may be a number of technological tools that can be used to monitor workers for their protection. Cameras may be installed throughout the workplace or other technological means of tracking employees who work outside the workplace can be required. Technological surveillance may raise privacy issues that should be considered in crafting a workplace violence prevention program.

Work refusals

Employers should also amend their work refusal policies by June 15, 2010. Now, a worker who fears workplace violence is likely to endanger him or she can refuse to work. Until the changes in Bill 168, it was not clear (the *Barmaid's Arms'* decision

notwithstanding) whether a worker was able only to refuse work if there was a risk of harm due to physical elements in the workplace. Now, it is clear that a work refusal can lawfully occur if the worker believes a co-worker or another person may endanger him or her due to workplace violence.

If a worker refuses, regardless of why there is a refusal, the legislation will change to require that a worker remain during regular working hours in a safe place "that is near as reasonably possible" to his or her workstation and remain available for the purposes of the investigation. Previously, the OHSA specified the worker was only required to remain near the workstation but did not require that he or she was to be available for the investigation,

although case law certainly interpreted the obligations of a refusing worker in that manner.

Requirement to prepare notice of workplace violence incident

Bill 168 also specifies that employers must report the occurrence of an incident of workplace violence pursuant to subsection 52(1) of the OHSA. This means that the reporting policies must be revised so that the appropriate reports are created and circulated within four days of the occurrence to the JHSC and trade union, if any, and to the Ministry of Labour if an inspector requires.

Conclusion

Bill 168 applies to all provincially regulated businesses in Ontario, with at least five employees. It does not matter if there has been no past outburst of workplace

violence or harassment. All employers with at least five employees must develop and implement the same type of requirements to address workplace violence and harassment.

Remember that these hazards will be treated by the Ministry of Labour as any other hazards and, where an employer fails to comply, orders or even prosecution can occur. Thus, to assist in the development of a due diligence defence, the records generated in developing the applicable policies and programs must be retained.

Legal Perspective is prepared by the law firm Bennett Jones LLP, with offices in Edmonton, Calgary and Toronto. Mary Beth Currie, a partner at Bennett Jones LLP, practices employment law, specializing in health and safety, with the Toronto office in Ontario. For more information, call (416) 863-3200.

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Ernest G. Tannis Feb. 9th. 2010

Part 1 of a 3-Part series

Do We Have to Negotiate in Good Faith?

How far back and how deep inside do we go to answer this question? When I unexpectedly authored "Alternative Dispute Resolution That Works" (Captus Press, York University Campus, 1989), which emerged from a presentation to the CCLA (County of Carleton Law Association) Litigation Update Conference in Nov. 1988, as part of a long ADR journey embarked upon in search of something better, not just something different, in the ways we solve problems and treat each other as human beings, it occurred to me in the research and from the experiences since then that we are not just talking about superficial process to go by but indeed superlative principles to live by.

This question of "duty to negotiate in good faith" is in five sections: this introduction, followed by what could be seen in the metaphor of a tripod, so that if one chair is broken, the chair cannot be used,, the three legs being: Values, Justice, Law, then ending with a conclusion with some ideas to ponder, tips to practice, and a way forward to promote.

I wish to share a favourite phrase from The Right Honourable Lord Moulton (1844-1921), published as an essay, which appeared in The Atlantic Monthly July 1924) entitled "Law and Manners": "the domain of the **Obedience to the Unenforceable**". Imagine the impact of such a philosophy to negotiating? I have mentioned this teaching many times in interventions and training.

What is unmistakable in the first leg of this framework is the role of **Values** which inform the way each person conducts themselves. What we all do every day, in every situation, at all stages of life, at all levels of society from the individual to the institutional to the international is **negotiate**. It is as ancient as history itself; in my book, one of the first recorded negotiations in literature is referred to when Abraham was negotiating with God on how to save the "righteous among the wicked" at Sodom and Gomorrah (Genesis 18: 17-33). Values are personal to each one, but how often do those in disputes get a

chance to get beyond the diatribe or vociferous nature of the dialogue or debate to the values that truly direct what is going on, consciously or unconsciously? These values can be on many levels, affected by family and cultural backgrounds. When people are asked "what values are guiding your discussion"? Can this be done in Court?

This brings in the values of third party neutral processes, where in a safe environment parties can go into their own 'battles within' to resolve the issues on the surface. Anyone involved in mediation, for example, can draw upon their own experiences to manifest this point. Let me describe one such actual intervention as an example of how real a life application has given confidence to this way of thinking. A few years ago, there was a hostile family litigation which was going on for over two years. One of the lawyers brought an application under the Family Law Act for the appointment of a mediator, itself a creative negotiation tactic, which led to the two lawyers nominating three candidates with the Judge's approval to choose from. For some reason, I was selected... In a second session alone with the couple, after the first one with the lawyers present, the couple were not understanding each other, especially after such acrimonious expensive litigation: the father deeply depressed, from the break up and how it occurred, when she left the house with the children and assets and the mother also distressed, living with her own parents, in fear. What was their common ground? Their love for their three children is what I observed, to which they both agreed, a first point in agreement. What to do or say next to encourage the parties to negotiate since mediation is essentially assisted negotiation? It occurred to me to ask the woman what "values" she lived by, to which she answered that she was a Christian. The man complained that all of that religious stuff was nonsense, that the children were being misled. It was a moment of truth. With their permission, I asked him what values he lived by, he simply said people live and die, that's it. Silence. It is

"For our discussion is on no trifling matter, but on the right way to conduct our lives"

– Plato, Republic, VIII, 3524

said in litigation training, do not ask a question for which you do not know the possible answers, but in mediation, I found the opposite to be true, so I asked him a question, not knowing what the answer might be: “how you resolve your conflict will be the only real education your children will have in solving problems in life, so what values would you like your children to have in life?” I could hardly keep up with the flip chart writing down all of the qualities he would be proud his children to have. When the page was full, I pointed to that chart and asked them if that list was a common set of values they could both work towards, and they both agreed. The couple then went on their separate ways after a few more sessions, got a divorce, completing the ADR process,

“how you resolve your conflict will be the only real education your children will have in solving problems in life, so what values would you like your children to have in life?”

which then meant to me, **A Dignified Resolution**. They felt a **duty** if not to each other than to their children. They then negotiated in **good faith** always, with points of differences of opinion, going back to those values. They then felt they had approached a sense of Justice for themselves and their children.

And what about **Justice**, the second leg on this chair or problem solving? This will be dealt with in Part 2. The universal answer to this question is embodied in another question: “**Who is my Neighbour?**” which was the central question posed by the House of Lords in the breakthrough Court case in the evolution of tort law which every law student studies, **Donohue v. Stevenson** (1932 AC 562). How Lord Atkin posed and answered this question as to whom a person in law owes a duty, the first hurdle in having a cause of action, is pertinent to not just legal jurisprudence but also to principled negotiation, “*Who then in law is my neighbour? The answer seems to be persons who are so closely affected by my act that I ought reasonable to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called into question.*”

How this applies in negotiating solutions in good faith will be further explored in Part 2.

In Part 3 I will deal with the “Law” suffice it to say for now that as set out in the leading Supreme Court of

Canada case, judicially noted almost 200 times, *Martel Building Ltd. v. Canada* (2000) S.C.R. 860, the Court wrote:

We conclude then that, as a general proposition, no duty of care arises in conducting negotiations. While there may well be a set of circumstances in which a duty of care may be found, it has not yet arisen.

Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not gone so far as to create new, unbargained-for, rights and obligations.

The common law Court's perspective is also expressed well in *Walford v. Miles* 1992 2 W.L.R. at 181, House of Lords, England:

“...the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party”.

A number of leading publications will also be reviewed, one general summary is pointed out by Professor William Tetley in his 2004 article *Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering* (McGill University 2004 35 JMLC 561-616): “*Thus good faith has often had to enter the common law in some disguised form, and this is precisely what it has done.*” What he means by “disguised form”, is like a ‘back door’ approach since where the Court senses an unfairness with or without a contract, without a common law positive duty to negotiate in good faith or a Statutory regime requiring a duty (like Quebec Civil Code), at least a dozen principles of equity have stepped in to remedy the situation, e.g. mistake, misrepresentation, breach of fiduciary duty, breach of confidence, doctrine of part performance, etc. A fascinating inquiry waits in this literature.

In the Conclusion in part 3, among other ideas, recommendations will be made for practitioners to be pro-active, for example, to have ADR clauses with such a duty to negotiate in good faith to actually be put into contracts and actually also in Wills, to avoid or at least reduce Estate litigation; some precedents can be found at www.adrcentre.org This is being done already but should be considered in every situation possible. Ultimately, we are in service to those whom we serve. We will serve them well when we serve up these notions of duty to negotiate in good faith. 🌱

The Mission of the ADR Institute of Ontario is to:

- Assist the public, business, and no-profit communities and government bodies at all levels to consider, design, implement and administer alternative (increasingly known as appropriate) alternative dispute resolution strategies, programmes and processes;
- Assist all the foregoing to locate ADR professionals with the level of skill and experience required to meet their needs;
- Provide training standards and accreditation procedures that contribute to the development of a community of ADR practitioners across Ontario that is competent, well educated and highly professional in delivering ADR services to its users;
- Provide a regulatory infrastructure that includes a Code of Ethics and a Code of Conduct for Mediators that set high standards of practice, as well as providing a complaint and discipline process for any dissatisfied user of ADR services;
- Provide ADR professionals throughout Ontario with educational and networking opportunities;
- Speak on behalf of ADR professionals in response to current events and government initiatives.

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