

Canadian Arbitration and Mediation Journal

A publication of the ADR Institute of Canada, Inc.

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page 38



LEADING DISPUTE RESOLUTION IN CANADA
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Message from the Editor

Welcome to this issue of the *Canadian Arbitration and Mediation Journal*. Feel free to share it with colleagues, clients, and friends. We are also pleased to let you know that past issues of the Journal can now also be found on CanLII at <https://www.canlii.org/en/commentary/journals/43/>.

This issue's contributors gently nudge readers to expand their vision of ADR, to revisit their assumptions about what it is and what it ought to be. **Dominique Panko** asks why mediators need to have subject-matter expertise and be of a certain age or stage in life. **Ruth Corbin** gives readers the tools to properly evaluate social science research rather than extracting isolated nuggets and using them to reinforce existing practices or beliefs. **Justice June Maresca** brings her experience to bear in reviewing *Negotiation and Conflict Resolution in Criminal Practice: A Handbook*, a book that explores the application of ADR to criminal justice. In the second of his two-part article, **Joel Richler** ques-

tions why civil trials are persistently used as a model for arbitral hearings. **Brent Batten** asks whether mediators have evolved to the point where technology can replace the traditional mediation setting. **Bill Horton** wonders what the experience of student arbitrators can teach about the decision-making process used by practising arbitrators. **Dana Holmes**, whom I interviewed, works in a system that gives federal employees a chance to resolve issues outside of the formal options like grievances or complaints, and **Al-Nawaz Nanji** invites readers to consider a modern ADR program that is based on a tradition of resolving individual disputes voluntarily through community mediation, conciliation and arbitration. **JT Dhoot** challenges readers to include valuation in their ADR repertoire. And **Daniel Brantes** and **Rafael Carvalho Rezende Oliveira** compare public administration arbitration in Portugal and Brazil where privacy and confidentiality are not necessarily given features.



GENEVIEVE A. CHORNENKI, LL.M. (ADR), C.MED, C.ARB

Genevieve has served as mediator, arbitrator, ADR consultant and trainer since 1989. She is a director of the Condominium Authority of Ontario and co-author of *Bypass Court: A Dispute Resolution Handbook*. She was inaugural chair of the Ontario Bar Association's ADR Section and received its first ADR Award of Excellence.

Thank you to all who made this issue possible: our contributors, the helpful staff at the ADRIC office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome. 🏠

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President's Message

This is the second issue with the new Journal design which was a result of your feedback on its format, content, length of articles, etc. Thanks to all those who participated. We are very pleased with its fresh look and hope you are.

Here is an update on ADRIC activities since the last issue of the Journal:

We enjoyed our 45th AGM and an excellent conference in Victoria in November, where we presented the national McGowan Award to Wendy Hassen of Alberta and the regional award to Charmaine Panko of Saskatchewan. We also said farewell to two long-time ADRIC directors: David McCutcheon and Jim McCartney. Both will continue to be involved with ADRIC on committees, but we will miss them on the board.

The conference sessions were well attended including the Med-Arbitration Rules consultation. The Rules Committee presented the Med-Arbitration rules to attendees and welcomed feedback. Many of the suggestions were incorporated and the rules sent to our wordsmith

for plain language work. The committee is now just reviewing one last time before we make them public. We will also be offering an ADRIC or ADRIC-accredited Med-Arb course and the Chartered Med-Arb designation. We have enjoyed a fair bit of media coverage on this specialised process - a good deal of interest!

The Government Relations committee (GRC) held an advocacy event for the BC legislature during the conference giving attendees an opportunity to network with a number of MPPs including the Attorney General, David Eby. The Hon. Mr. Eby also received and announced the presence of a number of Affiliate Presidents and ADRIC representatives. We were delighted by the warm welcome and acknowledgement of the importance of ADR.

Going forward we hope you will keep the following in mind:

The ADRIC 2020 Conference will be held in Ottawa-Gatineau October 20-23, which includes 2 days of Pre-Conference workshops and our partner's sessions October 20-21: we are partnering with St.



**ANDREW D. BUTT, M.S.T.,
B.ED., B.SC., C.MED, C.ARB**

Andy has 20 years of experience in executive management positions with large corporations, 15 years of extensive experience in mediating workplace disputes, completing workplace assessments, conflict coaching and training with managers and leaders in conflict management situations.

The Canadian Arbitration and Mediation Journal is now on CanLII!

We are delighted that [CanLII](#) (the Canadian Legal Information Institute) has added the Canadian Arbitration and Mediation Journal to [CanLII's commentary section](#). You will find current and all back issues.

Please share this great news with your colleagues in the law community!



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Paul's University Conflict Studies Program and the Informal Conflict Management System (ICMS) of the Federal Government. This will enrich our program with even more interesting sessions! We would like to hear from you - what content would you like to see? We also want to remind you about exciting **sponsorship opportunities**: your sponsorship not only reaches a unique target group, but is the only source of funding for the conference, supporting all logistics and keeping registration rates reasonable. Please support ADRIC and ADR by sponsoring; see the website for details or call the office.

We are also collaborating on another event in the fall: the inaugural Canadian Arbitration Week during the week of September 21st, 2020 in Toronto. ADRIC's contribution will be on the afternoon of Wednesday September 23rd. It was about time Canada should hold a dedicated arbitration learning and networking initiative! Learn more at www.canarbweek.org.

Looking forward to seeing you at these events!



ADRIC 2020

October 20-23, 2020

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- "Well done! Interesting."
- Alyson Jones
- "Very valuable and informative."
- Jenny Ho
- "More time - excellent presenters and content, fabulous session! Could have been a 2-3 hour session. Great material. Thank you for sharing."
- Leona Hamel, *Canadian Transportation Agency*

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Meaningful Mediation for Millennials

His arms are covered in colourful tattoos. “That was way less scary than I thought it’d be,” he says, eyes still wet with tears.

He was a millennial, 29 years of age. He’d just spent an hour talking about his parenting schedule.

Less than two weeks earlier he’d hung up on me abruptly when I called to invite him to mediation. He later confided that he’d been more afraid of meeting me, his mediator, than of leaving for multiple combat tours in the past five years. But, I’m a millennial, too.

According to Statistics Canada, millennials are the largest age grouping in Canada, making up 27% of the population¹. There is some disagreement on when the millennial generation starts and finishes. Statistics Canada uses the range of anyone born after 1981 but before 1996. Other end dates that have been considered are 1993, 1997, and 1998. The generation after millennials is Generation Z (sometimes called Centennials, iGen, or Gen Z) making up close to 22% of the Canadian population².

Millennials and even Generation Z are now having children and entering and leaving spousal relationships. When domestic relationships change or end, these young parents are looking for a different kind of legal services, a different kind of conflict resolution. They have new challenges, fears, expectations, and assumptions. Ever present is their assumption that the process of separation is going to be terrifying. Hillary Hoffer wrote for Business Insider that millennials are trying to avoid marriage and divorce altogether by opting to simply live together rather than marry³. Data supports her claim. In Canada, 21.3% of all

couples were common law in 2016⁴. This is the highest percentage of common law relationships ever in Canada. Millennials and Generation Z are also having fewer children later in life. In Canada, 284,724 children were born to mothers under the age of 35 in 2018⁵.

My observation in working with people under the age of 40 is that they experience marriage, divorce, and parenthood differently than previous generations. Their experiences are coloured by their fear of divorce and often by memories of their parents’ divorces. Millennial and Generation Z clients are looking for a divorce or separation that doesn’t feel like a divorce or separation. It is not uncommon at our law and mediation office to get calls from potential clients saying they don’t want to work with a lawyer, they don’t want lawyers involved, and they definitely do not want to go to court. Clients, especially younger clients, increasingly want their mediation tailored to be less formal, even so far as bringing their children with them, mediating at odd hours, and sometimes in sweatpants.

So, what kind of mediator will best serve millennials and Generation Z clients whose spousal relationships are changing or ending? What characteristics should that mediator have? Some might say that experience is the most important thing in the world. But *what* experience? *Whose* experience?

Being a mediator is not just for the experienced; mediating is the experience. If you peel mediation back to its essence, it is about the experience of the client, not the experience



DOMINIQUE PANKO, Q.MED

Dominique Panko is a Qualified Mediator at Panko Collaborative Law and Mediation. She is a general practitioner of mediation but works primarily with families. Dominique is a member of ADRSK and YMI and is part of the Under-40 forum Saskatchewan chapter. She is also the educational coordinator of Common Sense Mediation Academy which provides training and guidance to new mediators.

of the mediator. As a colleague said, “The mediator is the least important person in the room.”

So then, what is the mediator for? To listen, to understand, to be neutral, to translate. The mediator is there to help communication, not to tell clients what to do. Mediation is a set of skills and a process. With that process and those skills, mediators get through all the noise to what really matters, and they help turn that information into an agreement.

Millennial and Generation Z mediators may not bring long years of practice to the mediation table, but they have the ability to access the “secret sauce” of mediation as much as anyone else, and they have things

to offer. They give younger clients relatable and unthreatening options, and they offer older clients an environment free from preconceived notions and misplaced assumptions. They may generate more creative options because they don't get caught up in what has or hasn't worked before. Every client is new, every file unique, every option valid. All mediators can learn from colleagues who think to ask a new question and take a fresh angle. As the world changes so must we. It's time to focus on what makes mediation different from other processes. It is the curiosity that makes it different. We only allow ourselves to be curious when we recognise that we don't know everything, we will never know everything.


The success of mediation doesn't rest in the mediator's knowledge or their stage of life but rather in their ability to translate the narrative of the client into useful information. Communication skills, interpersonal skills, and the ability to shape the client's perspective and draw from the client's pool of information are the key aspects of a great mediator. And those are the attributes that I see millennial and Generation Z clients responding to

in mediators.

The world is changing fast. New parenting apps, new social media, new challenges to parent through (*how old do you have to be to have snapchat?!).* The speed at which the world now moves makes it impossible to understand everything. For generalist mediators especially, it just isn't realistic to believe that they would have a strong foundation in every subject they might mediate. Additionally, many of the issues parents need to discuss in mediation have absolutely no legal relevance. Parents are already the experts for many of the issues they need to work through in mediation.

If you offer mediation services, be honest for a minute. How often do you know more about a client's situation than they do? The law is one framework, the precedents or the way

things have been done before is another framework. In mediation, those frameworks are less important because self-determination is the guiding principle. Clients are free to make their own decisions based on their personal experiences and goals. My observation is that for millennials or Generation Z clients, those frameworks are even less important because they don't want to take part in a divorce, especially if they were common-law or never married.

It's time to take the emphasis off mediator experience and subject-matter knowledge. The spirit of mediation can be fulfilled regardless of the mediator's age, stage, or background. Everyone can mediate. The mediator's job is to guard the process and to guide their clients through to agreement. 

- 1 Heisz, A. and Richards, E. (2019). *Economic Well-being Across Generations of Young Canadians: Are Millennials Better or Worse Off?* [online] www150.statcan.gc.ca. Available at: <https://www150.statcan.gc.ca/n1/pub/11-626-x/11-626-x2019006-eng.htm> [Accessed 17 Dec. 2019].
- 2 Martel, L. and Ménard, F. (2018). *Generations in Canada*. [online] www12.statcan.gc.ca. Available at: https://www12.statcan.gc.ca/census-recensement/2011/as-sq/98-311-x/98-311-x2011003_2-eng.cfm [Accessed 17 Dec. 2019].
- 3 Hoffower, H. (2019). *Why are millennials abandoning divorce? Sex, money, and their parents.* [online] Business Insider. Available at: <https://www.businessinsider.com/millennials-declining-divorce-rate-hooking-up-delaying-marriage-2019-5> [Accessed 17 Dec. 2019].
- 4 www150.statcan.gc.ca. (2019). *The Daily — Families, households and marital status: Key results from the 2016 Census*. [online] Available at: <https://www150.statcan.gc.ca/n1/daily-quotidien/170802/dq170802a-eng.htm> [Accessed 17 Dec. 2019].
- 5 www150.statcan.gc.ca. (2019). [online] Available at: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1310041601> [Accessed 17 Dec. 2019]

Use The Model Dispute Resolution Clause Below When Drafting Contracts:

Simple Guidelines for Initiating Mediations

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall be mediated pursuant to the National Mediation Rules of the ADR Institute of Canada, Inc. The place of mediation shall be *[specify City and Province of Canada]*. The language of the mediation shall be *[specify language]*.



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Reading Research—Bamboozled No More

ADR practitioners want to stay current with new knowledge. Authors of published research and polls seek to seduce them with conclusions—about what people want, how they can be influenced, what part of the brain controls what functions, or other claimed breakthroughs in social scientific research. It is tempting to extract isolated nuggets from research and use them to reinforce an existing practice or belief. But can ADR practitioners do this with confidence? In the face of conflicting research and obscure technical detail, how do you decide what to believe? How do you evaluate research or determine what is true or correct? How do you know when to revise—or even discard—an existing practice or belief?

When reading a research report, one thing is certain: you should *not* scroll down to the author's concluding sentence and accept his/her interpretation as a statement of universal truth.

To master the art of reading research, three principles apply. They are the same ones identified by the Supreme Court of Canada¹ for evaluating survey evidence, and they are common to all social sciences: reliability, validity, relevance.

Reliability addresses the question of whether the results of one modest research project can be generalized to the world at large. Surveys and polls sample only a small portion of the population: will their results prove true for the whole population? According to established statistical theory, surveys can be generalized to the broader population **if** the sample was chosen to be random or otherwise representative of the population. Bigger sample sizes don't guarantee better results. The notorious 1936 Literary Digest presidential political poll in

the United States is a continuing historical reminder on this point. Based on a poll of two million voters, the Literary Digest predicted an overwhelming win for Republican candidate Landon. Instead, Roosevelt won with 62 percent of the vote. As it turned out, the magazine subscribers and other people who were polled constituted a biased sample of the universe of voters.

Reliability is sometimes referred to as “repeatability”: if the same study were performed on a different day, with different people, would you get approximately the same results? The margin of error (for example, “plus or minus 5%”) conveys how much the results could differ in the overall population. The confidence level (for example, “with 95% confidence” or “19 times out of 20”) means that if the research were repeated twenty times, 19 of those 20 times would give a result within the margin of error. Nothing is guaranteed about the truth of the results for the overall population, but 95% confi-

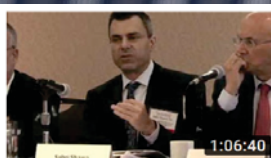
RUTH M. CORBIN, PH.D, LL.D

Dr. Ruth M. Corbin, Ph.D., LL.D., is Chair of forensic research firm CorbinPartners Inc., and an accredited mediator specializing in the resolution of expert evidence disputes in litigation and ADR forums. A member of the ADR Committee of the International Trademarks Association, she will lead a seminar on “mediating across cultures” in Singapore in 2020.



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dence is a pretty good insurance policy.

Validity refers to whether the right things are being measured in the right way. The legendary Howard Cosell, in the late 70s, was said to have complained into a microphone as Philadelphia Phillie shortstop Larry Bowa entered the batter's box, "His batting average is only 261, but this kid is a 300 hitter."² Evidently, Cosell did not accept that Bowa's batting average validly measured his actual abilities as a batter.

Some people use the words "reliability" and "validity" interchangeably, but these are not synonyms in the world of scientific research. It is important to recognize the difference in order to be a discriminating reader of research. A research result can be reliable but not valid. Your bathroom scale helps illustrate the point. If you keep your bathroom scale at a starting point of 5 pounds (perhaps a perverse motivator for losing weight), your bathroom scale is *reliable* in always telling you the same weight, but *invalid* because it never tells you your correct weight. Similarly, a study can be valid but not reliable. Consider, for example, an exit survey of 100 voters from a voting booth in University-Rosedale, a federal electoral district in Ontario, between the hours of 3 p.m. and 5 p.m. In the hands of a skilled interviewer, such a survey might be *valid* in that voters might be willing to tell the interviewer the truth of how they voted. However, as a survey of Canadian voters, the

survey would not be *reliable*, because the 100 daytime voters in a single riding are unlikely to be representative of the voting population at large. In other words, it would be a valid indicator of how those citizens had voted, but not a reliable indicator of the outcome of the election.

Relevance refers to whether the overall research objective—and the results it has produced—can be directly linked to addressing the underlying issue. The answer to that question is the purview of the user who knows first-hand the issue he/she is concerned with. For example, whether a valid and reliable survey of the public's interest in mediation should be relevant to government policy (and a basis for advocacy) is a matter of the research-users' professional judgment. In courts and adjudication forums, the relevance of evidence is typically argued by lawyers and decided by the trier of fact.³

Three little words—reliability, validity and relevance—can prove constant companions to the discriminating reader of research. 🏠

1 *Mattel Inc v 3894207 Canada Inc* [2006] 1 S.C.R. 772, 2006

2 Retold in Kaplan, R. M. and Saccuzzo, D. P. *Psychological Testing, Principles, Applications and Issues*. Monterey: Brooks/Cole Publishing Company, 1982, p. 85

3 A thorough account of the Courts' tripartite test for evaluating social science evidence is found in Corbin, R., "The Moron in a Hurry: a Creature of Law or Science?" in *Annual Review of Civil Litigation*, Editors: Justices Archibald and Scott, Toronto: Carswell, September 2015

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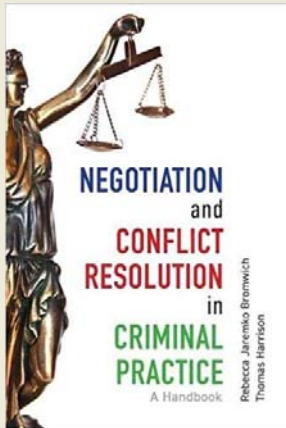
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Negotiation and Conflict Resolution in Criminal Practice: A Handbook

Rebecca Jaremko Bromwich and Thomas Harrison, Canadian Scholars, 2019

ISBN: 9781773381480

Reviewed by: Justice June Maresca

In the criminal justice system, alternative approaches are increasingly being used to resolve cases. I have seen the difference these approaches can make—first, as a lawyer representing young people accused of a crime and, later, as a judge presiding over criminal matters and leading a drug treatment court. It's good to see a book that broadens the conversation about these alternatives.

In *Negotiation and Conflict Resolution in Criminal Practice: A Handbook*, authors Rebecca Jaremko Bromwich and Thomas Harrison endeavor to describe how conflict resolution processes are—and should be—used in criminal cases.

Overview

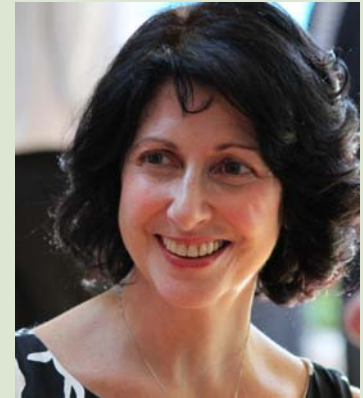
Each chapter begins with a list of learning objectives and an overview of the subject matter. After discussing each topic, the authors set out tips, tech-

niques, and strategies that they argue are useful in negotiating the resolution of criminal charges. They use hypothetical case studies and discussion questions after each chapter.

In Part I, the authors describe the general theory and practice of conflict resolution and then explain how these specifically apply in the criminal context. In Chapter 3, they discuss the systemic roles of advocates in criminal, cultural, and social contexts.

Part II begins with a discussion of the use of ADR processes in Canadian law generally. The authors then examine a wide range of ADR processes used in the resolution of criminal issues, including plea bargaining, the diversion of cases out of the court system, victim-offender mediation, and restorative justice processes.

The book closes with an interesting discussion about professional well-being and self-care. The authors



JUSTICE JUNE MARESCA

Justice June Maresca, LLB, LLM, is a retired Judge of the Ontario Court of Justice, where she continues to hear judicial pre-trials on a per diem basis. She has practiced and taught ADR processes in many forms over her almost 40 year career, including family cases, child protection mediation, arbitration, civil matters, and criminal cases. She started the Brampton Drug Treatment Court in 2015, and used conferencing when hearing Youth Justice cases.

rightly argue that “burnout” is endemic in the legal profession, particularly where counsel work closely with people whose lives are in crisis, whether they be accused persons or victims. Lawyers must care for themselves in order to be able to care for their clients, the authors say.

The Book's Strengths and Weaknesses

The authors set out “to describe the important role of negotiation and other conflict resolution techniques in Canadian criminal law” and to explore “a further important theme...practicality.” They call



attention to the fact that negotiation and communication skills are of critical importance to lawyers practising criminal law. In this, they do a great service to practitioners. As they correctly point out, opportunities to resolve criminal cases may arise at any point in the proceedings, and both Crown and defence counsel can best serve their respective clients through skillful negotiation and effective communication.

The authors maintain that collaborative approaches to resolving criminal cases, in particular interest based negotiation, will yield better outcomes than more traditional rights based or positional bargaining. While attention to the interests of all parties is often the most effective way to reach optimum solutions, it is important to maintain a distinction between private law matters and matters of criminal justice where the state brings to bear its authority on citizens. The authors sometimes overlook this distinction, such as by referring to arbitration as an appropriate process for the resolution of criminal matters. They take a blanket approach to the application of principled bargaining in the context of criminal law. They advocate using the “Seven Elements” of principled negotiation set out in Fisher and Ury’s *Getting to Yes: Negotiating Agreement Without Giving In*, without paying adequate attention to the nuances and unique circumstances that arise in criminal cases. Rather than giving readers a crash course in interest based bargaining and communication skills in Part I, the authors could have assumed a general level of competence and understanding in this area and focused more fully on some of the thorny legal and ethical issues that arise in negotiating criminal cases. For example, directives from the Ministry of the Attorney General as to the handling of certain offences often tie the hands of crown prosecutors, making interest based negotiation difficult in practice.

Throughout the book the authors refer to the Model Code of Conduct of the Federation of Law Societies of Canada, without explaining what that is, how it came into being, or whether it applies equally to lawyers practising across Canada. For readers who may not know, the federation developed the model code with a view to standardizing codes of conduct for lawyers across Canada. While some provincial law societies have incorporated sections of it into their own codes of conduct, the federation’s model code is not binding upon any lawyer. In a discussion about clients with diminished capacity, the authors direct readers to section 3.2-9 of the model code and the commentaries that follow. But the Law Society of Ontario’s code of conduct omits commentary 3 that deals with whether and how a lawyer may act for a person with diminished capacity. The distinction between the model code and individual codes of conduct of provincial law societies is important, and lawyers using this book ought to be made aware of it.

Part II of the book largely describes ADR processes used in the resolution of criminal cases, and the authors do a good job of setting them out, such

as victim-offender mediation, diversion programs, sentencing and peace making circles, *Gladue* reports, and several others. (Although it was somewhat jarring to see— more than once—young persons in conflict with the law described as “young criminals.”) An unfortunate omission was the role counsel and the court play in drug treatment courts. These courts take a singularly non-adversarial approach to addicted defendants, and counsel’s role is not widely understood. A similarly non-adversarial approach is sometimes taken in dedicated Youth Courts and ‘Crossover Kids’ programs, the latter being a program addressing the particular issues affecting youth who are involved with both child protective services and the criminal youth justice system. A discussion of the role of counsel in these programs would have been a welcome addition.

The greatest accomplishment of this book is that it draws attention to the fact that, even in criminal law, the use of alternative approaches to trials is growing and that lawyers are well advised to acquire the skills necessary to make full use of these alternatives on behalf of their clients. 🏠

An illustration of an iceberg floating in the ocean. The tip of the iceberg is visible above the water line, while the much larger, jagged base is submerged below the surface. The water is a deep blue, and the sky is a lighter blue with some clouds.

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The Proactive Arbitrator: Part 2¹

In Part 1 of this article² I wrote that commercial arbitrators should encourage parties to apply a “front end” approach and customize the process if participants are to truly enjoy the benefits that arbitration has to offer. Recognizing that all cases are different, the following is a process that, in my experience, balances full and fair disclosure with efficiency. This model covers ten aspects of the typical arbitration process.

Party Statements

Written statements, not “pleadings,” should be delivered early on. They should be advocacy documents containing statements of what the evidence will be and legal submissions. Key documents or excerpts should be attached. “Less is more” does *not* apply. For full and fair disclosure, statements should be delivered sequentially, not simultaneously, with provision for reply and sur-reply.

Evidence in Chief

A critical decision is whether evidence will be put forward orally or in writing, but no case requires that all—or even most—evidence be oral. Front-end arbitration compels the use of written evidence, delivered early, with counsel and the arbitrator working together to determine whether oral evidence is necessary or desirable. Arbitrators should reserve discretion to ask for oral evidence on important issues, such as issues of credibility.

Witness Statements

Sworn witness statements should cover the entirety of each witness’s evidence, and the reader should be safe in assuming that no new evidence will be presented at the hearing. A sequential exchange of witness statements should begin early, contemporaneous with or shortly after delivery of the party statements. Reliance documents or excerpts that form part of the witness’s evidence should be physically annexed or electronically linked. Provision should be made for reply and sur-reply statements to minimize any need for *viva voce* testimony.

Expert/Opinion Evidence

The procedure for the exchange of expert evidence should closely resemble the procedure for fact evidence, except that expert evidence will typically take the form of a written report. All procedural and scheduling matters pertaining to expert evidence should be settled at the first pre-hearing conference with the same objective of front ending that evidence.

Experts and the subject-matter of their evidence

should be identified early in the process, preferably no later than the delivery of party statements. At the first pre-hearing conference, it should be determined when the opinion evidence should be exchanged. In most cases, that should be at the same time as witness statements. There are, however, cases where delivery of expert reports is best deferred until document and witness statement exchanges are complete. As well, the process should allow for the possibility of expert consultations (with or without participation of counsel) in order to define the issues that the experts will cover.

After the complete exchange of expert reports, it should be determined when the experts will testify. Will it be as part of each party’s case, sequentially after the fact evidence in both cases is completed, or in “hot tub”³ fashion after the completion of the fact evidence? Logically and ideally, one of the two latter options should be pursued.

Document Exchange

With rare exception, the parties will require some means for the exchange of further documents following the exchange of fact evidence (and perhaps even after the delivery of expert reports). For this purpose, Rule 3 of the International Bar Association Rules on the Taking of Evidence in International Arbitration⁴ is often adopted *per se* or as a guide. The best procedure is this: Parties are entitled to make document requests by no later than a fixed number of days before the start of the hearing. The requesting party should, in the form of a Redfern Schedule⁵, precisely identify the document (or class of documents), explain why they are relevant and material to the outcome, and attest that it does not already have them, have access to them, or that they are not publicly available. Within a specified short number of days after that, the responding party should agree to deliver the documents or provide a reasoned

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refusal. The arbitrator should rule on any contested requests within a specified short number of days thereafter.

Oral Discovery

I am not dogmatic about whether or not parties should engage in oral discovery, but I do adhere to the following principle articulated by the International Centre for Dispute Resolution, and suggest that it also applies to domestic arbitration:

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fair process within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation...Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

Notably, oral discovery is not mentioned in Canadian domestic or international arbitration legislation, in any of the rules of the major arbitration institutions, or in the UNCITRAL Rules for *ad hoc* arbitration. Atypically, ADRIC's Rules⁶ allow for tribunal-ordered discovery, but only where necessary for a party to present its case (rule 4.4). That said, oral discovery (or alternatively written interrogatories) may be the most efficient means to obtain information that has not been reduced to writing.

If parties agree to oral discovery, the arbitrator should manage the process by directing who will be examined and on what issues or events and by setting time limits and a completion date for each examination that is well before the start date of the hearing. Where one party asks for oral discovery and the other refuses, the requesting party should satisfy the arbitrator that the examinations are necessary to present a case or defence on specific issues. There must also be certainty as to how discovery transcripts will be used. Are they for impeachment or in lieu of witness testimony?

Motions

Extensive motions should be discouraged, although some motions, such as those for summary disposition or bifurcation, can maximize arbitration efficiency. Wherever motions are to

be made, the following procedural principles should be adopted. Motions should be treated as measures of last resort. Notice of an intention to bring a motion should be given as soon as possible after the moving party has decided to bring one, but the arbitrator should serve as gatekeeper, determining whether to permit the motion. A date should be set in advance of the hearing after which no motions will be allowed. In all cases, the motion procedure should be tailored to fit the relief requested, and the formality associated with motions under court rules of practice should not be adopted. Not all motions require formal evidence, an oral hearing, or a personal attendance before the arbitrator.

Opening Statements

In an arbitration that proceeds as described above, formal opening statements are usually not needed. The tribunal will know what it needs to know in order to commence the hearing. An introduction to the case can be accomplished by page-limited written statements delivered within a few days of the start of the hearing, or by very short oral openings of, say, 15 to 30 minutes.

Final Pre-hearing Conference

It is a good practice to schedule a final pre-hearing conference no later than 10 to 15 days before the hearing starts. As a result of

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this meeting, the parties and the arbitrator should know, if they don't already, who will be called to testify and/or be cross examined, the order of witnesses, and the expected duration of each witness. While I do not subscribe to the use of "chess clock" procedures in most cases, that type of regimen can be useful to ensure the timely completion of hearings.

Planning the Evidentiary Hearing

Canadian arbitrators have much to learn from other jurisdictions where arbitrators and judges adopt a far more pro-active and inquisitorial role. For instance, the parties should expect that arbitrator questioning is part of the process, not an interference in the hearing. But arbitrators can, and should, be even more creative when it comes to planning for and conducting hearings. There are, after all, neither statutory provisions nor international rules that mandate particular hearing formats. Notably, in this regard, statutes and rules refer to "hearings," not "trials."

There is no particular magic to the sequential presentation of cases by claimant followed by respondent. By the time a hearing starts in a front-end loaded arbitration, the properly-briefed and properly-prepared tribunal will be well familiar with the case and the factual assertions of each side. In any given case, logic might dictate that witnesses be called out of sequence to respond to the evidence of each other. There may be key contested events in the chronology of a case that would be suitable for this type of format. It may very well be easier for arbitrators to properly and efficiently weigh and assess the evidence in relation to discrete issues if witnesses are called in a sequence that suits the case.

There are also cases that would benefit from a collegial hearing that takes the form of a discussion or meeting as

opposed to an adversarial trial-like hearing. This would, in effect, be a "hot tubbing" of all witnesses, not just the expert witnesses. In one case where I acted as counsel, all of the issues were highly technical and related to the parties' particular business. The arbitration agreement required that the panel members appointed by the parties had to be retired industry executives. As a result, the appointees had no prior arbitration experience. The hearing proceeded in a traditional trial format, but it was clear to me that it would have been far more efficient and beneficial to the parties and the tribunal if fact and opinion evidence were to have been discussed iteratively in a boardroom setting.

So, as a final comment, the litigation model should not serve as the foundation for the arbitration. Arbitrators and lawyers who represent parties at arbitration should (as many do) structure the process as creatively as possible, drawing from past arbitration experience. 🏠

- 1 This paper is based upon a presentation made at a November 15, 2018 meeting of the Vancouver Chapter of the Chartered Institute of Arbitrators (Canada Branch)
- 2 http://adric.ca/wp-content/uploads/2019/09/ADRIC_JOURNAL_2019_Vol28_No1.pdf
- 3 "Hot-tubbing" refers to the practice of experts testifying concurrently rather than one after the other.
- 4 See https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
- 5 See, for instance, https://law.academic.ru/6270/Redfern_Schedule
- 6 See <http://adric.ca/rules-codes/arbrules/>

Correction

In the first part of this article published in Vol. 28, No. 1, Summer/Fall 2019 of this publication, I wrote that Canadian arbitration statutes do not explicitly recognize the parties' obligation to participate in arbitrations in good faith or the arbitrator's power to manage time and costs. While this is true of the statutes in Common Law Canada, it is not the case in Quebec. There, article 2 of the Code of Civil Procedure imposes an obligation to participate in arbitrations in good faith, and an obligation to ensure that time and costs of arbitral steps are proportionate to the nature and complexity of the dispute.

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Online Dispute Resolution: The Future is Now

Technology is all around us. It's encroached so far into our daily lives that people now receive a dopamine release from their smart phones. When was the last time you left your phone at home? Did you panic when you couldn't find it? If you're like most people, you did. Can you remember the last time you went a whole day without being online?

With technology being such a constant in our daily lives, have mediators evolved to the point where technology can replace the traditional mediation setting? Private mediators all know the setting; we have all sat around a boardroom table while mediating any number of disputes and, for the most part, the public shares that vision of mediation. While mediators try to make the process and setting as comfortable as possible, is it time to start looking at shifting our focus to emerging technology as the new direction of mediation? As discussed below, a number of Canadian tribunals are taking the lead and moving in that direction.

What's the case in favour of using technology?

As our population base ages, individuals who are adverse to using technology are becoming a minority, and the demographics of mediation clients is changing. Mediators are now dealing with generations that are extremely adept and flexible in the technological fields and are more comfortable with technology than ever before. So why do we continue to mediate in the same way? Why haven't we evolved as well?

Traditionalists will argue that

the only true way to mediate a dispute is to get everyone in the same room and let them work out their conflict face to face. Let mediators read the room, decide when to prompt, and when to explore deeper into issues and look for opportunities that may not consciously be raised. All these arguments are valid, but they fail to see the limitations of traditional mediation settings, such as the stress imposed on participants.

In many situations, when faced with uncomfortable or stressful situations, our bodies naturally go through a stress reaction. These reactions can lead us to have an increased heart rate, heightened or lowered awareness, inability to make decisions, poor concentration, poor problem solving skills, and forgetfulness, amongst other things¹. Now, bearing in mind the goal of mediation is to bring two parties together to resolve their conflict, do these symptoms sound conducive to reaching our goal? I know what you're thinking: But we would not proceed if one of our parties were feeling that way. Well, in some cases, you never would be able to proceed.

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BRENT BATTEN

Brent Batten is the President of Okanagan Mediation Services, Wheat City Mediation, and Separate Canada. As a member of the ADR Institute of Canada's regional BC affiliate, Brent is committed to improving accessibility to Canadians to mediation professionals, regardless of geographic boundaries.

citizens living in rural communities, accessibility to professional mediation can be a challenge. There are geographical and physical limitations to people's accessibility to qualified mediators. Imagine navigating winter roads in Manitoba or sitting on the 401 at 4:00 pm in southwestern Ontario. With physical barriers like these, technology can fill the gap and ensure that everyone has equal opportunity to find assistance from the mediation community, no matter what their geographic location.

Stress reactions and geography play a role in the need to move technology to the forefront of mediation. So does accessibility for individuals with physical disabilities who may not be able to "come to you," in a manner of speaking. With accommodations being made across the country for people of varying abilities, do we not have a duty to make our mediation services just as accessible? One out of

five Canadians over the age of 15 has at least one disability². Unless we take steps to eliminate barriers to service, mediators who insist on in-person meetings will remain inaccessible to a large group of individuals.

Whether we like it or not, technology is the way of the future. As service providers, we need to embrace the role that technology can play to enhance our role and to focus on its benefits, rather than on the negatives associated with it. With developments in video conferencing, smart phones, and home computers, we can now come to people in a way that allows them to feel comfortable and confident. If we continue to respect the values inherent in mediation and follow established models of mediation, but change the *venue*, we can blend two worlds. We not only ensure that participants receive a great mediation process, but we also provide accessibility and promote confidence.

[PARLe](#) in Quebec has had success taking the traditional meeting place out of the mediation process. Launched in 2016, PARLe was developed by the Cyberjustice Laboratory of the University of Montreal, to

provide the Consumer Protection Office, an efficient, low cost, tool to allow consumers and merchants to settle low intensity disputes. The system provides a digital platform for a consumer and retailer to create proposals to settle their dispute, without having to formally sit down in the traditional setting. If the dispute is not resolved with 20 days, a mediator will review the proposals and attempt to find resolution. Any dispute that is not resolved can be transferred to the court system, along with all the documents uploaded to date. To date, 68% of cases referred to PARLe are settled, all while allowing the parties including the mediator to deal with the dispute from the comfort of their home or office.³

Likewise, the [British Columbia Civil Tribunal \(CRT\)](#), the first online tribunal, offers individuals the opportunity to attempt to negotiate a settlement online, in some cases with the assistance of a case manager, while also providing legal information to parties. Should an agreement be reached, the agreement can be converted into an order which is then able to be enforced. In the event that

an agreement is not reached between the parties, a Civil Resolution Tribunal Member will then make a binding decision.⁴ The CRT system provides ease of access, cost savings, and allows for the stress free access to dispute resolution. By allowing individuals to negotiate through their online system, it is now feasible for individuals to access the ability to find common ground, without reverting to the litigation system. Since 2016, the mandate of the CRT has expanded from handling simple small claims and strata disputes to also include, motor vehicle injury, societies and cooperative association disputes, and shared accommodation disputes. This expansion of areas of jurisdiction has shown the public has an appetite for dispute resolution that is accessible to the average person.

The [Condominium Authority of Ontario](#) is the first fully online tribunal in Canada, offering online adjudication in addition to online mediation. The legally-binding decisions of its adjudicators can be found on CanLII.⁵ Users in dispute are guided through the steps of filing an application, delivering notice, joining a case, negotiating, mediation, and finally a tribunal decision should negotiating amongst the parties fail and mediation prove to be unsuccessful. Parties are given control of the negotiating process by allowing them unlimited offers and counter offers to attempt to successfully find a settlement. At any point during the negotiation stage, a party can request to move forward in the process to mediation.⁶ This type of self guided control and autonomy has allowed the Condominium Authority of Ontario to empower individuals to access justice in a simple, user-friendly yet effective and professional manner.

As more jurisdictions are realizing the benefits of online mediation and expanding their areas of

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responsibilities, we are seeing a shift like never before as we merge new technologies with traditional mediation. We are opening up the channels for individuals in any location to seek ADR means while continuing to ensure that the professionalism and ethical behavior, cornerstones of mediation, is maintained.

Mediation will always rely on the individual mediators for their experience, expertise, and knowledge of human nature. However, we as mediators, can now rely on technology to help enhance our practice. Think of the advantages we can gain from being able to mediate conflict from anywhere on the planet, for people located anywhere on the planet. We are able to bring alternative dispute

resolution to people on a scale that would be unimaginable fifteen years ago.

I expect that all arbitrators and mediators became involved in conflict resolution in order to help people. Now, dispute resolution practitioners have an unprecedented opportunity to help people further by eliminating the physical and geographic barriers that may prevent them from seeking our help. To ignore technology would be doing a disservice to society that

would benefit from having more access to alternative means to resolve conflict.

Technology has shaped industries for years, and adapting is critical. Our field is no different. We must adapt and respond to the evolving needs of participants. We must provide people with options that make us accessible and increase their comfort. Only in this way will we continue to be leaders in conflict resolution. 

- 1 US Department of Health & Human Services, <https://foh.psc.gov/NYCU/StressReaction.asp>
- 2 Stats Canada, A demographic, employment, and income profile of Canadians with disabilities aged 15 years and over, 2017, www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm
- 3 PARLe: An Effective Access to Justice Tool for Consumers, www.cyberjustice.ca/en/actualites/2019/12/02/parle-un-outil-dacces-a-la-justice-efficace-pour-les-consommateurs/
- 4 Civil Resolution Tribunal, <https://civilresolutionbc.ca/>
- 5 www.canlii.org/en/on/oncat/
- 6 The CAT Process, www.condoauthorityontario.ca/en-US/tribunal/the-cat-process/



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Arbitration Decision Making—By the Numbers

Do arbitrators always base their decisions on the strict application of the law or on what seems fair?

In the course of an arbitration, when do arbitrators make up their minds? How open are they to changing their minds and how often do they do it? How confident are arbitrators that they are right, and how often do they think that other arbitrators may have come to a different result?

These are intriguing questions, but can we ever know the answers?

The Toronto Arbitration Society Gold Standard Course in Commercial Arbitration, of which I serve as course designer and director, offered a modest opportunity to explore these questions in a systematic way. The course runs from September to May and culminates in a highly realistic award-writing exercise in a fictionalized case called *BEHL v. Cutler*. I based the exercise on a real case but substantially rewrote the facts and submissions to make it as hard as possible to decide for one side or the other.

In *BEHL v. Cutler*, the claimant relies on the strict wording of the agreement to obtain a result that may seem unfair to many. The respondents urge a more contextual approach to interpreting the contract to achieve what they suggest is a fairer result. The specifics of the exercise are not important (and I do not want to reveal them here) but in almost all cases involving contract interpretation, this is the paradigmatic conflict. Canadian case law supports giving effect to the plain meaning of contractual language but also provides room for a contextual analysis based on the surrounding circumstances or “factual matrix” at the time a contract is entered into. In any given case, the lawyers representing the parties can usually find support in the jurisprudence to support either a strict constructionist or a contextual approach. One of these two approaches will prevail in each case based upon myriad factors, and the pre-dispositions of the judge or arbitrator will almost certainly play a role. Thus, the conflict between fairness and strict interpretation never goes away. And, I would

suggest, never will.

In each of the first two years of the course, which is now entering its fourth year, twenty students enrolled. With one exception (a person who audited the course and did not do the exercise), they were all practising lawyers who aspired to be arbitrators.¹ Their years of practice ranged from 3 to 43, but most were in mid-career. The award-writing exercise took place over six weeks, and students received the material in three stages: first the pleadings and witness statements, second the written submissions, and finally a summary of the written submissions that were made at the hearing. There is a twist in the evidence at the end and the (fictional) parties elect to proceed without oral examinations of the witnesses.

Even though *BEHL v. Cutler* was not an actual arbitration, it occurred to me that the exercise replicated arbitration’s core decision-making process and that the students were reasonable proxies for arbitrators. I sensed that we could learn something about arbitral decision making by asking all students some questions after they had completed the exercise. I collected their responses and sent them to FTI Consultants in Toronto, Ontario, who compiled the responses into chart form on a non-identifying basis.²

The combined results for the two years are reproduced below without extensive commentary so readers can explore them and draw their own conclusions.

I would make the following observations of my own:

- 1) In the sample of thirty-nine arbitrators³, twenty-four (60%) decided in favour of the claimant (legal

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correctness) and fifteen (40%) decided in favour of the respondents (fairness).

- 2) Those coming down on the side of fairness found it slightly harder to decide the case and were somewhat less confident in their conclusion.
- 3) Most arbitrators initially came to whichever conclusion they finally reached in the award well before the final hearing (some as early as the pleadings).
- 4) Most arbitrators changed their minds at least once before coming to their final conclusion (presumably often returning to their initial conclusion).
- 5) Almost all of the arbitrators recognized that other arbitrators could come to a different conclusion.
- 6) More of those applying a strict legal analysis felt that it conflicted with a fair result, whereas more of those who came down on the side of fairness felt it was also legally correct.
- 7) There is some evidence that if arbitrators encounter an issue in the course of practising law, they will tend to decide that issue in a way that is consistent with the position they advocated in practice.
- 8) Some arbitrators admitted to having been influenced by a factor which they did not express in the award, but most said they were not.

No doubt there are methodological faults to my approach. There are obvious questions as to whether the sample size is meaningful and whether the aspiring arbitrators are a reasonable proxy for the real thing. I also appreciate that many other questions could have been asked and other parameters explored. But this

was an exercise in professional curiosity, not behavioral science. Based on my own experience as an arbitrator, I am inclined to think that the human dynamics of arbitral decision making are well represented in the results. Perhaps there is room for a more elaborate experiment by others who would like to explore this further to see whether the results can be replicated.

I stopped the survey after the first two years of the course because I wanted to be able to refer to the results in the teaching of the course. However, it is interesting to note that in its third year, enrollment rose to twenty-six, and four of those who took the course were not practising lawyers. These comprised an executive in the mining construction industry, an insurance executive, an individual involved in the condominium management business, and a law student. One of the students who practises law remarked, "I don't know how a non-lawyer could process the issues in the case given the complexity of the problem."

One of the "non-lawyer" students did struggle to come to a decision and was unable to complete the assignment, but the remaining three came to well-reasoned conclusions that demonstrated an understanding of the basic issue in dispute. One favoured the claimant, and two favoured the respondents. That tiny sample is consistent with what most lawyers probably assume, that those not qualified in the law are more likely to decide based on fairness. Hence, the prohibition in almost all rules and statutes written by lawyers prohibiting the resolution of disputes *ex aequo et bono*⁴, unless the parties expressly agree. Who can say, however, that any of the "non-lawyers" were more right or wrong in the result than their legally-qualified colleagues?

Based on the survey, it could be argued that no result is "right" in any absolute sense of the word. But the exact opposite conclusion may also be drawn. Barring procedural unfairness, bias or excess of jurisdiction, every result in an arbitration can be classified as "right" for those parties and that case. Ultimately, in arbitration the parties bargain for the judgment of the particular arbitrators whom they select, or who are selected by an agreed-upon method. The judgments of others on the same issues, as variable as they may be, are not germane.

Whether or not you agree with that last statement, I hope you will find the results illustrated in the charts thought provoking. 🏠

ADR Perspectives

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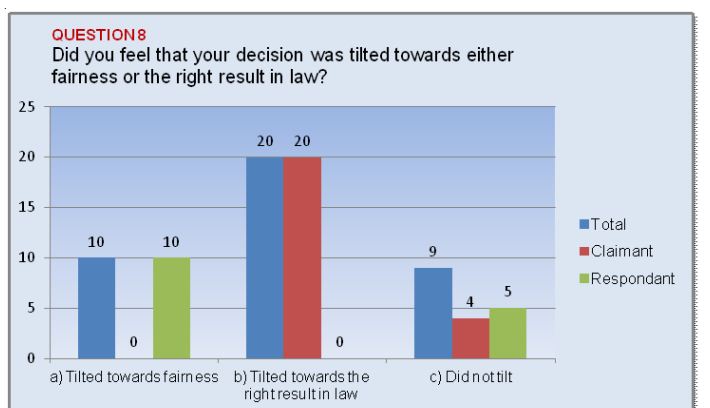
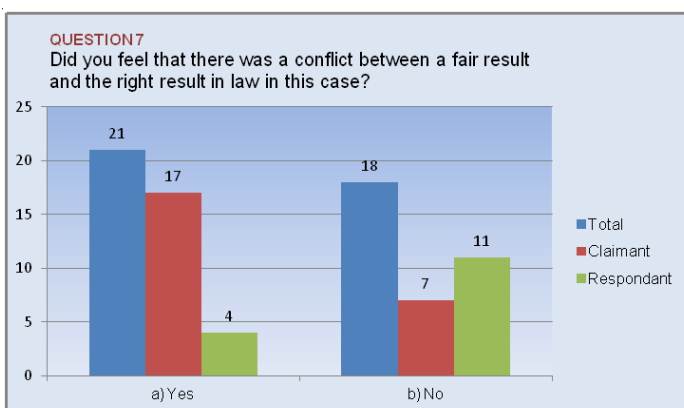
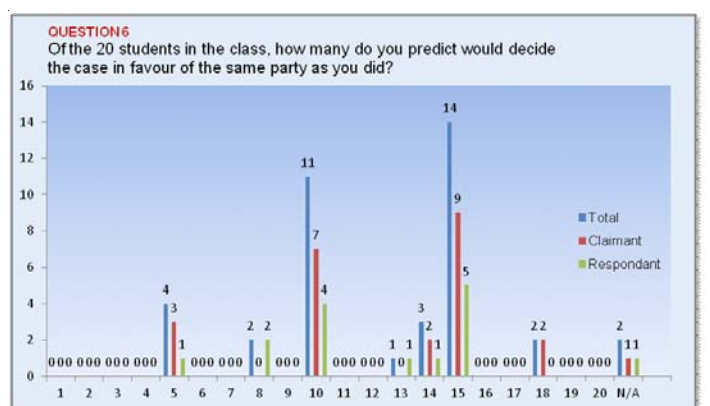
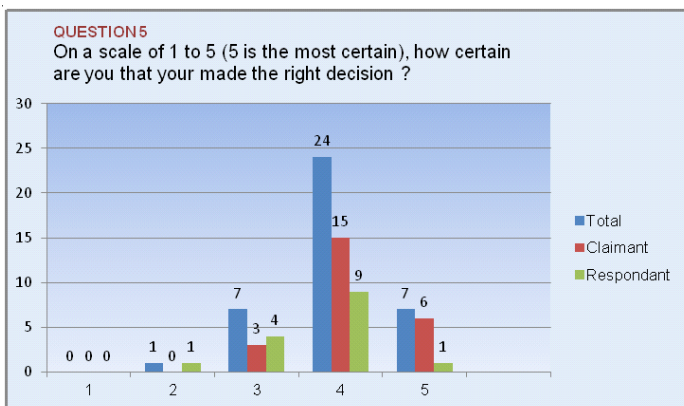
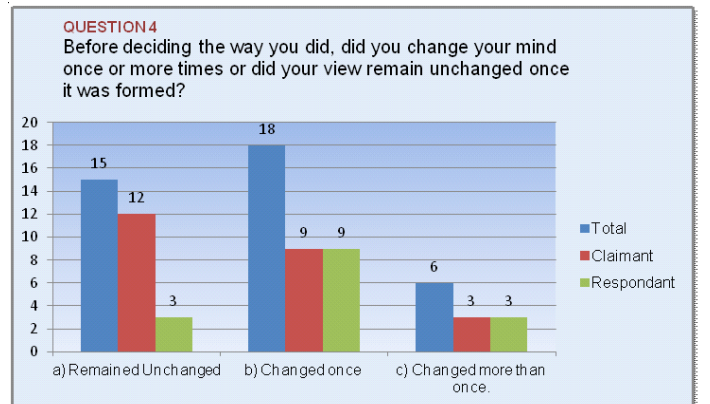
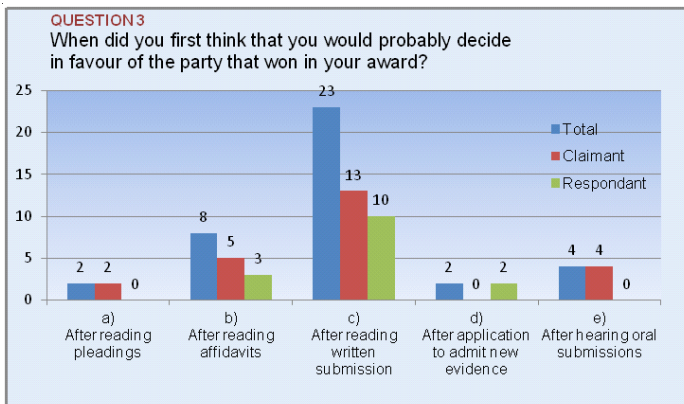
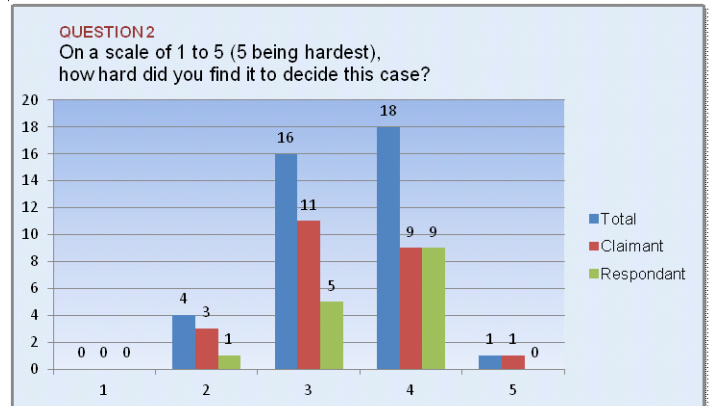
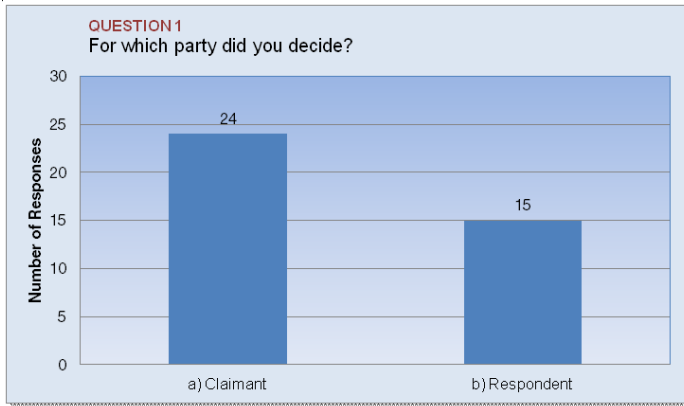
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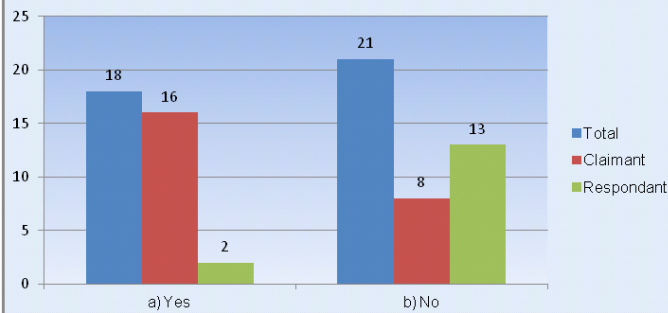
- 1 The course leads to a Q.Arb designation which is conferred by the ADR Institute of Canada through its provincial affiliates.
- 2 I am most grateful for the assistance of FTI Consultants in Toronto with this project.
- 3 One student audited the course and did not do the final assignment. Not all arbitrators answered all questions so there is some variability in the numbers.
- 4 On the basis of equity and good conscience.

Survey Response Summaries from 2017-2018 BHEL v. Cutler Anonymous Adjudication Questionnaire

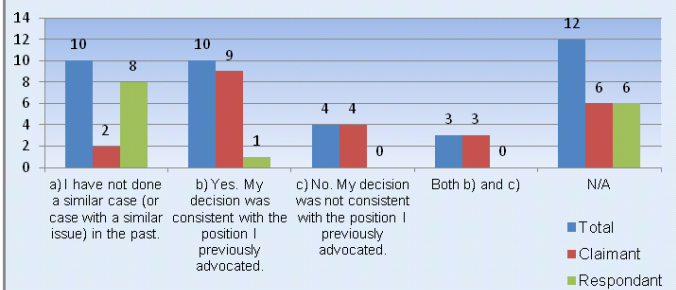


QUESTION 9

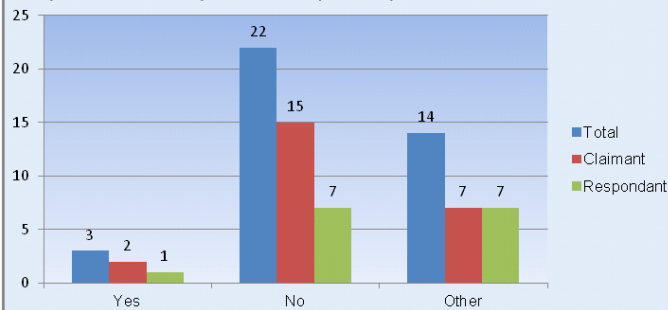
Have you previously been counsel in a similar case (or a case with a similar issue) in your practice?

**QUESTION 10**

If so, was the position you previously advocated consistent with or not consistent with your decision in this case?

**QUESTION 11**

Was there any consideration that caused you to decide the way you did but which you did not express in your award?

**QUESTION 11**

Comments for "other" responses *

Was there any consideration that caused you to decide the way you did?

2017	"That's not what a tribunal is supposed to do!"
2017	"Commercial reality"
2017	"Respondents argument seemed more fair only because of the amount of the [third party] offer. It would not be compelling if the offer was much less or much more."
2017	"Clean hands doctrine. The claimants were seeking equitable relief but it was unclear whether fiduciary duties to the corporation (like self dealing) were involved. Ultimately unnecessary and would require further evidence."
2017	"Need for predictability and certainty in contractual application and interpretation."
2018	"I wanted to deal with the idea but since the claimant had not discussed this legal idea, I didn't propose it, either."
2018	"Respondents missed too many opportunities to address the issues themselves."
2018	"I don't think so."
2018	"Throwing mud on the wall to see if any of it sticks."
2018	"There was no specific legal authority that came to mind, except that equity will not act without a wrong. There was no wrong."
2018	"No particular case."

* 3 of the respondents did not provide a response for this question.

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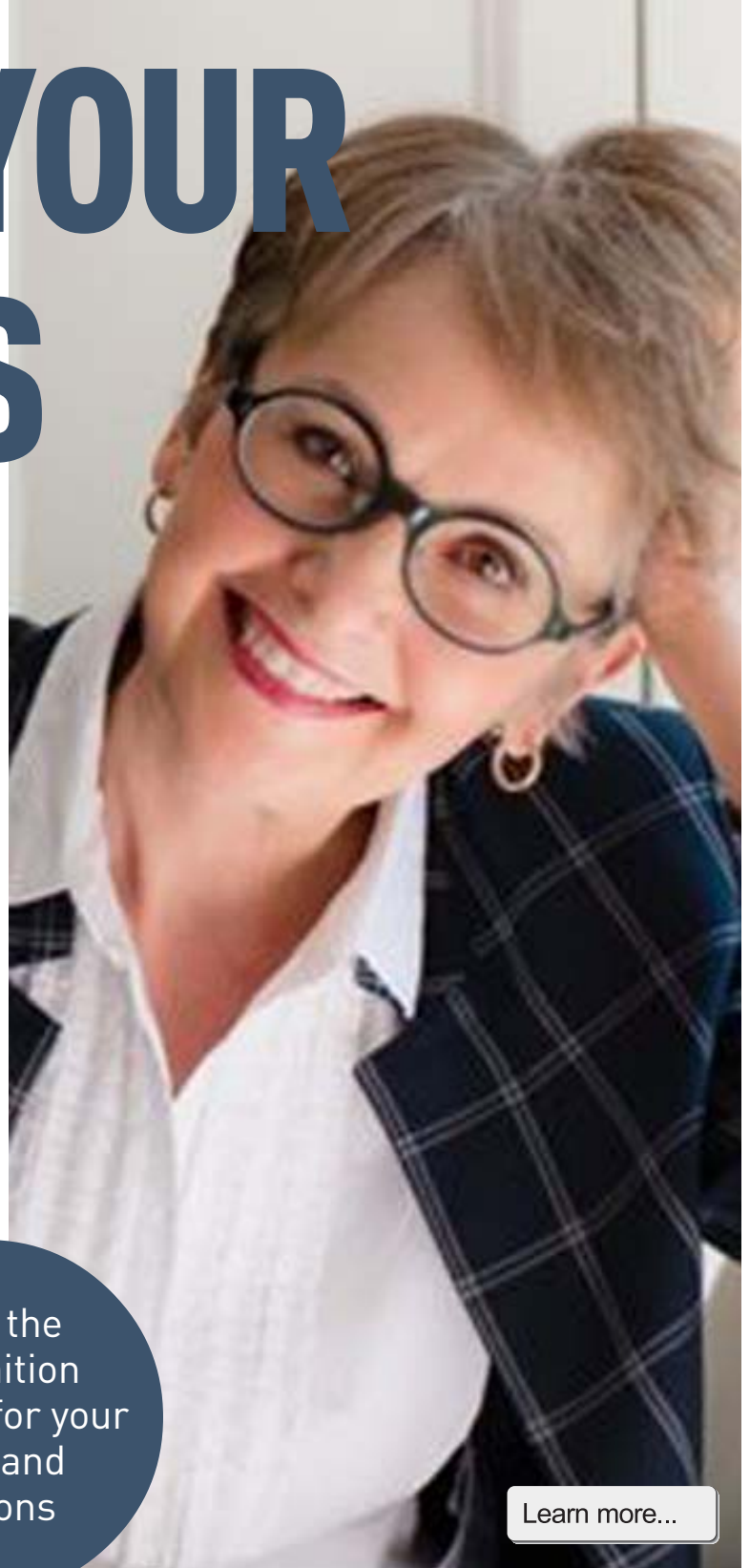
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Listen In

A Conversation with Dana Holmes, C.Med and Editor-in-Chief Genevieve Chornenki, C.Arb, C.Med

1. Dana, thank you for being willing to share your thoughts with me and Journal readers. What kind of ADR work do you do?

I do workplace ADR. I'm one of about 200 people who are part of the Canada-wide Informal Conflict Management System (ICMS) that gives federal employees a chance to resolve issues outside of the formal options like grievances or complaints. It's all voluntary. Employees can contact me on a confidential basis if they have questions, issues, or concerns about a work relationship. I'm available to everyone—union, management, and any employee, really, whether or not they're in a bargaining unit.

I offer a range of ADR interventions: conflict coaching, consultation, facilitated discussion/mediation, workplace assessments, group exercises, preventative training/workshops and information sessions. It all depends on what the employee is looking for. Sometimes, an employee may just want to know what options are available or who to approach and how. They may want to talk something through to clarify their own thinking. The next level of intervention that's more active from my point of view might be conflict coaching where I help the caller examine the situation from different points of view.

I am trained in a number of different approaches to conflict resolution, which I incorporate into my work as needed. For example, for group processes, I will typically set it up in a large circle with no tables and think about what seating arrangements

will best support people to have a constructive conversation. There are times I will use an object the group will pass around so that only the person with the object speaks at a time. There's no formula. I work with the people involved to customize an approach that's right for them and their situation.

2. Many if not most ADR practitioners are self-employed. Sounds like you're a practitioner with a J-O-B?

That would be correct. I am employed at the Canadian Food Inspection Agency (CFIA) out of an office in Guelph, Ontario. I work within guidelines set up by a steering committee made up of human resources, our unions, management, and our ICMS Manager. But over the years, I've worked in various federal departments and agencies.

My job is varied and thought-provoking: interesting people, challenging situations, variety, the chance to make a difference or help people. Stressful at times, too. But trust me: I'm well aware of the fact that I get to do dispute resolution on a full-time basis without having to market myself or run an office.

I also have the benefit of CFIA colleagues in Montreal and Ottawa. We try and keep each other updated with respect to what we are working on. We have monthly meetings and routinely call each other to bounce ideas off of the other person regarding how to deal with various situations. If we create workshops or presentations for our clients, we routinely share them



DANA HOLMES, B.A., C.MED

Dana brings a background in human resources to her role as a neutral helping people resolve workplace conflicts in the federal public service. She serves as a mediator and conflict coach, leads workplace assessments and large group processes, and does preventative conflict training for employees at all levels.

with each other. As a broader community, the ICMS Managers meet regularly and share perspectives, materials, successes and challenges within their respective organizations.

As a rule I work in Ontario, but from time to time I've helped my colleagues by doing interventions in other parts of Canada.

3. Give us a sense of what your average week might look like.

Each week can be very different. On average I handle 11 interventions of some type during the course of a month. Time spent will range from 30 minutes to 4 days, depending on the type of process I am conducting.

I don't have to meet any personal or organizational settlement targets or other numerical goals, but I'm always concerned about the effectiveness of what I do. Organizationally, we track success by looking to see if we helped to accomplish informal resolution. So, for instance, if

we are conducting a mediation arising out of a formal grievance, one measurement of success would be whether the grievance is “withdrawn” in favour of a negotiated outcome. Independent of that, we rely on anecdotal factors, such as both union and management indicating that relationships have improved as a result of a mediation even if there is not a withdrawal of the grievance.

Our Agency also tracks numbers and types of processes in a way that does not allow for the identification of the parties. We ask our clients to voluntarily complete an anonymous survey giving their feedback with respect to the process. We ask things like whether they felt they were given an opportunity to provide their perspective, offer solutions, identify concerns?

Although I am neutral, I also recognize that I do react to some things and therefore, when they occur, I have to be mindful of why I may be reacting in a certain way and think about things I can do to minimize my reaction. When I first took on this role, it was coming back to an organization I had previously worked in doing Human Resources work. This presented challenges initially as I had to work hard to build the trust with the union representatives and employees that I was now indeed neutral, when previously I had been an advisor to management. That took time. However, I believe I am respected in the organization for the work I do and am seen as being neutral.

4. What attracted you to ADR?

Was it a vocational choice?

My job suits me. I like people. I enjoy working with them and trying to make their work life better. But I never thought of my work as a calling or a vocation. How could I? When I was growing up, going to university, and making career choices, there was no

such thing as ADR. No such thing as a mediator or a conflict resolution practitioner. So it wasn't something to aspire to. That's different now. My 15-year-old niece told me she wants to be a mediator when she grows up.

Being an ADR practitioner is more mainstream than it ever was. Now it could be considered to be as much of a vocation as any other career. I think it became a vocation for me over the years as I consciously gravitated towards training and opportunities which allowed me to become an ADR practitioner. I find that I use my relevant skills in all aspects of my life and ask myself the questions I would of others when I find myself reacting to something.

I come from a Human Resources background and one facet of my job was supporting management as they handled formal processes such as grievances and investigations. I observed that those processes, while addressing issues that the employees had identified as being of concern at the time, were not really the underlying concerns for the employee and the outcomes really didn't solve the problem. Therefore, I started taking

ADR training and became part of the federal government's Peer Mediator program, where I was a mediator for other government departments. I then transferred to another government department doing conflict resolution work at a more entry level, and when my current organization started their own ICMS program, I applied and got the position.

5. How did you make the transition from labour relations advisor to neutral?

Slowly and carefully. One of the biggest things I had to learn—and the lesson presented itself on my very first file—was not to get involved in the content of a dispute. It wasn't up to me to rule on whether something had been done correctly. In the first instance, that was for the people directly involved, and if I couldn't help them come to a resolution, it would have to be taken up in a formal process. This is a unionized workplace, and it is important to me to be and be seen to be trustworthy by both union and management both of whom, I might add, are committed to maintaining healthy work relationships.

The advertisement features a dark blue background with abstract, glowing white and yellow lines that create a sense of movement and depth. In the upper left, the KPMG logo is displayed in white. Below it, the text "Dispute Resolution Services" is written in a large, white, serif font. Underneath this, three lines of text in a smaller, white, sans-serif font read: "Financial knowledge.", "Informed opinions.", and "Successful dispute resolutions." The KPMG website address, "kpmg.ca", is positioned in the lower left in a white, sans-serif font. In the bottom right corner, the phrase "Let's do this." is written in a bold, white, sans-serif font. At the very bottom, there is a small line of fine print in white.

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I have a B.A. in Labour Relations from McGill University, a certificate in Dispute Resolution from University of Toronto and have my Chartered Mediator accreditation through the ADR Institute of Canada. Additionally, I have taken a number of courses and workshops in the ADR and coaching field. While I get the sense that being an ADR practitioner without a law degree is atypical in this field, I personally think it is an advantage. Given our role is to be as neutral as possible and that parties bring their own experts. I don't have or want to know what the black-and-white interpretation of a document would be and, therefore, am able to come at situations from a different perspective.

6. What have your years as an ADR practitioner taught you about human nature?

What being an ADR practitioner has shown me is that we have failed our society by not giving people the tools to resolve disagreements when they have them. We sanction avoidance and, therefore, people are apprehensive about dealing with conflict.

It has also taught me that our fight or flight instinct is not our friend. It leads people down a dark hole and many people do not want to do the self-reflective work needed to keep them out of that negative space. It is so much easier to be a victim and blame someone else for your situation as opposed to taking responsibility for

doing something to change it.

On the plus side, I have found that in the majority of cases people genuinely want to resolve the situation and move forward towards a more positive relationship with the other person. I have not had a case that did not resolve when the parties came in with the mindset that they were going to resolve the situation. They are also very happy to have assistance in doing so, as in many cases they just didn't know what to do and felt helpless.

I believe the work has made me better able to see, appreciate and work with "shades of grey." It also has reaffirmed my belief that miscommunication vs. intentional " nastiness " is the underlying cause of conflict in most cases. 🏠



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A Pluralistic Perspective to Dispute Resolution: An Ethical and Holistic Approach

Any differences must be resolved through tolerance, through understanding, through compassion, through dialogue, through forgiveness, through generosity, all of which represent the ethics of Islam.

(His Highness the Aga Khan, Syria, November 2001)²

In daily life and in any community, there will inevitably be disputes, including matrimonial disputes, commercial or business disputes, estate disputes or other disputes. In the Ismaili community, we do not deny the existence of disputes. Rather, we recognize and embrace differences, and work through the process of trying to resolve conflicts in a non-adversarial, culturally sensitive, equitable and ethical manner, consistent with both Canadian legal principles and the humanistic ethics and principles of fairness. The reality is that disputes between people can result in acrimony and emotional damage which can impact individuals, families and communities. For that reason, an ethical and holistic approach is required in order to repair the wounds of conflict in order to preserve and improve the quality of life of the disputants.³

Who are the Ismailis?⁴

The Shia Imami Ismaili Muslims, generally known as the Ismailis, belong to the Shia interpretation of Islam. We are highly diverse in our ethnicity, language, culture, and geography, and today we live in over 25 countries in Central and South Asia, Africa, the Middle East, Europe, North America, and Australia.

The Ismailis affirm that after the death of Prophet Muhammad (peace be upon him), his cousin and son-in-law, Ali became the first Imam (spiritual leader). Ismailis believe that this spiritual leadership, known as the Imamate, continues in the hereditary line descending from Imam Ali and his wife Fatima (the Prophet's daughter). Ismailis are united by a common allegiance to the living hereditary Imam of the time. His Highness the Aga Khan is the 49th Imam of the Ismailis and is a direct descendant of the Prophet.

In 1986, His Highness the Aga Khan established a well-defined global institutional framework for the Ismaili community through which to address, among other things, the health, education, economic and social welfare aspects, as well as the religious aspects, of the daily lives of Ismailis. This institutional framework includes a dispute resolution system in the form of Conciliation and Arbitration Boards, formalizing and updating

an age-old Ismaili tradition of amicable dispute resolution.

Why was Conciliation and Arbitration Board (CAB) created?

Ismailis have, throughout their fourteen centuries of history, maintained a tradition of resolving individual disputes and differences through an entirely voluntary process of mediation, conciliation and arbitration within the community. It is from that long tradition that the present CAB system has emerged.

His Highness the Aga Khan was concerned about the enormous and often needless costs of litigation being incurred by members of the Ismaili community in various parts of the world. He desired that Ismailis not only resolve disputes amicably within the ethics of their faith – which promote a non-adversarial approach to dispute resolution in keeping with the principles of negotiated settlement, compliance with agreed settlements, and the 'bandaging of wounds' – but also that they should act pre-emptively to prevent disputes. The courts, being unfamiliar with Ismaili traditions and cultures, were not always able to comprehend the inter-generational attitudinal issues involved in disputes, nor their underlying cultural nuances and sensitivities, let alone being able to always resolve them. The Aga Khan viewed amicable dispute resolution, without recourse to courts, yet operating within local laws and honoring the ethics of the faith, as an important aspect of the improvement of the quality of life for Ismailis globally.⁵

Building on the community's existing tradition of settling disputes amicably,⁶ the Aga Khan established a formal dispute resolution system whereby Conciliation and Arbitration Boards would operate at both the national and international levels. The system currently operates in 19 jurisdictions

AL-NAWAZ NANJI, M.B.A./LL.B.¹

Al-Nawaz Nanji is the Chairman of the Ismaili National Conciliation and Arbitration Board for Canada, an organization that provides dispute resolution services to the Ismaili community. He is a tax partner at Osler, Hoskin & Harcourt LLP. His practice focuses on tax dispute resolution and litigation. Full bio. www.osler.com/en/team/al-nawaz-nanji



around the world. In some countries, CABs have been recognized by the government as having primary jurisdiction over matters of matrimonial law and personal law within the community and their decisions have been recognized and endorsed by law.

In Canada, there is a National CAB and five Regional CABs, one for each of the regions in which Ismailis live: (1) British Columbia; (2) Edmonton; (3) The Prairies (extending beyond the Edmonton territory); (4) Ontario; and (5) Quebec and The Maritime Provinces. There is also an International Conciliation and Arbitration Board (ICAB), which coordinates mediation training, establishes policies and rules, oversees the global CAB system, and deals with international cases. Canada has made significant contributions globally, both in terms of sharing Canadian best practices which are utilized by ICAB in other jurisdictions and sharing Canadian volunteers for many global initiatives. Thus, the contribution of the CABs in Canada extends far beyond jurisdictional boundaries of Canada.

What are the areas of CAB's work?

All disputes between parties residing in the same region are handled by the regional board. Where the parties reside in different regions of Canada, the relevant regional boards cooperate in seeking a resolution.

Cases involving disputes between parties residing in different countries are dealt with either by the International Board or by the National Boards of each country in cooperation with each other and with the assistance of the relevant regional boards in that country.

The primary objective of the CAB system is to assist disputants (where at least one party is an Ismaili) to resolve their dispute in an equitable, speedy, confidential, cost effective, amicable, ethical and constructive manner and in an environment that is culturally sensitive.

Membership and Training

Members of the CAB are appointed by the Aga Khan to serve a three-year term and reflect the geographic, demographic, linguistic, and cultural diversity of the Ismaili community in that region, with an eye to equal gender representation.

Members come from a variety of disciplines and diverse backgrounds: lawyers, social workers, accountants, entrepreneurs and other professionals. This pluralism is invaluable in promoting effective mediation.

All members in the CAB system are volunteers and no remuneration is accepted in relation to any of the services provided as part of the CAB system.

All members receive extensive mediation skills training from certified mediation trainers who provide them with the necessary skills and knowledge to ensure their compe-

tence and fairness in resolving disputes.⁷ This includes 40 hours of general mediation training, as well as at least 20 hours of continued professional development training. In Canada, members also complete training on domestic violence screening. Many of the CAB members are also accredited with various alternative dispute resolution institutions.

Past appointed members who have been trained continue to assist as alumni both in mediations and the work of the CAB.

Conciliation and Mediation

The CAB's approach to mediation is guided by the following principles:

- Before mediating on any dispute, the CAB must first be satisfied that the parties to the dispute have come to the CAB voluntarily and of their own free will and desire to have their dispute resolved through the system;
- The mediation processes are conducted by CAB members who have received professional and customized training to ensure their competent and equitable handling of the matter;
- The processes are conducted in accordance with rules that are intended to assist in assuring the appropriate standard of operation, and which request an ethical buy-in from the participants;
- The duty of confidentiality to the parties to the dispute must be respected in all cases unless and otherwise required by local laws (e.g. child abuse cases);
- Parties are encouraged to obtain independent legal advice to obtain a full understanding of their legal position to have a proper appreciation of their options; and
- The CAB system is available at no cost and is therefore highly accessible, including by those of limited means.

The high incidence of mediation and conciliation in the community is a strong indication that members of the community have confidence that their rights will not be compromised and that a fair, ethical, and equitable resolution of their dispute will be achieved through mediation or conciliation by the CAB. Much of this confidence rests on the fact that:

- the CAB System is constitutionally established by the Imam of the time, and thus embedded in the social fabric of the community; and
- the CAB members and those whom they assist share an abiding commitment to the ethical principles of kinship, fairness, and justice to guide the amicable resolution of disputes.

In terms of performance and experience, the following is a summary of the number of cases handled by the CAB System in Canada for the period 1998 to 2003 and for the period 2012 to 2018, the nature of those cases, and the suc-

cess rate (being the resolution of the case resulting in a verbal or written agreement).

TABLE 1:

CASES HANDLED BY THE CAB SYSTEM IN CANADA		
	1998-2003	2012-2018
NUMBER OF CASES (TOTAL)	769	847
Number of region-specific cases	661	708
Number of inter-regional and international cases	108	139
NATURE OF CASES		
Matrimonial	63%	67%
Commercial	29%	21%
Other (including inheritance cases)	8%	12%
SUCCESS RATE	69%	70%

In Canada, the regional CABs have mediated collectively close to 850 cases over the past seven-year period. With a 70% success rate (which has not significantly changed from 20 years ago), the community has realized considerable savings in time and money and diverted many cases from the judicial system.

Bandaging the Wounds and Continuous Improvement

Even in the poorest and most isolated communities, we have found that decades, if not centuries, of angry conflict can be turned around by giving people reasons to work together toward a better future — in other words, by giving them reasons to hope. And when hope takes root, then a new level of tolerance is possible, though it may have been unknown for years, and years, and years.

(His Highness the Aga Khan, Tutzing, Germany, May 2006)⁸

The community dimension of the CAB system, and its focus on healing relationships amicably, equitably, and ethically, enables it to provide some further valuable contributions in addition to pure dispute resolution. The CAB process seeks to help parties “bandage their wounds,” i.e. help parties move past the conflict with a positive outlook and in a way that fosters communal harmony.

The CAB conducts a survey within six months after completion of a case to determine the parties’ level of satisfaction with CAB services and to assess the durability of their settlement agreement. Post-mediation surveys also provide an opportunity to canvass whether other communal support would be valuable to any of the parties, to assist with emo-

tional, financial or any other issues they may be facing as a result of the dispute.

For example, parties who need additional support or counselling for mental health issues or who seek to improve their skills, can, with their consent, access resources from other Ismaili institutions. Support from other (non-Ismaili) institutions may also be sought where necessary and appropriate to assist with the resolution of a dispute. In order for parties to heal and move beyond their dispute, it is important for them to be able to have seamless access to other services, such as health, social and educational support.

The CAB also surveys its mediators to assess level of satisfaction, with a view to continuously improving processes and quality of services, as well as provide support to mediators.

Dispute Prevention

The CAB system collects and analyzes the root causes of disputes and shares those root causes with other Ismaili institutions responsible for the well-being of the community so that they may take appropriate dispute prevention measures.⁹

This holistic approach to the effective resolution of disputes is by collaborating with other Ismaili institutions to encourage the implementation of dispute prevention measures.

- a. **Marital:** The Aga Khan Social Welfare Board for

Personal Service. Worldwide Reach.

Our Canadian Litigation, Arbitration and Investigation team has the local knowledge to apply the regulatory, economic, political and cultural context to legal issues and apply effective alternative dispute resolution processes. This paired with our global reach allows us to provide you with fully integrated teams and consistent quality wherever you do business.

To learn more, please contact
Heather Treacy, Q.C., Partner, Calgary Office at
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Canada has developed a pre-marital toolkit and program to assist newly engaged couples to improve their communications skills.

- b. **Family:** The CAB members encourage families to prepare wills to prevent potential disputes upon death of a family member.
- c. **Business:** Similarly, the Aga Khan Economic Planning Board for Canada provides seminars to Ismaili entrepreneurs highlighting the importance of documenting business deals and exit strategies.

Why is CAB concerned with a holistic approach?

As I look to the future of the Ismaili Community worldwide, living in many parts of Central Asia, and in more than 25 different countries, ..., and as I look at the Ummah, I conclude that every, and all those peoples, if they wish to achieve a better life for themselves in the generations ahead, must absolutely achieve peace within their societies, and because we are Muslim, conflict must be replaced by a peace which is predicated on the ethics of our faith. We must not kill to resolve our differences, whatever they may be. They must be resolved, as I have said, within the ethic of our faith, through dialogue, through compassion, through tolerance, through generosity, through forgiveness and through kindness. These are the pillars on which to build a strong society in modern times - not through weapons".


(His Highness the Aga Khan, Tajikistan 1995)¹⁰

Both the teaching and practice of tradition encourage the need for voluntary and peaceful resolution of disputes. The Holy Qur'an places a strong emphasis on the responsibility for all human beings to seek to resolve their disputes amicably, ethically, equitably, and, to strive for reconciliation and communal harmony.

The Ismaili tradition fosters an ethos for amicable dispute resolution that is non-adversarial. The emphasis is on finding creative solutions through a collaborative process of fair dialogue in search of the common good, and on healing relationships beyond the outward "issues" presented.

For the Ismaili community, the resolution of the dispute is not only important for the involved parties alone, but also for the community as a whole. The community is a stakeholder in the amicable resolution of the dispute. Where the parties are Ismailis, their continued constructive participation in the community post dispute is important. The parties, for example, may both be volunteers in relation to one of the Ismaili community's projects or programmes. Also, there may be others within the community who may be affected by the dispute or have a stake in its resolution, particularly in the case of family matters. Hence, it is critical to strive for an amicable resolution which minimizes any potential repercussions both on the parties themselves and on others, and to allow the parties and others affected to continue to be able to deal amicably with each other and to participate fully and constructively in the wider communities where they live.

Conclusion

While the Ismailis' dispute resolution system is rooted in our traditional values, its modern infrastructure interfaces comfortably with the domiciliary legal systems within which it functions. It is grounded in the ethics of the faith and complies with the laws of the various jurisdictions in which the Ismaili communities reside. The CAB system addresses needs that extend beyond traditional dispute resolution, addressing also dispute prevention, post settlement assistance, the possibility of wider support for parties to a dispute, and the "bandaging of wounds" to help them move past their conflict. Disputes can be resolved in a community context in a confidential and non-public manner to find resolutions that accord with the parties' needs and that help parties improve their quality of life. 

1 Al-Nawaz Nanji is the current Chairman of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board for Canada, and a tax partner at Osler, Hoskin & Harcourt LLP: <https://www.osler.com/en/team/al-nawaz-nanji>

2 "Aga Khan speaks of Islam and Syria's contemporary challenges", online: <https://www.akdn.org/press-release/aga-khan-speaks-islam-and-syrias-contemporary-challenges>

3 See also Celina Charania Shariff and Karim Sunderji, "A Holistic Approach to Dispute Resolution," ACResolution Magazine, September 2016, pp. 13-15, online: http://www.acresolution-digital.org/acresolutionmag/september_2016?pg=13#pg13

4 The Ismaili Community, online: <http://theismaili.org/community>

5 *Jivraj v Hashwani* [2010] 1 All ER 302, [2009] EWHC 1364 (Comm) at para. 43.

6 This concept of reconciliation and harmony is also found in the traditions (sunna) of Prophet Muhammad whose life is filled with examples of mediated solutions to human problems. There is a well-documented incident that during the reconstruction of the Ka'ba, the building in Mecca to which Muslims go for pilgrimage, a dispute arose over the placing of the Black Stone (Hajr al-Aswad) into the building. Each of the four tribes of the Quraysh wanted to have the honour of placing the stone, to the exclusion of the others. An impasse arose and the matter was referred to the Prophet. He asked each of the contesting tribes to choose a leader. He then spread a full sheet of cloth on the floor and placed

the stone in the centre, asking all four leaders to each hold it at one end and raise it together. Thus, a serious conflict was averted by the Prophet's prudent action in giving all four leaders an equal honour of placing the stone. Source: Dr. Mohamed M. Keshavjee, "Family Mediation in the Shia Imami Ismaili Muslim Community – Institutional Structures, Training and Practice", The Institute of Ismaili Studies: <https://iis.ac.uk/family-mediation-shia-imami-ismaili-muslim-community-institutional-structures-training-and-practice>

7 Mohamed M. Keshavjee and Tony Whatling, "Reflective Learnings from the Training Programmes of the Ismaili Muslim Conciliation and Arbitration Boards, Globally," online: <https://iis.ac.uk/reflective-learnings-training-programmes-ismaili-muslim-conciliation-and-arbitration-boards-globally>

8 Online: <https://www.akdn.org/speech/his-highness-aga-khan/upon-receiving-tolerance-award-tutzing-evangelical-academy>

9 Teresa F. Frisbie, "A modern, worldwide dispute resolution system inspired by Islam," Chicago Daily Law Bulletin, April 6, 2016, Volume 172, No. 67, online: <https://www.luc.edu/media/lucedu/law/centers/advocacy/adr/19409%20LB%20reprint%20Loyola%20Apr06-2016-B.pdf>

10 Dr. Mohamed M. Keshavjee, "Family Mediation in the Shia Imami Ismaili Muslim Community – Institutional Structures, Training and Practice", The Institute of Ismaili Studies: <https://iis.ac.uk/family-mediation-shia-imami-ismaili-muslim-community-institutional-structures-training-and-practice>

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Valuation as a Tool to Resolve Disputes

Individuals and organizations form business relationships to solve problems and create value.

At times, diverging views on how to achieve these objectives can result in disputes the parties are unable or unwilling to resolve without the involvement of a third party. The complexity of their dispute and the potential value at stake often determines whether disputants do nothing, attempt to resolve things directly by negotiation, or call upon an independent adjudicator, such as an arbitrator or court-appointed judge, to resolve the issues for them. One aspect of the dispute resolution process—and typically one of the most contentious—is quantifying the value or loss of a certain asset or event. Valuation is the act or process of estimating the value of an asset and an independent valuator is a person who provides an opinion of value. In this introductory article we discuss how independent valuers can help individuals, organizations, and adjudicators resolve business disputes.

How a valuator can help

Most parties involved in a business dispute want the same thing: a fair, transparent, timely, and cost effective resolution. If we begin with this end in mind, an independent professional who specializes in valuations can contribute to dispute resolution by:

- Helping the parties identify their priorities so that they focus their time and effort on those aspects that “move the dial” rather than on contentious issues which have a limited impact on the financial outcome of the dispute;
- Asking the parties the right questions to identify potential information gaps; as the saying goes “you don’t know”;

what you don’t know”;

- Explaining technical concepts¹, methodologies, formulae, and calculations so that parties understand the “how” and the “why” that underlies “the number”;
- Providing market intelligence and insights otherwise unavailable to the parties;
- Bringing a sense of neutrality, credibility, and confidence to the dispute resolution process.

A multi-generational business in the transportation industry had two shareholders, siblings, who actively worked in the company. The remaining shareholders were out-of-town cousins with limited knowledge of the business. The company’s performance declined in recent years, and the cousins wanted to sell their ownership interests, so the siblings, who wanted to continue running the business, offered to purchase their cousins’ shares. The offer was perceived as a “lowball offer.” After numerous attempts to negotiate a sale price failed and the relationship deteriorated, both sides hired an independent Chartered Business Valuator (CBV). In the end, the CBV’s report confirmed that reliable data and analyses did not support many of the siblings’ assumptions about the com-



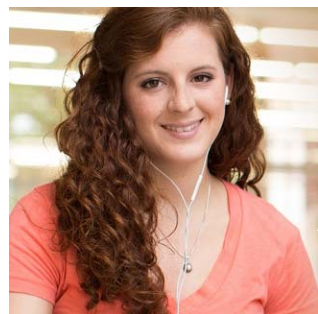
JT DHOOT, AACI, CBV

JT Dhoot is the Founder and Principal of Omnis Valuations & Advisory Ltd., a boutique consulting firm specializing in business valuations, commercial real estate appraisals and litigation support services. His clients include private investors and investment groups, publicly-traded companies, government agencies, professional advisors and not-for-profit organizations.

pany and its fair market value.

What could go wrong?

An independent valuation can help disputing parties and/or adjudicators by providing a range of realistic values for assets or ongoing enterprises. However, in some circumstances valuations result in further confusion. How does this happen and why? First, the parties must accept that valuation is inherently subjective and, although there are best practices and professional standards aimed at improving consistency in valuations, it is possible (and likely) that two equally-qualified and competent valuers will



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arrive at different opinions of value even if they are provided with the same factual information.

A manufacturing business operating in Alberta's energy sector was extremely profitable in the years leading up to 2014 when the price of oil was in excess of \$100/bbl, but when the price of oil declined drastically in late 2014 and 2015, so did the profitability of the business. Two competent valuers who were given the same historical operating and financial data on the business gave notably dissimilar opinions of value. But why? It turned out that the first valuator agreed with industry professionals who anticipated market conditions in the energy sector would improve in the near future, whereas the second valuator shared the view of professionals who believed the energy sector would remain depressed for many years. These divergent assumptions led to divergent values.

Sometimes disputing parties independently retain their own valuation experts and, unless they agree on basic facts beforehand, there can be inconsistency with respect to the information provided to each valuator. Problems created by asymmetric information are

compounded when one person or group has considerably more knowledge about the business than the others do. This can happen in situations where some investors are involved in the day-to-day operations of the business while others, known as passive investors, are not. Whether the parties intentionally withhold relevant information or selectively disclose information to advance their respective interests, a valuator's reliance on inaccurate information can lead to material errors in valuation.


In a dispute between the active and passive investors in a family-owned restaurant, each party retained their own valuator to estimate the value of the company. Both valuers were given the company's financial statements and tax returns, but details with respect to non-arm's length employment contracts and real property leases were not disclosed to either of them. Although each valuator arrived at a relatively similar opinion of value, factual inconsistencies in their respective valuation reports indicated that legitimate operating expenses had been understated. Consequently, the income and overall value of the company had been overstated by both valuers.

Helpful tips

Independence, impartiality, and objectivity are cornerstones of the valuation profession and disputing parties and decision makers can make use of these attributes to inform their decisions in a business dispute.

Members of the CBV Institute and the Appraisal Institute of Canada (AIC) are recognized experts in the valuation of business interests and real property, respectively. In a dispute resolution process where emotions are high and monetary values are significant, engaging a qualified valuator can bring much needed credibility and transparency to the process. An opinion of value from a qualified valuator signifies that "the number" is backed by adherence to a code of ethics and a professional reporting standard. As a result, disputants and decision makers benefit from knowing there are no conflicts of interest or independence concerns and that the appropriate scope of work, disclosures, calculations, and explanations are included in any valuation report they rely on.

Parties involved in a dispute can benefit from jointly retaining a single valuation expert—as opposed to each retaining their own valuation expert—because doing so can reduce costs, accelerate timelines, and provide more robust reporting that enables confident decision making. In some circumstances, the valuator can convince the parties that their win-lose approach to dispute resolution is having a negative impact on the overall value of their business and/or assets. Adopting a win-win approach can often result in improved financial outcomes and the betterment of ongoing relationships.

In the end, the willingness of disputing parties to resolve their disputes and the availability of relevant information are the key ingredients for valuation experts to use in the dispute resolution process. 



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¹ <https://www.remonline.com/5-things-you-need-to-know-about-cap-rates-and-multiples-in-valuations/>

Arbitration and Administrative Law: A Comparative Perspective Between Brazil and Portugal

This article compares arbitration legislation and the use of arbitration in public administration¹ in Brazil and Portugal. It explores how and when the arbitration process can be used in public contracts or by public organizations in both countries.

1. Objective Arbitrability and Applicable Law

In Brazil, the reform of the arbitration act (Law 9.307/1996) by Law 13.129 / 2015, categorically allowed arbitration in the public administration. The Brazilian Arbitration Act provides that direct and indirect public administration may use arbitration to settle disputes over available property rights. The question, however, lies in defining “available property rights.”²

In Portugal the Voluntary Arbitration Law (LAV) allows arbitration within the public administration, but it is not specific and only deals with the subject in general. Article 1 paragraph nº 5 of the LAV states that the State and other legal entities governed by public law may enter into arbitration agreements insofar as they are authorized to do so by law, or if such agreements concern private law disputes. This provision is identical to art. 1, § 1 of the Brazilian Arbitration Act that was reformed in 2015.

However, Portugal’s Code of Procedure in the Administrative Courts (“CPTA”) permits the arbitration of issues within the public administration that would not be possible, a priori, in Brazil, such as: (i) the use of arbitration to judge the validity of administrative acts and (ii) legal relations issues of public employment. By contrast, labor arbitration in Brazil is governed by specific legislation; with the reform of the labor legislation through Law No. 13.467 / 2017 (“Labor Law Reform”), the legal system began to include the arbitrability of private individual labor disputes, pursuant to art. 507-A of the Consolidation of Labor Laws (CLT). Besides that, the control of the administrative act in Brazil is only performed by the public administration itself, by the legislative power or by the judiciary.³

There are other basic differences between the two countries. According to Article 39 nº 1 of the Portuguese Law 63/2011 (LAV), the arbitrator may decide *ex aequo et bono*, if agreed by the

parties, including in arbitrations involving the state. Such a basis for an arbitral decision is forbidden by the Brazilian Arbitration Act which states in article 2 § 3 that arbitration that involves public administration will always be decided in accordance with the law and will be subject to the principle of publicity.⁴

In short, the object of arbitration in public administration under Portuguese law is broader than under Brazilian law. In Brazil, arbitration related to public administration cannot be decided *ex aequo et bono*, does not normally involve the review of administrative acts, and cannot be used for matters related to public employment.



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PH.D**


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2. The publicity duty

In Brazil, public administration arbitrations are, in general, public proceedings. According to article 1, § 3 of the Brazilian Arbitration Act, the arbitration involving the public administration will always be decided according to law and will respect the constitutional principle of publicity enshrined in article 37 of the Brazilian Constitution. The principle of publicity is closely related to the democratic principle (article 1 of the Brazilian Federal Constitution) and enables the exercise of social control over public acts.

According to Gustavo da Rocha Schmidt in his work of reference on the subject in Brazil, art. 37 of the Brazilian Federal Constitution determines the application of the principle of publicity to the public administration, which shall promote the disclosure of acts related to arbitration. The specialized private institution which will administer the arbitration proceedings would be merely a service provider and, as a contractor, would, therefore, have no obligation to publicize the acts of the arbitration proceedings by publication in the Official Gazette⁵.

Publicity does not make it impossible to use arbitration in public contracts⁶.

Firstly, confidentiality, although common in arbitrations, is not a compulsory and binding feature. The parties that may prefer and consent to arbitration even if the proceedings are publicized, which would happen in court in any event. In the case of public administration arbitration in Brazil, decisions, judgments, and other acts shall be public and transparent.

Secondly, the constitutional principle of publicity does not prevent the secrecy of documents or procedures in exceptional cases. This is also the case in judicial proceedings themselves, subject to the secrecy of justice, as well as in relation to documents backed by confidentiality and/or judicial reserve.

At this point, it should be noted that Law 12.527 / 2011 (Law on Access to Information - LAI) allows confidentiality in two situations: a) information classified as confidential, considered essential to the security of society or the state (article 23); and b) personal information related to intimacy, privacy, honor and image (article 31).

Accordingly, in arbitration involving public administration in Brazil, publicity does not preclude the confidentiality and secrecy of acts and documents that may endanger the security of society or the state, or that require personal information related to intimacy, privacy, honor, and image.

It is worth mentioning that article 3, item IV, of Federal Decree 10.025 / 2019 provides that information about the arbitration procedure will be public, except for the information necessary for the preservation of industrial or commercial secrecy and information considered confidential by Brazilian law. Similar wording is found in the State Decrees of Rio de Janeiro

(Decree 46.245 / 2018) and São Paulo (Decree 64.356 / 2019), which also require the respective Attorney General's Office to make arbitration proceedings available upon request of any interested party.

In Portugal, art. 30 of the Code of Procedure in the Administrative Courts deals specifically with the publicity of arbitration awards. According to that provision, the administrative process is public, just as the judgments are public and are subject to mandatory publication in a case law database. The published decision shall provide the ruling, identify the arbitrators, give the date of the decision, and indicate the reasoning and grounds for the decision.

In Portugal, the duty of publicity is specific concerning the arbitration award, but in Brazil the scope of publicity is broader. For instance, decrees in the states of Rio de Janeiro and São Paulo require publicity of petitions, expert reports, and decisions of arbitrators of any kind. We believe that this trend will be followed in other federal entities in Brazil.

3. Institutional Arbitration

The Arbitration Act, as amended by Law 13.129 / 2015, does not address the requirement of an ad hoc or institutional arbitration, which, in principle, gives the public administrator discretion to choose either path for any specific case. Notwithstanding that discretion, we believe the use of institutional arbitration to be ideal. That would allow the choice of an existing arbitration chamber that is recognized by the legal community and has experience which, in theory, guarantees greater legal certainty to the parties. Also, an arbitration chamber has the advantage of having its own regulation and providing secretarial services to the parties. The preparation of documents, receipt of petitions, holding of hearings, and other acts can be facilitated through the chamber's established procedures.

The big question would be the choice of arbitral chamber. In Brazil, there is no need for bidding to choose the arbitral institution due to the technical and singular nature of the service in addition to the notorious specialization of the chambers. See art. 25, item II, of Law 8.666 / 1993 (Law of Public Bids and Contracts).

One option to facilitate the selection process is the accreditation (or registration) of arbitral chambers by the public administration. After compliance with primary and proportional requirements set by the administration, all arbitration institutions could achieve accreditation, and the contractor that is interested in resolving a dispute then chooses from among the accredited institutions. That is the solution adopted by Federal Decree 10.025 / 2019 (Articles. 10 and 11), by Decree 46.245 / 2018 of the State of Rio de Janeiro (Article 14) and Decree 64.356 / 2019 of the State of São Paulo. (articles 13 to 15).

In Portugal, Article 187, n° 2 Code of Administrative Proceedings provides that *"the State may, under the terms of the law, authorize the establishment of institutionalized arbitration centers for the composition of disputes that may be arbitrated"*. According to that provision: *"The binding of each ministry to the jurisdiction of arbitration centers depends on the decree of the member of Government responsible for the area of justice and the member of Government competent by reason of the matter, which establishes the type and the maximum value of the disputes, giving interested parties the power to approach these centers for the settlement of such disputes"*.

4. Conclusion

We began this article by addressing arbitrability in Brazil and Portugal with a focus on public administration. Under Portuguese law the scope of arbitration is broader, and arbitrators are allowed to adjudicate the validity of administrative acts and issues of public employment. Such issues are not susceptible to arbitration in Brazil.

Secondly, we addressed the public administration's duty of publicity and how confidentiality can be dealt with in arbitration proceedings. Portugal is ahead in this regard because it has the electronic means to disseminate arbitration awards. Portugal's law is specific with respect to the arbitration award, whereas Brazil's requirement is much broader, in some instances extending to the publication of petitions, ex-

pert reports, and arbitral decisions of any nature (not just the arbitration award).

Thirdly, we analyzed the use of institutional arbitration by the public administration in both countries, and we noticed a clear difference in the process of choosing the arbitration chamber. Portugal's Code of Administrative Proceedings seems to leave the choice of the arbitral institution to the discretion and goodwill of the ruler. Brazil brings a more democratic solution by allowing the accreditation (or registration) of arbitral chambers, without distinction, that meet primary legal requirements set by the public administration and the law. As a result, all arbitration institutions can be accredited by the government in Brazil, and it is up to the contractor who is interested in resolving the dispute to choose the accredited institution.

It is worth noting that there is a draft Law on Voluntary Administrative Arbitration prepared by a Working Group formed by the Lisbon Regional Council of the Bar - Group coordinated by Professor Tiago Serrão, which, if approved, will fill the gap about arbitrability in the Portuguese public administration⁷.

There are many similarities and some differences between the two countries, but only one certainty: Brazil and Portugal are at a point of no return in searching for ways to bring the efficiency of arbitration to the resolution of conflicts involving the public administration. 🏠

1 In Brazil, "public administration" is defined to mean federated entities (Union, States, Federal District, and Municipalities – Direct Administration) and the legal entities created or controlled by them (Indirect Administration). In Portugal, "public administration" is defined to mean Portuguese organizations and institutions that depend directly on the Portuguese State. It is divided in three major groups: direct administration, indirect administration and autonomous administration. Portugal is a Unitary State whereas Brazil is a Federal State. Brazil is decentralized politically and administratively (twenty-six States, one Federal District and five thousand five hundred and seventy Municipalities) while Portugal is decentralized only administratively (eighteen districts and two autonomous regions that are subdivided in three hundred and eight municipalities divided in three thousand and ninety-two local government authorities namely parishes).

2 In our opinion, this is a matter inherent to administrative hiring, since the contract is the instrument that regulates this availability and to what extent it will best serve the public interest. The Brazilian public administration may only

insert as an object of contract a theme related to available property rights. When such a right is non-negotiable, and inalienable there is an imposition by the administration which means the use of pure force to serve public interest.

3 On the control of acts of Public Administration, see: OLIVEIRA, Rafael Carvalho Rezende. Curso de Direito Administrativo, 7. ed., São Paulo: Método, 2019, p. 833-934.

4 Similarly, Federal Decree 10.025 / 2019 provides: "Art. 3º The arbitration dealt with in this Decree shall observe the following conditions: I - exclusive arbitration decided in accordance with the law shall be permitted; (...) Paragraph 2 *Ex aequo et bono* arbitration is prohibited".

5 SCHIMIDT, Gustavo da Rocha. *Arbitragem na administração pública*. Curitiba: Juruá Editora, 2018, p. 59.

6 OLIVEIRA, Rafael Carvalho Rezende. *Licitações e contratos administrativos*, 8. ed. São Paulo: Método, 2019, p. 280.

7 SERRÃO, Tiago et. al (Coord.). *Arbitragem Administrativa: Uma proposta*. Coimbra: Almedina, 2019.



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[More information](#)

Lionel J. McGowan Awards of Excellence in Dispute Resolution

Call for Nominations for 2020



ADRIC is calling for nominees for the Lionel J. McGowan Awards of Excellence in Dispute Resolution for 2020.

The awards are named in recognition and honour of Lionel J. McGowan, the first Executive Director of the Arbitrators' Institute of Canada. The presentation of the McGowan Awards will take place during the ADRIC 2020 Conference in Ottawa-Gatineau, October 20-23, 2020. There are two awards: one which recognizes outstanding contribution to the support, development and success of the ADR Institute of Canada, Inc. and/or development of alternative dispute resolution nationally and one which recognizes contribution to a Regional Affiliate and within a Region.

Deadline

Nominations will be accepted until Friday, July 3, 2020. You are encouraged to submit nominations at any time prior to this date. Please send nominations **in the form of a letter explaining why you feel your nominee should be recognized and highlighting the nominee's specific contributions**, to the McGowan Nomination Committee at the ADR Institute's national office, by fax or e-mail.



LEADING DISPUTE RESOLUTION IN CANADA
SINCE 1974

McGowan Nominations Committee

ADR Institute of Canada, Inc.
234 Eglinton Ave. E., Suite 407 Toronto, Ontario M4P 1K5
Fax: 416-901-4736 admin@adric.ca

National Award of Excellence

This award is similar to the Regional award, but given for contributions to the ADR Institute of Canada. A candidate's contributions to the support, development and/or progress of the ADR Institute of Canada and its policies and programs, and to promotion of ADR on a national scale, would be relevant. Professional ADR teaching, hearing ADR cases and other ADR practice activities do not qualify. Similarly, simply being on the Board of the ADR Institute of Canada does not qualify unless it included major contributions to the Institute through development of the Institute's structure, National-Regional relationships, national programs or materials, funding, or other significant Institute initiatives.

Regional Award of Excellence

This award is for an individual who has made an outstanding contribution to the development and success of the Regional Affiliate of the ADR Institute of Canada, either by a short-term exceptional effort or through constant contributions over a long period of time, or has contributed significantly to the promotion and development of ADR within the region. Note that simply being a member for many years, being on a board or committee for many years, or carrying out one's own ADR practice do not apply toward the award.



Professional Designations for Mediators and Arbitrators

ADRIC's professional designations in mediation and arbitration identify and differentiate those who hold them. They demonstrate to potential clients that you have achieved prescribed training and experience levels recognized by your peers and based on objective third party assessment by a committee of senior and highly respected practitioners.

C.Med, Q.Med, C.Arb, Q.Arb, C.Med-Arb

These credentials¹ after your name enhance your credibility and marketability. These national designations communicate your membership in a national organization dedicated to promoting ADR and your commitment to continuing education and engagement in the practice.

The C.Med (Chartered Mediator) and C.Arb (Chartered Arbitrator) are Canada's preeminent generalist designations for high-level practising mediators and arbitrators and the most senior designations offered by ADRIC.

The Qualified Mediator (Q.Med) and Qualified Arbitrator (Q.Arb) are entry-level designations. They provide recognition of training and moderate experience and offer a solid foundation as you progress to the next designation.

The new Chartered Med-Arb Designation (C.Med-Arb) is available to members who hold both a C.Med and C.Arb designation and have taken special ADRIC training. Med-Arb is unique in the ADR world, and is a distinct process designed to meet the needs of the parties as a customized dispute resolution process. It requires a high level of practitioner competence to do successfully.

These designations are recognized and respected across Canada and internationally. They are often accepted as the minimum criteria for membership on rosters including those with the Federal Government.

For more information and criteria, visit ADRIC.ca



¹ All designations are TM ADR Institute of Canada, Inc.



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ADRIC honours Past Presidents, Fellows, Directors Emeritus and Recipients of the McGowan Awards for their support and significant contributions to the growth and development of ADR and ADRI.

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ADRIC brings together seven affiliates in addition to major corporations and law firms to promote the creative resolution of disputes internationally and across the country. Our broad membership base allows for diverse skills and experience that contributes to the development of dispute resolution in Canada. Numerous organizations refer to ADRIC for guidance in administering disputes between organizations its clients or customers,

between employees, or between employees and management using ADRIC's National Mediation Rules and its Arbitration Rules. Members adhere to ADRIC's Code of Ethics and are subject to disciplinary policies. Those who have achieved the required education and practical experience may apply for recognition as designated Qualified Arbitrators, Chartered Arbitrators, Qualified Mediators, or Chartered Mediators.

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