WHO ARE WE?

ADRIC brings together seven affiliates as well as major corporations and law firms to promote the creative resolution of disputes across the country and internationally.

This broad membership base allows for diverse skills and experience and contributes to the development of the field of dispute resolution in Canada.

Numerous organizations refer to ADRIC for guidance in administering disputes between the organization and 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.
MESSAGE FROM THE PRESIDENT

NEW ADRIC BRAND
Have you noticed our new logo and colours? ADRIC had heard many times that the colour red in our old logo was not the appropriate colour to represent ADR - that it should be a “calmer” colour. We also wanted to refresh the logo to be more relevant to our members and users of ADR.

After extensive interviews with design firms, focus groups, etc., the winning logo was finally approved by the ADRIC board and officially launched at the AGM before ADRIC 2015. If you were not able to attend, have a look at the video posted to our YouTube channel - it is worth a watch.

We have also adopted a new tagline, selected from over 50 suggestions, intended to provide the public a glimpse of what ADRIC, its affiliates and membership are all about: ARBITRATION. MEDIATION. RESOLUTION.

And we have officially embraced our acronym: ADRIC. It is the address of our new website: ADRIC.ca, and all staff email addresses.

We hope you like the new look as much as we do!

ADRIC 2015: BIG SKY; BIG IDEAS IN ADR
ADRIC 2015 was held in Calgary at the end of October: hailed as a great success with participants. The pre-conference, LEADING THROUGH CONFLICT – TOOLS FOR LEADERS AND ADR PROFESSIONALS, was well-attended and participants were delighted with the program and instructor, Eric Stutzman, providing comments such as “surpassed my expectation, excellent resource tools and application methods, engaging and fun with valuable content, it was great - practical and very informative…”

Also wildly successful was our new initiative: ADRIC Talks, organized by Don Shapiro. Attendees were delighted, providing comments such as: “I learned more in this session than anywhere else and laughed at the same time!" We have recorded these - stay tuned to our YouTube channel.

And all the sessions in the five streams over the two days were popular. As a response to evaluations from previous years, we varied the length of the sessions so some could address topics in greater depth.

One of the most notable comments we heard and felt ourselves: the positive energy at this conference was incredible - many thanks to all involved in planning and to all participants - we are inspired to surpass your expectations again next year in Toronto, October 12-14!

ADRIC 2016: TORONTO, OCTOBER 12-14, 2016:
Speaking of next year’s conference, we are excited to be coordinating the only Canadian edition of the Global Pound Conference Series on October 12, 2016! This full-day interactive consultation will be held the day before the ADRIC 2016 Conference & AGM in Toronto, at the same venue: the Ritz-Carlton. This is going to be a “once in a generation” opportunity to give shape to mediation in a global context, and we invite you to consider helping us prepare for this important event.

We will also be offering one or two in-depth workshops on October 12th, followed by our AGM and conference on October 13 and 14. The ICC Canada International Arbitration conference will also be held on October 14, so Toronto is certainly the place to be. We want to ensure international arbitrators have the opportunity to attend both conferences, so will be holding our international arbitration sessions on October 13 and domestic on the 14th. Book your accommodations soon as Toronto will be a very popular place! We have arranged an excellent rate for luxury accommodation at the Ritz-Carlton - see our website for details.

We continue to forge strong strategic alliances with organizations. Some of our more recent partners include: the new Canadian Association of Peace and Conflict Studies (CAPCS), ICC Switzerland, Association for International Arbitration (AIA) and the Dispute Resolution Boards Foundation (DRBF) which held a session at the conference - watch for the recording on our YouTube channel.

THE PRESIDENTS’ ROUNDTABLE AND THE CORPORATE ROUNDTABLE
Comprised of the Presidents of each of our seven affiliates, myself as ADRIC’s President and our ED, Janet McKay, this group has quickly become a very important forum for us all to engage at a peer level. The two largest affiliates’ Executive Directors also attend for operational issues. Chaired by ADR Atlantic’s Andy Butt, the Presi-
students themselves set the agenda and prioritize items at each meeting and are bringing many topics forward to seek input from other regions, such as types of membership, current events or initiatives, Memos of Understanding, etc. It was determined at one of the meetings that the current MOUs between ADRIC and affiliates are not only 30 years old but have become irrelevant, so the MOU TaskForce was born. With good pan-Canadian representation their goal is to develop and define a new relationship, not only with ADRIC but amongst the seven affiliates as well.

Similarly, we are looking forward to the Corporate Roundtable as a forum leading to sharing, best practices engagement and to support the needs and goals of our valuable Corporate Membership and further advocate for ADR. Our Corporate Members include law firms, ADR firms, government agencies, non-profit organizations and educational institutions.

**CONNECT WITH ADRIC**
Whether you are an individual Member, Corporate Member, partner or friend, we invite you to look us up on social media: We are delighted with the connections we continue to make and the increased interaction. If you haven’t connected yet, please do!

M. SCOTT SIEMENS, C.MED, B.COMM., FICB
PRESIDENT@ADRIC.CA

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**ADRIC'S NEW LOOK**

January 2013 was the beginning of the development of a comprehensive Strategic Plan, which the ADRIC Board finalised and began implementing in January 2014. One of the most challenging initiatives was given to the Marketing and Membership Committee: to rebrand ADRIC with a fresh, new look. ADRIC had heard many times that the colour red in our old logo was not the appropriate colour to represent ADR - that it should be a “calmer” colour.

After extensive interviews with design firms, focus groups, etc., the winning logo was finally approved by the ADRIC board and officially launched at ADRIC 2015, our Annual National Conference.

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We have also adopted the new taglines above, selected from over 50 suggestions, intended to provide the public a glimpse of what ADRIC, its affiliates and membership are all about.

**NEW WEBSITE.**
And we have officially embraced our acronym, ADRIC. It is the address of our new website: ADRIC.ca and all staff email addresses.

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MESSAGE FROM THE EDITOR

In this 2015 Fall/Winter edition of the Canadian Arbitration and Mediation Journal, we advance the discussion on some familiar and important themes.

In past issues, we have published articles on the specific application of ADR techniques in various business sectors. In his article in this issue, Kevin McElcheran provides an in depth examination of methods in which mediation can be used to resolve some of the most complex and high value of all commercial disputes: corporate insolvencies and restructurings. To some degree, the use of mediation to find solutions to specific aspects of such disputes has a long history. Many judges who have supervised insolvencies have used unconventional, non-judicial techniques for achieving or encouraging resolution and, occasionally, have stepped into a true mediation role. McElcheran advocates a more systematic approach to the use of ADR, recognizing that ultimately insolvencies are multi-faceted, multilateral negotiations which can be facilitated by more fully integrating mediation skills and techniques into the process.

Mary Satterfield contributes a thoughtful and thorough discussion of the possible expanded use of co-mediation as a technique in dispute resolution. Often as mediators, particularly the more successful among us, we operate in isolation and never consider all the benefits which a team approach may bring in appropriate cases, not only for mediators but for the parties they serve and for the profession as a whole. Satterfield’s article should provoke a very useful discussion within ADRIC as to how the tool of co-mediation might be expanded with ADRIC’s support.

On the subject of developing the art of mediation, Meagan Storey has written an important essay on the need for a greater emphasis in our law schools on the culture, value and skills which are foundational to dispute resolution. The case method of teaching law creates the impression that legal analysis and argument followed by judicial determination is the only way to get to a “correct” result. Yet we know that only a small fraction of all cases are ultimately resolved this way. Also case law precedents and analysis as a predictor of results is unreliable due to competing legal principles, factual distinctions between cases and the development of the law. Storey advocates a curriculum based on a recognition of the importance of other methods of resolving disputes.

Another major gap in Canadian legal education, which perhaps should be explored in a future article, is the failure to teach commercial arbitration in law schools, despite the growing use of this method of dispute resolution in business cases. When arbitration is taught in law schools, the focus is usually on international commercial arbitration with a strong emphasis on arbitration institutions and their rules. Yet non-institutional (“ad hoc”) arbitration is much more common in Canada when Canadian lawyers are on both sides of the case, for both international and non-international cases, and many creative approaches are possible beyond the typical choice of conducting arbitrations as if they are simply private litigation.

In an article based on his speech to the Toronto Commercial Arbitration Society last spring, J. Brian Casey addresses the issue of what we need to do in Canada to “up our game” with respect to international arbitration. This is a topic that is increasingly attracting interest as many new arbitration centres are springing up around the world in places like Singapore, Dubai, Sydney and Hong Kong to compete with traditional arbitration seats such as London, Paris and Geneva. Even the City of New York, which is not as high on the hit parade of arbitration venues as it would like to be, has recently developed an arbitration centre with all the bells and whistles. Does Canada have some particular selling points? What do we need to do better? Casey addresses these issues in the context of Toronto, but the discussion is applicable (and needed) for other Canadian venues that offer many unique advantages to the international arbitration community.
One of the key ingredients in any jurisdiction’s competition for international arbitration work on the global stage is a knowledgeable judiciary that is supportive of arbitration. In that regard, we are privileged in this issue to publish the address of Justice Frank Marrocco, Associate Chief Justice of the Superior Court of Justice of Ontario, which was also delivered at the last TCAS annual meeting. In a simple but compelling fashion, Justice Marrocco summarizes the extent to which all arbitration practitioners in Canada are in need of support from the courts and the extent to which an enlightened degree of cooperation is important to both streams of adjudication.

I hope you will enjoy the articles in this edition. Please keep us in mind for any articles you may wish to submit for consideration. We are always willing to discuss your ideas in advance and to provide guidance and feedback as your article is being written.

**ADRIC’S COMMITTEE LEADERS**

ADRIC WOULD NOT BE WHAT IT IS WITHOUT ITS COMMITTEE MEMBERS AND CHAIRS, WHO WORK EXCEPTIONALLY HARD TO MOVE ADRIC FORWARD. WE ENCOURAGE MEMBERS TO PARTICIPATE ON OUR COMMITTEES AND JOIN THESE LEADERS:

**Angus Gunn**, Chair of the Rules Committee;  
**Bill Horton** for his work as Editor-in-Chief of the Canadian Arbitration and Mediation JOURNAL;  
**Randy Bundus** Chaired the Insurance Committee this year, which negotiated the best E&O package for members;  
**Gary Furlong**, Chair, C.Med/Q.Med Standards and C.Med National Audit and Appeal Committee. Many thanks to Gary for his tireless work and high standards;  
**Bryan Duguid** continues to lead ADR Perspectives e-newsletter and works exceptionally hard to source articles and keep the important publication on track. **Anne Grant** has recently stepped down from her position as Co-Editor - and we thank her for her service. **Ron Pizzo** has recently joined Bryan and we look forward to the fruits of his work.

**THE ADRIC BOARD TRULY IS A WORKING BOARD. MOST DIRECTORS CHAIR TWO OR MORE COMMITTEES! WE OFFER OUR SINCERE THANKS TO THE FOLLOWING CHAIRS:**

**Andy Butt**, Presidents’ Roundtable.  
**Michael Erdle**, Technology Committee. Michael and his committee have been very active this year, working to identify the best technology to serve our members.  
**Bill Hartnett**, Co-Chair, Membership & Marketing Committee.  
**Jim McCartney**, Co-Chair, Membership & Marketing Committee and Chair, C.Arb/Q.Arb Standards Committee and the Ad hoc Arbitration Rules Administration Process Review.  
**David McCutcheon**, National Conference Committee.  
**Jim Musgrave**, By-Laws & Governance, Nominations and Roster Development.  
**Chuck Smith**, Human Resources. Along with Andy Butt, Chuck has been busy with the Executive Director in creating great structure and policies for our staff.  
**Anne Wallace**, National Courses Committee. The National Introductory Courses in Mediation and Arbitration were launched this year after many years of planning and writing.

**SINCERE THANKS TO THE FOLLOWING DIRECTORS WHO HAVE RETIRED FROM THE BOARD:**

**Randy Bundus**, Corporate Member Representative of Insurance Bureau of Canada, served since 2003, and as President 2009-2012.  
**Jeffrey Smith**, Treasurer and Director since 2006.  
**Louise Novinger Grant**, Corporate Representative of Burnett Duckworth & Palmer has served since 2009.  
**Derek Lloyd**, Corporate Representative of Dentons has served as a director since 2007.

If you would like to learn how to become involved in ADRIC, please visit the website: [www.adric.ca/about-adr/committees](http://www.adric.ca/about-adr/committees)
MEDIATION – A CORE RESTRUCTURING TOOL

1. INTRODUCTION
To many, the phrase “insolvency law” seems like an oxymoron. Only in the world of insolvency law do court orders stay legal remedies instead of enforcing them. Only in the world of insolvency law is the debtor’s default in its legal obligations to its creditors the basis of an order that those creditors shall have no legal remedies against the debtor.

The apparent “lawlessness” of insolvency law is derived from the fundamental nature of commercial insolvency. Commercial insolvency is not a legal problem. It is a business problem with legal implications. For this reason, effective insolvency laws must be directed at solving business problems by providing a forum and context for a solution to evolve.

Canadian insolvency legislation is designed to provide this forum and context for the restructuring of insolvent but viable commercial enterprises. Each of Canada’s insolvency statutes permits an insolvent debtor to file or apply for an order that stays all creditor claims in order to present to its creditors a plan of arrangement to restructure its relationship with its creditors.

Canadian insolvency legislation is designed to provide an opportunity for the restructuring of insolvent but viable commercial enterprises. Each of Canada’s insolvency statutes permits an insolvent debtor to file or apply for an order that stays all creditor claims in order to present to its creditors a plan of arrangement to restructure its relationship with its creditors.

The basic organizational idea at the core of insolvency law is that the exercise of individual creditor remedies destroys value in the enterprise of the debtor that could be saved and distributed to creditors through a plan of arrangement or compromise, or the sale of the business as a going concern. It is an acknowledgment of the limitations of court-based remedies, and the inadequacy of court orders to rectify business problems. Business problems require a commercial solution that can only be achieved by agreement.

Canada’s most influential judges in insolvency cases understand and nurture consensual resolution of the commercial problems that are the cause of insolvency. Justice Houlden and Justice Farley were good examples but with entirely different styles. When Justice Houlden politely deferred hearing a motion he might have thought premature or disruptive, he was giving the parties an opportunity to achieve a consensual resolution of the issue before him. Justice Farley’s more direct approach of “ordering” the parties out of his courtroom and into the hall to resolve issues was designed to achieve the same result.

The apparent “lawlessness” of insolvency law is derived from the fundamental nature of commercial insolvency. Commercial insolvency is not a legal problem. It is a business problem with legal implications. For this reason, effective insolvency laws must be directed at solving business problems by providing a forum and context for a solution to evolve.

The techniques employed by Justices Houlden and Farley — withholding or deferring adjudication of difficult issues in restructuring proceedings, effectively locking the parties in a virtual room with instructions not to come out until they have a deal, has worked in some cases, but put at risk other necessary functions of the supervising court. The court must perform the adjudicative functions that are assigned to it by insolvency legislation. Only the court can make the Initial Order in CCAA proceedings. Only the court can approve the revitalizing transaction that saves the business, whether through the sale of the business as a going concern, or a plan of arrangement to restructure its relationship with its creditors.

These adjudicative functions limit the ability of the court to encourage consensual resolution. The techniques employed by Justices Houlden and Farley created an opportunity for deal making but could not facilitate the confidential, privileged communication between the parties that is necessary for consensus building. The need to preserve the objectivity necessary for the court to perform its adjudicative functions creates a corresponding need for insolvency proceedings to include mediation. Mediation would facilitate appropriate and fair commercial solutions to the business problems at the core of insolvency.

2. TRANSACTIONAL AND ENTITLEMENT DISPUTES
Canadian insolvency legislation is designed to provide an opportunity for the debtor and its legitimate stakeholders to preserve and maximize the value of a viable business enterprise, and to distribute that value fairly and appropriately among its stakeholders. Value
is preserved and realized by the stay of proceedings and the powers of the court to preserve and transfer contractual relationships, to approve sales outside of the ordinary course of the business and to approve or sanction a proposal or plan of arrangement. The disputes between the debtor and its stakeholders that may arise in the context of the potential exercise of any of these court powers may be termed transactional disputes.

The value that is preserved by the resolution of transactional disputes and the completion of a sale of the business or a plan of arrangement must be distributed to the creditors of the debtor fairly and in accordance with their entitlements. When the business is sold as a going concern, the proceeds will generally be distributed to creditors in accordance with the amount and priority of their claims as proven in a claims process. When the business is restructured through a plan of arrangement or compromise, the value of the business is distributed through a scheme that is approved by all classes of creditors and by the court.

In the case of either a sale or a plan, throughout the course of an insolvency proceeding the debtor must determine each creditor’s entitlement to the value preserved and realized through a revitalizing transaction. Each creditor must prove its claim and each claim must be classified with the claims of other creditors who have a commonality of interest.

Accordingly, in Canadian insolvency proceedings, there are two main needs for dispute resolution as part of the core functions of insolvency law: first, to resolve transactional disputes that arise in the restructuring process itself, including disputes arising in the negotiation of the plan and second, to resolve “entitlement disputes” relating to creditor claims and entitlement to participate in the value generated and preserved by the sale or restructuring transaction.

Transactional disputes are very time-sensitive. They are “real time” disputes in the sense that the preservation or creation of value in the insolvency process through a plan or sale of the business is dependent on the timely resolution of transactional disputes. For example, the ability to transfer a critical contract to a buyer of the business as a going concern must be determined before the transfer of the business can be completed.

Transactional disputes are also relationship-sensitive because they frequently involve enterprise stakeholders of the business such as employees, landlords, technology licensors, joint venture partners, and other on-going relationships of the business.

Entitlement disputes are frequently less time- and relationship-sensitive for the business. Unless the disputed claim of the creditor would result, if allowed as claimed, in the creditor having a veto over any plan of arrangement, entitlement disputes can be resolved in the claims process. In many cases, entitlement disputes can be finally resolved after the completion of a sale or the implementation of a plan. Partial distributions can often be made to creditors allowed claims, while reserves are maintained for disputed claims pending their determination.

While entitlement disputes are less time-sensitive, all entitlement disputes must be resolved before the value preserved or created by the success of the restructuring can be fully distributed to the debtor’s stakeholders. Fair distribution based on legitimate entitlement claims is also a fundamental value of insolvency proceedings. Accordingly, efficiency in the resolution of entitlement disputes is an essential function of the completion of each case. Successful restructuring does little good for financial creditors if the value created cannot be distributed to them, or is wasted in the cost of resolving claims.

**[A] ADJUDICATION OF TRANSACTIONAL DISPUTES**

The 2009 amendments to Canadian insolvency legislation enhanced the adjudicative role of the courts in the resolution of transactional disputes in a number of respects. As a result of the amendments, interim financing cannot be approved except on notice to every secured creditor who is likely to be affected by the charge. A contract cannot be disclaimed without following a statutory procedure that gives counterparties to contracts with the debtor rights to seek judicial intervention to preserve their contractual rights. No sale of assets out of the ordinary course of business, such as a sale of the business as a going concern, can be completed without the approval of the court.

The 2009 amendments also enhanced the role of the monitor as an assistant to the court in its adjudication of transactional disputes. Among the factors to be considered by the court in its adjudication of transactional disputes, the 2009 amendments of Insolvency legislation expressly require the court to consider the opinion of the monitor. In the case of interim financing, the court must consider any monitor report relating to the debtor’s cash flow. When deciding whether to approve a transfer of contractual rights, the court must consider whether the monitor approved the assignment. The sale of assets out of the ordinary course of business is approved by the court only after considering whether the sale process was approved by the monitor.

These amendments did not change the essential roles of the court and the monitor in the restructuring process. The statutory role of the court is adjudicative in its essence. Through the stay of proceedings, insolvency legislation provides an opportunity for the debtor to negotiate the terms of its restructuring. That opportunity is afforded by court order, which must be made judicially. The court has wide discretion in making the stay orders and in resolving transactional disputes in formal insolvency proceedings. Nevertheless, the court must exercise this discretion judicially based on evidence of the factors it is directed to consider by statute and precedent. Further, the CCAA expressly requires the court to rely on the reports and recommendations of the monitor when exercising its discretion.
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While insolvency legislation gives the court the tools to adjudicate transactional disputes, the exercise of those powers is expensive, divisive, time-consuming and subject to appeal. Like Justices Houlden and Farley, experienced commercial judges understand that the exercise of court powers to resolve transactional issues imposes burdens on the business that impairs the restructuring goal of the process. They understand that in every case, a negotiated resolution of a transactional dispute should be preferred over a court determination.

(B) ADJUDICATION OF ENTITLEMENT DISPUTES

Courts have well-developed mechanisms for determining entitlement disputes, using claims officers as delegates of their adjudicative powers. The BIA includes claims process mechanisms, which are invoked automatically for the proof of unsecured claims and at the instance of the Trustee for determination of secured claims. Claims orders are routinely made in CCAA proceedings requiring creditors to prove their claims. Under the BIA, the trustee reviews claims submitted and disallowances of claims can be appealed to the registrar. In CCAA proceedings, claims officers are typically appointed with a broad procedural discretion concerning the adjudication of claims disallowed by the monitor or disputed by the debtor. Decisions of the registrar or the claims officer may be appealed to the supervising judge.

As in the case of transactional disputes, the role of the monitor, the court, and the claims officer are adjudicative. The monitor allows or disallows claims in whole or in part as a first level of adjudication. The claims officer adjudicates disallowed claims when the creditor objects. The court hears appeals from decisions of the claims officer.

Entitlement disputes can be disruptive to the restructuring and can impair the completion of a revitalizing transaction for the business if the rights in dispute are critical to the business or the approval of the sale or plan of arrangement. For example, if the claim or priority of the claim of a secured creditor is in dispute, it may not be possible to assess the fairness of a plan of arrangement or to determine the appropriate classification of creditors to vote on any plan of arrangement.

Again, while practice and insolvency legislation gives the court the adjudicative tools to deal with critical entitlement disputes, the exercise of those powers to resolve critical entitlement disputes is expensive, divisive, time-consuming, and subject to appeal. Further, even when the resolution of a claim is not necessary before a revitalizing transaction can be completed, the efficient but fair resolution of each and every claim is necessary before the full value created by the restructuring can be distributed to the stakeholders of the business. Consequently, efficiency requires that negotiated resolutions of entitlement disputes are frequently preferable to adjudication.

3. CASE MANAGEMENT – A CONTEXT FOR NEGOCIATION

When the Commercial List was created in Ontario in 1991, one of its goals was to provide continuity in the supervision of restructuring proceedings and to be a “scheduled” court. The initiatives of the time included the identification of a supervising judge who would have carriage of the restructuring proceedings and the requirement that the parties and their counsel apply the “three C’s” of practice on the Commercial List: communication, cooperation on procedural matters, and common sense.

The 2009 amendments, in enhancing the adjudicative function of the court, have resulted in more formal case management of restructuring cases on the Commercial List. Through the use of case management and case management conferences, particularly with the input of the monitor, the court can lay out timetables for the efficient and timely adjudication of transactional and critical entitlement disputes that must be resolved before the business can emerge from restructuring proceedings, either through a plan of arrangement or compromise, or through a sale of the business as a going concern.

As has been the case since the days of Justices Houlden and Farley, scheduling (or deferring the scheduling) of the adjudication of critical transactional and entitlement disputes creates a parallel timetable for the negotiated resolution of such disputes. Through case management, the court can influence the context in which disputes are resolved. For example, the court may defer the hearing of an entitlement dispute involving disputed unsecured creditor claims until after the completion of the sales process if it seems likely that the value of the business might be less than the secured debt. Alternatively, the court might accelerate the hearing of a dispute about the right of the debtor to disclaim a contract if the disclaimer is a requirement of the restructuring. The early resolution of critical transactional disputes will permit the debtor to choose a restructuring plan of action that will preserve the business and provide the maximum benefit for its legitimate stakeholders.

Case management allows the supervising court to move the adjudication of critical issues forward in a logical progression in light of the overall goals of the restructuring process. At the same time, the adjudication timetable focuses the efforts of the debtor on the consensual resolution of the same critical restructuring issues in the same logical progression. For these reasons, the Consolidated Practice Direction Concerning the Commercial List expressly mandates the use of alternative dispute resolution mechanisms, such as mediation.

4. MEDIATION AS A RESTRUCTURING TOOL

Mediation of transactional and critical entitlement disputes in the restructuring process has cleared the way to a successful restructuring in many cases. In the Air Canada restructuring, mediation by Justice Winkler, as he then was, of disputes between Air Canada and its unions was an important step in the completion of that restructuring. In the Canwest case, the appointment of then Chief Justice Winkler as mediator of disputes between Canwest and Goldman Sachs, its co-shareholder in
mandates mediation in commercial insolvency cases. There is no model order or directive for including mediation in initial orders or claims orders. While these statutes do not formally require mediation, neither statute stays or prevents the debtor and its stakeholders from entering into agreements to mediate disputes. As a voluntary mediation is not a proceeding, nothing in an initial order under the CCAA or the filing of a proposal under the BIA prevents any party affected by a CCAA or BIA restructuring proceeding from inviting the debtor to negotiate the resolution of any transactional or entitlement dispute under a mediation agreement.

The format for court mandated mediation in restructuring proceedings typically follows the provincial rules of civil procedure in the venue of the case. For example, Manitoba makes judicially assisted mediation (appointing a sitting judge as a mediator) available in all civil cases, including restructuring cases filed in Manitoba under the CCAA. In other provinces, CCAA courts have appointed sitting judges (Justice Winkler in Air Canada, CanWest and Nortel, for example) and can appoint or facilitate the appointment of non-judges (George Adams in Stelco, for example). If a sitting judge is appointed, the terms of the mediation will be set out in a court order. If the mediator is not a sitting judge, the terms of the engagement may be set out in an agreement or in an order made on the consent of the mediator.

5. THE COMMERCIAL MEDIATION ACT
If the terms of mediation are not expressly set out in an order, the format for a mediation agreement in restructuring proceedings also follows local provincial law or convention. In Ontario, in a plan mediation agreement made pursuant to commercial mediation legislation, a debtor can invite its creditors to invite other parties to participate in a mediated negotiation without creating a record that may be admitted as evidence in any subsequent adjudicative process. The invitation to mediate a commercial dispute, the parties’ willingness or refusal to participate in mediation, and any information exchanged even before a mediation agreement is signed are not discoverable or admissible in any adjudicative proceeding.36 If the parties agree to mediate amendments to their contractual or other commercial arrangements, the agreement to mediate, all documents produced for the mediation, statements and proposals made in the mediation process, and the fact that a party or the mediator terminated the mediation are all protected from discovery and are not admissible evidence in any adjudicative proceeding.36

The protection of an invitation to mediate a commercial dispute provided in the Commercial Mediation Act is consistent with the principles supporting settlement privilege recognized at common law. Arguably, the provisions of the Commercial Mediation Act may apply more broadly, since the recipient of an invitation to participate in a plan mediation might not be contemplating litigation.38

Mediation agreements under the Commercial Mediation Act relating to transactional disputes must contemplate and facilitate the compilation, review, and analysis of critical financial information about the debtor company’s business. This may be accomplished by the creation of confidential virtual data rooms.
Each Fall, ADRIC presents our AGM and Annual National Conference including two full days of substantive learning, with over 40 stimulating sessions in specialized streams such as Commercial, Mediation, Workplace, Family, Special Interest, etc. Conference topics reflect current interests and issues across Canada and internationally with special keynote addresses by some of the leading experts in the field.

This event is by far the best venue to network with prospective clients and referral sources, and develop strategic relationships that will help you now and into the future.

Position yourself and build relationships with national and international industry leaders including in-house counsel, arbitrators, mediators, lawyers, and the most sophisticated consumers of arbitration and mediation services.

Mark your calendars and save the dates October 12-14, 2016. Ritz-Carlton Toronto!

FULL-DAY PRE-CONFERENCE WORKSHOP WEDNESDAY OCTOBER 12.


The Global Pound Conference (GPC) Series 2016-17 will facilitate the development of 21st century commercial and civil dispute resolution tools, at domestic, regional and international levels.

Launching in Singapore and finishing in London, the GPC Series will convene all stakeholders in dispute resolution - commercial parties, chambers of commerce, lawyers, academics, judges, arbitrators, mediators, policy makers, government officials, and others - at conferences around the world. 36 cities across 26 countries are already confirmed. These conferences will provoke debate on existing tools and techniques, stimulate new ideas and generate actionable data on what corporate and individual dispute resolution users actually need and want, both locally and globally.

Be part of the Global Pound Conference Series and help shape the future of dispute resolution.
The role of the mediator is fundamentally different from the role of a judge or a monitor. Both the judge and the monitor are given clear adjudicative responsibilities by the insolvency legislation. By definition, a judge is a person with the authority to impose solutions on the parties. If the debtor applies for an initial order, the judge must grant or refuse the application after considering the evidence and exercising his or her discretion. Throughout the restructuring process, the judge must approve critical steps. Finally, the concluding transaction, whether a plan of arrangement or a sale of the business, must be approved by the judge on the basis of evidence and applying statutory and common law tests.

As the 2009 amendments have made abundantly clear, the monitor is also part of the adjudicative process. In respect of transactional disputes such as disclaimer or assignment of contracts or the sale of the business as a going concern, the monitor must assist the court by providing its recommendation for any adjudicated outcome. These court decisions are made only after the court has heard the evidence presented by the debtor and the recommendation of the monitor. The recommendation of the monitor is a required part of the evidence in the adjudication of any transactional dispute. With respect to entitlement disputes, the monitor is responsible for assessing claims and adjudicating them. It is the monitor that allows or disallows claims in whole or in part, clearly an adjudicative function.

As reflected in the Commercial Mediation Act, a mediator cannot be a decision maker of the dispute being mediated. Further, the effectiveness of the mediation process depends on the confidentiality and privilege of the communications between each party and the mediator. As helpful as the court and the monitor can be in encouraging negotiation and settlement of critical issues in the restructuring process, nothing said to a judge who is charged with adjudicating the dispute and nothing said to the monitor who must make a recommendation about an adjudicated resolution of the dispute is truly confidential or without prejudice. The appointment of a mediator by the court or by the parties can catalyze the negotiation between the parties embroiled in the dispute. Unlike the supervising judge or the monitor, the mediator can facilitate a negotiated solution by direct involvement in the confidential, without prejudice discussions that are necessary for efficient negotiation.

Choosing an appropriate mediator is important to a successful outcome. Meditation skills are different than skills used by judges in adjudicating disputes. For entitlement disputes, such as the appropriate amount of a disputed creditor claim, a mediator with an appreciation of the legal issues is the appropriate choice because it is important that the parties involved in the litigation believe that the mediator “gets” their case and understands its legal and evidentiary strengths and weaknesses. However, many hotly contested transactional disputes in restructuring cases involve issues of commercial risk which, if adjudicated, would come down to the exercise of the supervising judge’s discretion. When mediating such transactional disputes, parties should be looking for a mediator who “gets” the commercial issues that are in play, because the best outcome will be a compromise that makes commercial sense for the parties. In such situations, a lawyer or business person with mediation training can be most effective in the shuttle diplomacy that can help the parties solve critical transactional disputes.

Mediators, unlike judges and monitors, are not part of the adjudication process. Unlike the monitor, the mediator will never make recommendations about substantive remedies to the court. The mediator cannot disclose anything said in the mediation process without the consent of the participants to the mediation. With the benefit of both confidentiality and privilege, all parties can discuss the issues to be negotiated with the mediator with no fear of disclosure of those discussions either to the monitor or to the court. This confidentiality and privilege allow the mediator to gain the trust and confidence of each par-
The key to a successful mediation is the “shuttle diplomacy” provided by the mediator. The mediator cannot disclose information obtained in discussion with one party to any other party without permission. Nevertheless, the secret information held by the mediator when discussing options with each of the other parties expands the discussion with each party allowing them to discover common ground that can resolve the dispute. This is especially important in the negotiation of solutions to transactional disputes, as the conflict engendered by the dispute impairs direct discussion of “out of the box” or non-linear solutions. Creativity flows more naturally in discussions with a neutral but knowledgeable mediator.

Transactional disputes may require more than one mediation session to resolve. Building consensus among stakeholders on the principle elements of an ongoing relationship that is key to the restructured business is an iterative process because the concessions necessary to complete a deal with one stakeholder may require concessions from another. The first level of consensus must be reached with critical participants in the on-going business, such as the plan sponsor who will provide capital for the business as it continues on emergence. Bringing counterparties to critical contracts such as license arrangements might be a second phase. This process can continue until a restructuring agreement or plan has been settled, which would often take months to complete.

The negotiation of transactional disputes in insolvency cases differs from the negotiation of entitlement disputes because leverage is often more important than legal rights in transactional disputes. Legal rights predominate in the resolution of entitlement disputes. Entitlement disputes can be adjudicated or settled as commercial disputes as they often are resolved outside of insolvency proceedings.

Transactional disputes, on the other hand, must be resolved as part of the restructuring plan or sale of the business as a going concern. The plan development process involves bringing together many component parts and is dependent on the resolution of all material transactional disputes. The agreement of the provider of each component can “make or break” the plan and, therefore, the plan or sale will come together only when all of the critical parties have sufficient motivation to commit to make their needed contribution.
Because of the successful restructuring’s dependency on consensus-building among key participants, each such participant has leverage. For this reason, timing and sequencing is important in the negotiation of transactional disputes in insolvency cases. Mediation of transactional disputes on a coordinated basis can help move the participants toward consensus and avoid or mitigate the “whipsaw effect” that multiple bilateral negotiations can have on the debtor.

Transactional disputes often involve on-going relationships between the debtor and the other party to the dispute and therefore include business risk as well as legal risk analysis. Because transactional disputes involve relationships, the currency of negotiation often differs from the currency available for negotiation of an entitlement dispute. Settling an entitlement dispute is a negotiation about the amount of the claim. Often, the settlement of a transactional dispute includes exchanges of different forms of value over time, inviting creative solutions that are best developed through the confidential discussion and shuttle diplomacy offered by mediation.

Mediation of entitlement disputes can easily be incorporated into a claims order, either by the appointment of a claims mediator as a separate officer, or including mediation powers in the powers of the claims officer if more than one claims officer is appointed for the claims process. In either case, the officer mediating an entitlement dispute would not be the claims officer who adjudicates the claim if it does not settle.

While appointment of a claims mediator can be included in a court order by the supervising court, entitlement claims can be mediated by agreement between the claimant and the debtor with the participation of the monitor. If the debtor and the creditor are able to negotiate a settlement with the assistance of a mediator, and the monitor agrees with the mediated settlement, the settlement can be implemented by a revision of the monitor’s notice of disallowance or by the withdrawal of part of the claim, which will be accepted by the monitor in the reduced amount.

7. ENDING IN A REVITALIZING TRANSACTION AND DISTRIBUTING VALUE

The end game of any successful restructuring process is a transaction that alleviates the business from on-going controversy and best positions the business for success. Going concern outcomes of formal insolvency proceedings can be achieved by compromises with creditors made through plans of compromise or arrangement or through a sale of the business as a going concern with court approval and a vesting order.

Mediation of key transactional disputes through court order or a mediation agreement can provide structure and a timetable for negotiations that are an appropriate adjunct to case management of the restructuring process. By recommending, promoting, or ordering mediation to assist the key stakeholders of a distressed business, the court can actively facilitate the resolution of transactional and key entitlement disputes to overcome the impediments to a revitalizing transaction.

Consensual mediation can embody the commitment of the participants to a process of collaboration to find a solution to the business problems facing the debtor. A mediation agreement can be specific to the resolution of individual disputes, such as the repudiation of a contract or, if among key stakeholders in the restructuring, can apply to the development of the plan itself. In either case, a mediation agreement facilitates an effective and efficient restructuring process by allowing the debtor and its key stakeholders to focus on the real problems impeding the business and to avoid battles that cannot be won or can only be won at a prohibitive cost.

Because mediation is designed to assist parties in building consensus, it is uniquely suited to the restructuring goal of permitting business people to find business solutions to the business and legal problems caused by insolvency. Every successful insolvency case ends in a deal that preserves the business, therefore preserving and creating constructive business relationships that are necessary for renewed success is a key objective of a restructuring process. Equally important is the fair and efficient distribution of the value created or preserved by a restructuring to its financial stakeholders.

Litigation in the restructuring process, particularly of transactional disputes, polarizes stakeholders of the business, is destructive of relationships, and drains the debtor company’s resources. Success in a restructuring cannot be won in a court. Like all business solutions, a plan or a sale that saves and positions a business for future success must be negotiated. Building the multi-party consensus that is necessary for success is not an easy task. Mediation is proving itself as a core tool in that consensus building process.

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1 After more than 30 years practicing insolvency law in large commercial law firms, Kevin McElcheran has opened his own independent practice to focus on applying alternate dispute resolution techniques in the context of commercial restructuring. This article benefited greatly from the comments of Pamela Huff on an earlier draft.

2 Companies’ Creditors Arrangement Act R.S.C. 1985, c. C-36 s. 11 ("CCAA") s. 11.

3 Justice Lloyd Houlden until his retirement from the Ontario Court of Appeal in 1998, Justice Houlden was responsible for carriage of many large insolvency cases and was the presiding judge of Bramalea, Etobos, Standard Trust and People’s Jewelers.

4 Justice Farley was the first supervising judge of the Commercial List in Toronto. He presided over many restructuring proceedings over his 18 years on the bench starting with Campeau Corporation in 1991 and ending with Stelco in 2006.

5 Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, (“CCAA”) s. 11.

6 Ibid, s. 36.

7 Ibid, s. 6; Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, (“BIA”) s. 59.

8 A subset of entitlement disputes are disputes relating to preferences and other disputes arising from the avoidance provisions of local insolvency law.

9 For example, Arctic Glacier’s plan of arrangement provides for reserves for dispute creditor claims while permitting payment of allowed creditor claims and distributions to equity unit holders.

10 The BIA and the CCAA were overhauled by amendments to both statutes that came into effect on September 18, 2009.

11 Supra note 5, s. 11.2.

12 Ibid, s. 32.
Under the
Ibid
16
Ibid
15
Ibid
14
Ibid
13
Ibid
12
Ibid
11
Ibid
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Ibid
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22
Ibid
21
Ibid
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Ibid
19
BIA
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BIA
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24
Consolidated Practice Direction Concerning the Commercial List
23
"Restructuring: The Justice James Farley Legacy" (1 June 2006), online: Lexpert
22
Consolidated Practice Direction Concerning the Commercial List
21
Canwest Communications Corp., Re,
20
Ibid
19
Ibid
18
O.S.C.B. 2105.
17
Note 7, s. 121-6.
16
Commercial Mediation Act
15
Commercial Mediation Act
14
The conduct of the mediation cannot be reported here (the author was counsel
13
for Goldman Sachs) because of the confidentiality that is a necessary part of all
mediations. The importance of the mediation is always the result.
12
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11
10
Although commercial mediation legislation may apply when common law settle-
ment can be disclaimed by one of the parties and, if it can be disclaimed, what is
the effect.
9
Note 32 at paras 52-53.
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ommend consulting G.W. Adams, Mediating Justice: Legal Dispute Negotiations,
2d ed (Toronto: CCH Canadian, 2011) at 207.
5
Ibid, s. 9(11).
4
Ibid.
3
J. Sopinka, S.N. Lederman & A.W. Bryant, The Law of Evidence in Canada, 4th
ed (Toronto: Butterworths, 2014). The test for the application of settlement privi-
lege is described as follows:
a) A litigious dispute must be in existence or within contemplation;
b) The communication must be made with the express or implied intention that it
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9
Ibid, s. 3.
8
Ibid note 5, s. 36.
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Ibid.

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13 Ibid, s. 36(1).
14 Ibid, s. 11.2(4)(g).
15 Ibid, s. 11.3(3).
16 Ibid, s. 36(3)(c).
17 Under the CCAA, the stay is created by the Initial Order of the court (s.11.02).
18 BIA, supra note 7, s. 121-6.
19 Ibid, s. 128-9.
20 Ibid, s. 135.
21 Ibid, s. 135(4).
22 Ibid, s. 192(3) for appeals from the Registrar in Bankruptcy. The claims order
typically provides appeal rights from the claims officer.
23 “Restructuring: The Justice James Farley Legacy” (1 June 2006), online: Lexpert
24 Consolidated Practice Direction Concerning the Commercial List, Part XIII.
25 Canwest Communications Corp., Re, 18 O.S.C.B. 2105.
26 Consolidated Practice Direction Concerning the Commercial List, Part XVII.
27 In the Air Canada case, the core legal issue was whether a multi-party shareholder agree-
ment can be disclaimed by one of the parties and, if it can be disclaimed, what is
the effect.
28 The conduct of the mediation cannot be reported here (the author was counsel
for Goldman Sachs) because of the confidentiality that is a necessary part of all
mediations. The importance of the mediation is always the result.
29 Concurrent decisions of the U.S. Bankruptcy Court and the Ontario Super-
ior Court (Commercial List) were issued on May 12, 2015. Appeals are
anticipated and the proceeds of the Nortel sales have not been distrib-
uted to creditors.
30 Report of the Mediator dated 16 July 2014, filed in support of a motion to ap-
prove a settlement. See Krya v. Montague Capital Partners Ltd., 2014 ONSC
4949, 2014 CarswellOnt 11549 (Ont. Sup. Ct.)
31 A number of claims in the Arctic Glacier Income Fund restructuring were re-
solved with the benefit of mediation encouraged by Justice Spivak who super-
vised the case. The transcript of the hearing for approval of the Desert Mountain
claim in that case included a discussion of the use of mediation in the process.
32 Although sitting judges, the judges appointed as mediators do not adjudicate
the dispute they are mediating.
has been enacted in Nova Scotia as Commercial Mediation Act, S.N.S. 2005, c.
36. In many respects, commercial mediation legislation is consistent with com-
mon law and civil code principles relating to settlement privilege. See Union
CarswellQue 3600, 2014 CarswellQue 3601 (SCC).
34 Commercial Mediation Act, ibid.s. 4(2)(b) provides that it shall be interpreted
with recourse to the Model Law and s. 4(3) requires mediators to apply the gener-
al principles of the Model Law in respect of questions that arise in mediations.
35 Ibid, s. 9(11).
36 Ibid.
37 J. Sopinka, S.N. Lederman & A.W. Bryant, The Law of Evidence in Canada, 4th
ed (Toronto: Butterworths, 2014). The test for the application of settlement privi-
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41 Supra note 5, s. 36.
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2d ed (Toronto: CCH Canadian, 2011) at 207.
INTRODUCTION
I became interested in the role of co-mediation while developing an internship program with colleagues. We pondered this model as part of the dispute-settlement spectrum, what it is and how it fits with sole mediation. Would a co-mediation setting provide a suitable internship? What were its essential characteristics? How was it similar and/or different from sole mediation? Where was it practiced and what were some of its outcomes? The resulting inquiry and reflections have led to a better understanding and appreciation of its role and value.

CO-MEDIATION
Co-mediation has been defined as the co-operation of at least two (sometimes more) mediators in a mediation (Simon and Kassam and others). This model of mediation has been adopted as the model of choice for community mediation throughout Ontario by the Ontario Community Mediation Coalition (OCMC), across the United States (Friesen) and elsewhere in jurisdictions as diverse as the United Kingdom and Scotland (MacKay and Brown), Australia and Malaysia (Honeyman, Goh and Kelly).

In each of these jurisdictions, the assignment of community mediators seems to vary. In Ontario, for example, an experienced or “lead” mediator and a second “moderate”, less extensively trained, or “new” beginning mediator are assigned to a case (Friesen). Most are volunteers, but trained and supervised by paid staff. Scotland assigns mediators, all trained volunteers, primarily on the basis of availability (MacKay and Brown), while in Australia, in child welfare matters, for example, one mediator will have some connection with an aboriginal clan or group, if the parents are aboriginal and the second will be a trained mediator or child welfare worker without an aboriginal connection. Malaysia has a different model, particularly when dealing with disputes between ethnic Chinese. There, at least one of the mediators is an authority-figure who is sought as having the wisdom and experience to understand the dispute. The mediator is usually unpaid as such an appointment is considered an honour. In each jurisdiction, the assignment of cases appears to reflect actual differences in the setting, whether cultural or administrative.

A review of the literature (please see the attached bibliography) and personal reflection on many years of private mediation, assumes that co-mediation is a viable model, not only for community mediation, which is well established, but also where varying expertise is desirable (Love and Stulberg; Rosengard), for purposes of training new mediators (many authors), and particularly where cultural balance is essential (Honeyman, Goh and Kelly).

In family and estate mediation, co-mediators with different expertise are often engaged, which might include a coordinating mediator, a financial expert, a child development specialist, a family relations mediator, or a person with a special knowledge about aging or illness. Co-mediation is also a sound method of training new mediators. In Ontario, it is the method for developing community mediators and elsewhere is widely recommended as a desirable method for developing new mediators. Rosengard recommends co-mediation as the preferred method for training new (and chargeable) lawyer-mediators to increase their effectiveness and economic contribution to the law firm.

An especially strong case is made by Honeyman, Goh and Kelly and also by Mason and Kassam for culturally balanced mediation, with one of the mediators reflecting or understanding the cultural context of the parties and the dispute.

To illustrate from my own experience:
A matrimonial dispute was at issue. The case was referred to me by a young, Middle-eastern mediator, since the parties preferred a mature person, preferably a woman, to assist them. The wife wanted to be financially comfortable, but wanted their adult son to be the beneficiary of the husband’s business, contrary to the usual division of assets. The husband wanted to be generous, but not on the wife’s terms. With their consent, I engaged a middle-Eastern colleague and financial expert with whom I often worked as a co-mediator. He explained the various options to the parties. The case settled quickly on the wife’s terms, largely because the co-mediator understood the husband’s reservations and was able to help him to appreciate the advantages to him, as well as the wife’s interest in benefiting their son, rather than herself.

ADVANTAGES
Co-mediation has many advantages. The leading authors, Love and Stulberg, are referred to by other authors as articulating best-practice guidelines for co-mediation. They first point out that co-mediation can either enhance or diminish the effectiveness of the media-
tion process. By employing less and more experienced mediators, they can greatly enhance and improve the process and outcome. The same is proposed where there is both substantive and process expertise between the mediators. An effective team can:

- enhance their expertise, insights and listening capacity
- increase their patience and perseverance
- create balance with diversity of mediators
- provide a model of effective communication, co-operation and interaction for the parties
- multiply the linkages that the parties can develop with the mediators
- allow one mediator to take a risk, the other mediator to act as rescuer, if needed
- be more efficient with division of tasks
- create training, learning and enrichment opportunities for mediators

(Love and Stulberg, p. 180)

Most essentially, the mediators must share a common vision of the mediation process. Keyes adds that “co-mediation can provide the variety, flexibility and integrated approach that makes mediation such an attractive option for people in dispute” (Introduction at p. 1).

The primary caveat to realizing this objective is to plan, plan and plan some more.

**DISADVANTAGES**

Advantages are usually accompanied by challenges. In my experience, lack of planning is the single major downside. This lack about both the process and the goals can be counter-productive to the mediators, as can differing expectations about the process, timing and outcome. Another major downside is the lack of cohesion and respect between mediators. If they are not respectful and confident of one another, the mediation is not likely to succeed, quite apart from providing negative modeling for the disputants. A further cautionary note: co-mediation is not for every mediation. The absence of teamwork, a united front and unity of direction create a huge, often insurmountable disadvantage. Possible further disadvantages of co-mediation identified by Love and Stulberg are:

- conflict and competition between co-mediators
- more time-consuming if mediators must negotiate roles, tasks and process
- “divide and conquer” attempts by parties
- undue constraint between mediators in trying to assert themselves

(p. 180)

**KEYES HAS ADDED**

- age and cultural diversity
- unresolved dynamics and teamwork
- failure to provide a united front

**PRACTICE GUIDELINES**

From these advantages and disadvantages a series of guidelines has emerged which tries to capture co-mediation’s advantages and to minimize the risks of potential harm. The guidelines are:

- choose a partner with a similar vision of the mediator’s goals and compatible strategies
- assign leadership roles to the co-mediators
- use seating arrangements to maximize opportunities for success
- assign specific tasks to each mediator
- use the opening statement to set the tone
- adopt non-competition between mediators
- consult with the other mediator before making important decisions
- maximize the diversity of the mediation team
- have a fall-back plan if the mediation is not working
- be flexible
- debrief after each session
- support each other (Love and Stulberg, p. 18)

TO THESE KEYES HAS ADDED:

- prepare the approach and process each time
- gain feedback, debrief and reboot the mind for the next phase (pp. 1&2)

The inescapable conclusion is that preparation in its various aspects is essential to successful co-mediation, perhaps more so than to sole mediation where a single mediator can act spontaneously.

**CONNECTEDNESS AND AUTHORITY**

The concepts of connectedness and authority in co-mediation were identified by several authors (Honeyman, Goh and Kelly; Mason and Kassam) as having an important impact on the resolution, or dissolution of disputes. By “connectedness” is meant a sense on the parties’ part that the mediator is in some way “one of us”. By “authority” is meant a sense by the parties that even while being “one of us”, the mediator is a person of more than average seriousness of purpose, experience and gravitas. Authority (here) is sharply distinguishable from both capacity to make a decision and any predilection to do so. (Honeyman, p. 501).

One of these authors, Kelly, an Australian aboriginal woman, used the example of “connectedness” of an aborigi-
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nal co-mediator, not of the disputants' tribe, but who had a distant tribal connection, who was engaged in a previously mediated and intractable dispute concerning several aboriginal children. The aboriginal extended family members perceived a connection, that their culture and parenting were understood and appreciated and the children would be protected in their care. Primarily because of her presence, a mutually acceptable child care plan was reached. Connectedness seems to have been the crucial factor.

An early example from my own experience is similarly illustrative. I was engaged as a lawyer in the "domestic assault" court. Two Portuguese immigrants became involved in a dispute over who owned a lawnmower. Each believed the prior owner had given it to him. The dispute escalated, blows were exchanged, the police were called and the first to strike was charged with assault. I realized the consequences of an assault conviction on a new immigrant, but I spoke no Portuguese. I called the Catholic priest from the nearby Portuguese parish, who came directly to court. I explained, the priest translated. I explained the basis and possible consequences of an assault conviction, the priest continued to translate and to negotiate with the disputants. The dispute de-escalated. Eventually, they agreed to share the lawnmower and thanked the priest and me. The presiding judge was informed and withdrew the charge. I believe that, in this case, both connectedness to the Portuguese priest and the authority of the court setting were significant factors.

Honeyman (at pp. 201 – 204) proposes that the concepts of connectedness and authority can also be applicable to the west, to the United States (and presumably also to Canada). Connectedness can be found in various ethnic groups, but also in neighbourhoods and in employment situations, where large groups of people identify with their neighbourhood or employment. Further, he believes that the failure of the mediation profession to grow exponentially as expected, in favour of retired judges or experts, often with no media-
tion training, is a search for authority in the settlement of disputes. He points out that co-mediation, which has been widely used in the west to augment process skills, has the potential to provide both community connectedness in a western sense, and the authority to settle which is vested in the mediators. He uses as his primary example the commercial sphere, where thousands of parties have selected former judges as having the authority to settle, together with connectedness to lawyers, who are often the persons who select them. Clearly, these are aspects of mediation and co-mediation which require study, attention and possibly adoption.

TRAINING FOR CO-MEDIATION
To date the training for sole mediators and co-mediators is rather different, although the content is similar. Sometimes, the most significant difference is the intention of the mediator. Sole mediators intend to settle the dispute, whereas the intent of co-mediators, particularly community co-mediators, is to repair the relationship of the parties. Sole mediators are highly trained in the skills of mediation, and generally employ either an elicitive or transformative approach, which is focused on the individual’s capacity to mediate. This training includes screening for domestic violence, intensive training in skills, role plays, process design to suit the case, in depth case analysis, developing options for settlement, alternatives to a mediated settlement, and ethical issues in mediation. The result is highly trained, very skillful mediators. This training, together with actual mediations can lead to the granting of designations offered by the Alternative Dispute Resolution Institute of Ontario (ADRIO) and Alternative Dispute Resolution Institute of Canada (ADRIC), or similar designations by the Ontario Association for Family Mediation (OAFM) and Family Mediation Canada (FMC), especially the Accredited Family Mediator (AccFM). There are also more stringent in-person examinations of competencies for more senior designations, such as the Chartered Mediator (C.Med) designation of ADRIO and ADRIC and the Certified Mediator (CertMed) of OAFM and FMC. Each of these requires an examination of competencies in person or by video and a larger number (15 or 20) completed mediations. The designations are, in effect, notice to the community of the competence and expertise of the mediator.

Community mediators in Ontario receive a somewhat different training. There is the same emphasis on skills, diversity, power imbalances, competence of mediators, cultural sensitivity, ethics and the mediation process. But their emphasis is on co-mediation and utilization of their joint undertaking, with a focus on transformative mediation, meaning to focus on helping mediation participants to better understand their own and their disputants’ behaviour in order to avoid similar future conflicts and to resolve their own dispute. Their basic orientation is followed by advanced transformative training, which may be followed by further training in specialized aspects such as mediating with elders, youth, landlord and tenant situations, police complaints and mentoring, and with further training about ethics. Their mediators are divided by training into “lead” mediators with extensive training, “moderate” mediators with less training, who are always paired with co-mediators with similar or greater training, and “new” mediators who have basic qualifications and who are always mentored by “lead” mediators. Community mediators receive ongoing mentoring from their peer mediators and agency staff and by participants (Friesen, pp 2 & 3). It appears from the foregoing that qualified sole and community mediators both receive extensive training for the mediations undertaken by them. The question is whether their approach to training and skill development meets the needs of the parties and how well their needs are met. Some authors contend that without connectedness and authority, the needs of the parties may not be met and the mediation is less likely to succeed (Honeyman, Goh and Kelly; also Mason and Kassam).

CONCLUSION
The inescapable conclusion is that co-mediation has a valuable place in the mediation spectrum. A further conclusion is that sole and co-mediation have much to offer to the other mediation model. Closer collaboration between sole mediators who are represented by ADRIC and ADRIO and co-mediators, primarily community mediators who are members of OCMC and other community mediation organizations, would benefit the mediation profession and the communities they serve.

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FILLING THE GAP: A CASE FOR MANDATORY ADR CURRICULA IN CANADIAN LAW SCHOOLS

INTRODUCTION

Alternative Dispute Resolution (ADR)¹ has been a rising tide in the Canadian legal system since the early 1980s because approaches to problem-solving other than litigation have proven efficacious and valuable to stakeholders.² As a result, ADR processes have become mainstream rather than ‘alternate’ and are increasingly employed in all manner of disputes. They have been integrated through policy, organizational structure, and legislative reform in myriad fields including business, industry, trade, labour, government, and diverse aspects of the legal system in provincial, national, and international jurisdictions. Further, the important role of ADR in enhancing access to justice in Canada has long been promoted by leading members of academia, bar, and bench. Yet in Canada, an “implementation gap”³ has been identified that continues to prevent ADR from being understood and embraced within and outside the legal system as a means for citizens to achieve just resolution of disputes.

Legal education, with its central influence on legal culture and mindset, has been identified as an important factor in this regard and is considered a key part of the solution. While ADR has emerged in law school curricula across Canada, the current elective and isolated approach to the subject matter has not translated into graduates who are fully equipped to serve the best interests of clients within a changing legal landscape. Law schools need to embrace the shift in legal practice and consider ADR studies with a gravitas commensurate with its practical importance. Through mandatory foundational courses and integrated curricula all graduates should be equipped to understand when ADR is appropriate, engage in the extensive range of ADR practices extant, meet professional competency standards, avoid obstructing the current systems, learn invaluable communication skills, and incorporate humanity in a client-centered practice.

THE CALL AND THE RESPONSE

The call for increased ADR education in law school has sounded for decades. Almost 20 years ago a national report on access to justice commissioned “to facilitate modernization of the justice system so that it is better able to meet the current and future needs of Canadians” called for the transition from a litigation-centered approach to an ADR approach.⁴ In 1996, the CBA Task force on Systems of Civil Justice charged educators with the responsibility of preparing practitioners and facilitating the transition to non-adversarial approaches recommending that “Law schools, Bar admission course educators and continuing legal education providers offer education and training on dispute resolution options and on the means by which they can be integrated into legal practice, and... such courses be mandatory in Canadian law schools.”⁵

Now, almost two decades later, virtually the same recommendations continue to be made by leading legal players to realize “the still untapped potential”⁶ of ADR in addressing the pervasive national struggle for access to justice. In 2013 the National Action Committee on Access to Justice in Civil and Family Matters (“Action Committee”) called for “a significant shift in culture” which moves away from complicated, traditional procedures and towards prioritizing client-interests through active collaboration, innovation, and multi-service models.⁷ Research conducted by the Family Justice Working Group subcommittee was “forceful and virtually unanimous in recommending that priority be given to non-adversarial family dispute resolution processes and that the courtroom be treated as a valued, but secondary resource...”⁸ Again, the National Action Committee tasked law schools with leading the change and placing a “greater emphasis on CDR skills and knowledge across the entire law school curriculum.”⁹ Specifically, recommendations were made for “increased skills based learning that focuses on consensual dispute resolution, alternative dispute resolution and other non-adversarial skills.”¹⁰

Canadian law schools have responded to the challenge to some extent and all have provided ADR opportunities within their course lists. However most programs do not have a mandatory ADR requirement but rather offer select upper year electives or include ADR as a sub-topic in general Legal Process courses.¹¹ There are some bright spots with programs offering limited mandatory modules,¹² or allowing students to choose an ADR stream.¹³ The University of Manitoba, for example, has a mandatory second year Negotiation course¹⁴ and the University of Calgary and Thomp-
son Roads University boast identical mandatory programs that include a one-credit, first-year “Interviewing and Counselling” course, a three-credit second year “Negotiation and Mediation” course, and a three-credit course in Adjudication covering arbitration, tribunals, and trials.15 Similarly, the University of Ottawa has a mandatory first-year three-week intensive program.16

While the above noted programs certainly represent progress towards incorporating ADR within the curriculum, the situation in Canadian law schools remains largely the same as it was 10 years ago with no requirement that graduates complete ADR theory and skills courses on a par with traditional subjects.17 In most universities ADR classes are of limited enrolment and infrequently offered which further restricts the opportunity for students. For example, the University of Toronto, with a first-year class of 200 students, has the usual complement of compulsory first-year courses but no mandatory ADR courses in the curriculum. The upper-year program boasts over 180 courses that are offered each year.18 An examination of the 2014-15 timetables indicates one first semester course in Alternative Dispute Resolution in the Legal Environment with a maximum enrolment of 25 students.19 One Negotiation course is taught in both semesters in a reduced 24 hours of class time format. While the course description does not indicate an ADR or mediation focus it speaks of following the program from Harvard University called Principled Negotiation and using Getting to Yes as the required text.20

At the University of New Brunswick, the focus on a comprehensive general legal education requires a high number (7) of upper-year compulsory courses. ADR courses are elective with limited class size making it challenging for students to exercise the option.21 This trend of limited upper-year elective course-offerings can be seen in programs across the country22 but to truly keep pace and support the changing emphasis in the legal system from adversarial advocacy to client-centred multi-service problem-solving, a fundamental response at the heart of legal education is essential. As stated by Julie MacFarlane “for legal education to stay relevant, changes in legal practice must resonate in the academy.”23

**ADR EDUCATION IS ESSENTIAL TO MODERN PRACTICE**

In the modern age, the goal of ADR education would have much in common with the aims of traditional legal education that seeks to train students to “think like a lawyer.”24 As Prof. Macfarlane states “Any level of legal studies, whether it is basic or advanced, theoretical or applied, jurisprudential, or interdisciplinary, must reflect the ways in which law is understood, used, and practiced in the real world…”25

Today the legal “real world” involves ADR processes entrenched in every field. The trend towards privatization of dispute resolution and law and court reform to incorporate ADR processes is obvious in every jurisdiction from mandatory mediation in Ontario26 to the Dispute Resolution Office in the British Columbia Ministry of Justice27 and numerous legislative provisions that trigger non-traditional dispute resolution models in many provinces.28 In his 2008 examination of the pervasiveness of ADR in Canada and internationally, Prof. Farrow describes the myriad areas into which ADR has expanded.29 He outlines the wide range of ADR methods used by the federal and provincial governments from processes developed in civil justice and family court system to the forum selection clauses in standard form contracts that require private arbitration in many commercial transactions. This is further evidenced in his sampling survey of Canadian administrative tribunals primarily focused on Health, Environment, Labour and Human Rights most of which use some form of ADR.30 In the business sector, Stipanovich & Lamare examine the 2011 Fortune 1000 survey of ADR in the corporate/commercial, consumer, and employment sectors. Their 2013 article for the Harvard Negotiation Law Review states that, while the use of arbitration is in decline, mediation is “virtually ubiquitous among major companies” 31

“The 2011 Fortune 1000 survey reveals an important evolution in corporate sector practices three decades into the Quiet Revolution in dispute resolution. A dwindling few major corporations continue to embrace hardball litigation as a broad policy, while many more are increasing their emphasis on alternatives. Nearly all companies have recent experience

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with mediation, which is now employed more extensively across the broad swath of civil conflict and the great majority of companies foresee its use in the future. Mediation’s success has contributed to the marked fall-off in the use of binding arbitration, which calls to mind mediation’s earlier role in the reduced incidence of trial. Today, there are also many companies using approaches focused on more strategic management of conflict, in a manner more reflective of business priorities. These include targeted ENEs that promote settlement or more effective case management, ECA, and integrated systems for managing workplace conflict. Such approaches represent a significant step beyond reactive and reflexive advocacy.402

There has also been substantial growth of ADR in Family law and wide recognition that a consensual and mediated approach is preferable in most family cases. The Final Report of the Family Justice Working Group identifies several aspects of family disputes which are better addressed through ADR processes that attempt to minimize conflict including the role of emotion and personal values, the ongoing nature of relationships, the best interests of children and the focus on future outcomes.33

Provincial Bar Societies have recognized the importance of ADR processes. Proficiency and knowledge in ADR now figures in professional codes of conduct. In New Brunswick, for example, among the factors used to determine a lawyer’s competency are “investigating facts, identifying issues, ascertaining client objectives, considering possible options, and advising the client as to appropriate course(s) of action” and “implementing the chosen course(s) of action through the application of appropriate skills including...negotiation, alternative dispute resolution, advocacy, problem solving ability as each matter requires.”34 Lawyers are bound to recognize their lack of competence in certain areas. Lawyers are also ethically obligated to advise and encourage fair and reasonable settlement and recommend appropriate ADR options to clients and fully explain and pursue that process if the client instructs.35 Further the Code also contemplates the ethics and duty expected when Lawyers act as arbitrators and mediators.36 These obligations and expectations are also reflected in the Federation of Law Societies Model Code37, which has been adopted by several provincial law societies.38 How can lawyers be expected to understand, advise and engage within the extensive range of ADR options and processes both within and outside the legal systems to properly serve clients? How are they to satisfy their ethical obligations without a fundamental knowledge of conflict theory, mediation, and ADR systems?

THE CASE FOR COMPULSORY ADR IN LAW SCHOOL CURRICULA

Law school has been identified as the appropriate forum to teach fundamental ADR theory and skills to all students by leading members of the legal community from Supreme Court Justices39 to senior law professors with extensive research experience.40 Law schools have also recognized a need and made ADR courses available within the course lists and some schools have become centers of scholarship for ADR practice.41

What is required now, however, is the committed stance indicated by a compulsory ADR requirement for graduation. Mandatory offerings telegraph the value and importance of the subject matter and practical skills to all students. Graduates who have not been exposed during the JD program may never pursue education in ADR. As aptly stated by Australian authors Duffy and Field, “If an ADR subject is not a mandatory component of the law degree...it is possible that law students may become legal practitioners without ever learning that legal disputes can be resolved effectively outside of the courtroom.”42

Legal education provides the lens through which students view the law. Universally required foundational courses such as constitutional, property, criminal, tort, and contract law are specifically designed to introduce students to essential concepts which shape their understanding of the remainder of their legal education.43 However, these courses, together with additional mandatory elements such as moot court, continue to emphasize trial advocacy and traditional adversarial practices. Based in history and precedent, the focus is on positional and rights-based argument and judgements with little or no discussion of methods or outcomes achieved through negotiated, mediated or collaborative settlement.44 Combined with the reality that the mentorship baton is taken up by a senior bar whose training, experience, and often, law firm culture, is still largely rooted in traditional advocacy, how can new lawyers be expected to practice any other way? The old adage comes to mind that “if all you have is a hammer, everything looks like a nail.”

Prof. Farrow’s view is that “In essence, we continue to approach the teaching of dispute resolution largely as if over 90 percent of cases go to trial, not the other way around.”445 The oft-quoted low litigation statistics mean the overwhelming majority of cases begun in court do not end in court, suggesting that lawyers are engaging in forms of dispute resolution outside of the courtroom, recognizing at some point the advantages of settlement over proceeding to trial. But the statistic does not reveal the reason or terms for settlement. It does not disclose the role of escalating costs, emotional strain or litigation fatigue in leveraging or forcing a compromise or withdrawal nor does it reveal the fairness of the outcome or the satisfaction of client. In light of the tiny fraction of litigated cases it is patently obvious that quality time and effort should be expended on legal education around settlement and the theory and skills that facilitate fair settlement of disputes.

There is growing scholarship that “thinking like a lawyer” requires a real understanding of conflict theory, positional and interest based negotiation, and the wide range of dispute resolution processes available. Duffy and Field argue that traditional legal education provides a limited view of both the
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issues and the options:

“ADR instruction allows law students to appreciate that conflict may also be managed around power, interests and extra-legal considerations. Analysis of appellate court decisions does not teach a law student how or why a conflict may have arisen in the first place. There is no consideration as to how the conflict matured into a dispute, and why it ultimately ended up before a court as opposed to being negotiated between the parties.”

Foundational ADR education allows law students insight into all these matters and that discernment can then be employed to serve clients in choosing options, handling negotiations and resolving issues earlier or preventing conflict.

Introduced in a mandatory first-year course, ADR study would provide, from the beginning of legal education, a more balanced “big picture” than provided by traditional programs and thereby shift student’s understanding of the lawyer’s role across the range of available dispute resolution processes. Law school is the proper forum also because it has a record of success in traditional pedagogy that can be utilized to provide high quality comprehensive instruction in theoretical foundations, skills and scholarship. Professors of ADR familiar with emerging scholarship and best practices would reduce issues with respect to inconsistency in ADR training by providing an appropriate standard of program and instruction.

Introducing ADR concepts at the outset of legal education when the seeds of collaboration, communication, and problem solving are sown would also mean that law students would understand, examine and apply these principles during the rest of their education exploring interests and alternative solutions before fixating on the winning argument at trial. Research has shown that prior exposure to ADR training impacts students’ approach to black-letter courses. In a two-part review of ADR education, Australian authors Gutman, et al. highlight a number of success stories including the example of Ohio State University where researchers found that, compared to their classmates, students who had previous mediation training were more inclined to apply that training in their first-year property course. In their own research investigating the impact of teaching ADR to law students, Gutman, et al similarly concluded, “unambiguous evidence of change to some assumptions students brought to their law course. In general, they moved from more adversarial to more collaborative stances.”

Mandatory first-year courses have previously been successfully implemented in other jurisdictions. During the mid-80s, ADR was integrated into the first-year curriculum in the United States with “The Missouri Project” and was successful in an attempt to “bring the ideas and training of the external ADR movement into their schools and to find aspects in ADR approaches and techniques that might be appropriate for ordinary legal practice.” The Missouri Project was implemented by six other American law schools including Hamline University, which found that the level of ADR exposure was positively linked to “problem-solving orientation responses” similarly a model for first-year mandatory ADR course is provided by Australian educators at La Trobe University, which saw “clear changes in [students’] attitudes towards managing legal conflict...” and “…unambiguous evidence of change to some assumptions students brought to their law course. In general, they moved from more adversarial to more collaborative stances.”

“Moving ADR teaching into the heart of the substantive law curriculum takes seriously the rise of the ADR movement and its place in mainstream legal education vis-a-vis other, traditional process-oriented courses. It also takes seriously the project of pushing the agenda of alternative processes for the resolution of disputes, which are in turn designed to play a role in the overall project of improving access to affordable civil justice.”

Introducing ADR theory in concert with traditional study also informs the understanding of the adversarial process. Litigation, at the most basic level, deals with human beings, clients, in conflict. It is somewhat ironic then that most lawyers do not receive education in conflict theory. Surely the ability to understand and analyze a dispute ought to be a core component of education for all conflict professionals. Often clients approach lawyers when they are in conflict, and frequently not until that conflict has reached crisis. While it is a common response to point out that lawyers are not therapists or social workers, the reality is that emotions run high in most legal disputes and, while they do their best to deal with it, lawyers should not have to learn the hard way how to do so. “Emotion may be the cause of conflict, the result of conflict or the reason why a conflict escalates. It stands to reason that there will be an emotional dimension to the resolution of a conflict.” An understanding of the impact of emotion and practice in emotional competency should be actively incorporated into legal education from the outset as being an integral part of the lawyer’s job.

Discussing traditional legal education, Julie MacFarlane notes that “Clients are virtually “invisible” in law school, and legal education does almost nothing to prepare prospective lawyers to “relate” to the client, as clients are sometimes painfully aware…” The “new lawyer” as she envisions her would be adept at all dispute resolution processes depending on the appropriate forum for the client, “...the central role of an advocate in a system of conflict resolution is to assist the client in continually reassessing what he needs and wants in light if what is possible and what the costs may be, and then to advance that goal. This role includes regularly assessing the potential for resolution, which means that the advocate must draw on the qualities of effec-
Effective negotiator, including listening to what the client really wants and prizes and what he is prepared to give up in order to achieve resolution, being firm about bottom lines, and being creative about negotiable issues.58

The essential task is to help clients navigate legal disputes whether as staunch advocate or expert facilitator. The lawyer’s role is directed by the circumstances of each case. Lawyers need to be equipped with the theory and skill to understand the big-picture of each conflict, to understand client interests and needs, to advise clients on the most appropriate forum for resolution, and to guide them in that process.

Comprehensive ADR education is the recommended solution because it is in line with the future direction of legal services as demanded by the public.59 A report released as part of the recent CBA Futures Initiative identifies the factors that will shape the future of legal services. According to this national study clients want lawyers who “know them,” who prioritize their interests and guide them towards the best process to achieving satisfactory resolution. Clients also seek more direct involvement, accessible information, an understanding of the range of options, and to have strong communication between their lawyer, themselves, and other relevant parties.60

Despite the increasing push by clients for more control and involvement,61 the complexities of the law are such that clients follow lawyers’ advice on appropriate forums. Clients are ill equipped to determine whether court will achieve their objectives and they must rely on the expert knowledge of legal professionals to provide “reliable guidance on the best way to handle the situation.”62 Research has shown that the

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less lawyers know about ADR the less likely they are to suggest it or use it in practice. Exposure to the full continuum of dispute resolution processes allow lawyers to truly serve their clients by bringing all of the options to the table with authority and confidence.

There is a need for fundamental ADR education across the board but the urgency is most widely acknowledged in areas involving highly emotional interpersonal conflict such as Family Law. Competent family ADR professionals are essential particularly now when a systemic transformation away from adversarialism and towards consensual dispute resolution is occurring. The need for a broader legal foundation is highlighted by the pressing call for non-adversarial and consensual approaches in the Beyond Wise Words report. The Family Justice Working Group aptly illustrates the context with an iceberg metaphor to describe the deficiencies of the trial model in addressing key aspects of a conflict:

“The facts, law, rights, duties and positions that law posits...are the portion of the iceberg that sits above the waterline. Below the waterline sit the needs, interests, values, biases, beliefs, perceptions, and emotions of the parties...Not only do these substantial and very powerful forces below the surface have the potential to prolong and severely complicate adversarial process, they also have the capacity to destabilize any resolution that does not take them sufficiently into account.”

Taking a cue from the guiding principles of the National Action Committee, the “primary starting point and consistent focus is on the needs and concerns of individuals: it looks at legal problems from the point of view of the people experiencing them...” Research shows that clients are seeking simplified processes which allow for transparency, expediency, and empowerment. In essence, they want to understand what is going on and have some measure of control, and they need communication, support, and expert guidance from their lawyer.

The Family Justice Working Group cites with approval the Family Law Education Reform Project Final Report, a US report which recommended that law programs

“...Emphasize the multiplicity of dispute resolution processes and treat litigation as but one alternative, useful only in a minority of cases. Students would be introduced to mediation, negotiation, advocacy, collaborative law, cooperative law, and advanced techniques in negotiation... Continue to emphasize strong grounding in the law and analytic rigor, but add a focus on competence and skills, and teach budding lawyers to be reflective and self aware in the practice of law... Practitioners also need strong skills in interviewing, listening and counseling emotionally troubled clients.”

Numerous theoretical models are available which provide insight into the origins and drivers of conflict. Understanding the psychology of conflict, including principles such as attribution and examining sources, escalators and de-escalators of conflict, provide a framework for approaching the issues and an opportunity to consider the big-picture before choosing a resolution process. One wonders how many fewer lawsuits would be filed or completed in Court if clients knew the toll it would exact or lawyers knew the role that heightened emotion plays and what clients really wanted before they engage full scale adversarial mode.

Another important aspect of ADR education not currently addressed by the traditional curriculum is interest-orientation. Traditional legal education focuses on rights in an adversarial process that necessitates win-lose scenarios and continues to place a strong emphasis on monetary remedies. ADR training expands the playing field by focusing on interests in addition to monetary compensation.

“Lawyers should be able to help their clients consider their legal options in the broader context of their more general goals and interests. Lawyers should, for example, be prepared to help clients consider economic, reputational, psychological, moral, and justice implications of alternative courses of action, as appropriate.” This perspective allows for creative solutions that are, if possible, mutually beneficial to the parties and provides an extended tool kit.

Another very important reason to require all lawyers to study ADR theory and skills in law school is to maintain the integrity of the current ADR system. The benefits and value, the ‘raison d’être’ of the ADR systems are undermined and frustrated by untrained lawyers who attempt to employ adversarial approaches. Research supports the common sense notion that adversarial strategies employed in a collaborative or interest-based process have a detrimental impact on the process and outcomes. Lawyers need to speak the same language to engage productively and be equipped to advise their clients in dispute resolution processes. Moreover, common training in ADR breeds cooperation, collaboration, and communication because knowing that someone has had training in interest-based resolution-focused problem solving changes the interaction between them.

Mandatory ADR education early in law school also emphasizes the importance of developing communication and interpersonal skills. Legal disputes are stressful and intimidating for clients. In an impossibly complex system, part of the role of the professional is to simplify and empower clients by helping them to understand the process. “Lawyers spend more time communicating with people than they do analyzing case law and legislation, so legal education must devote energy to improving the way law students interact with people.” The value of ADR goes beyond the legal sphere in this regard. The study of ADR, including theoretical understanding of conflict and skills developed around interpersonal communication, might prove valuable and transferable to all aspects of legal practice, and other fields of work and life.
Interestingly, Susan Swaim Daico reviewed a series of studies conducted by Irene Taylor examining the attributes of “top” Canadian lawyers in a variety of professional and demographic categories. She notes that the most significant trait was higher emotional intelligence than other lawyers. Other particular strengths included adaptability, interpersonal skills, optimism, empathy, ability to read and consider emotion, abstract and creative thinking, and problem-solving.

As stated by Duffy and Fields, “If the skills of legal reasoning and “thinking like a lawyer” promoted in legal education de-emphasize the human element of a conflict and devalue the importance of emotion, then at some point in the law degree, we need to remind law students that these are primary considerations.” ADR education also addresses a challenging task faced by lawyers guiding clients to set reasonable objectives and managing expectations. Lawyers are highly skilled at reframing, whether it is to adapt a narrative into a legal argument or combining evidence to support a case. However, ADR education facilitates reframing issues to assist clients in focusing on essential interests and achievable goals.

One of the most compelling arguments for mandatory foundational ADR theory and training in law school involves that human element. Law school has a personal and profound effect on many students, one that is difficult to understand unless you have been through the crucible. Savage’s qualitative study of ADR teaching in two law schools concludes that ADR courses ‘put back everything law school took out’, re-integrating humanity and common sense into the dispute resolution process. Therefore, the study of ADR theory and training by all students from first-year would allow students to retain their own humanity, remember the central role of the client and appreciate a real world perspective while developing keen analytical ability.

The literature surrounding access to justice calls for processes which have come to be known as “alternative”, such as mediation and interest-based negotiation, to be made the default, and suggests that “litigation should be utilized only for the limited number of cases where CDR is inappropriate or impractical.” However, the transition to and implementation of ADR by lawyers has been slow. The National Action Committee identifies a clear “Implementation Gap” and calls for a move “beyond wise words” to engaging in active change. “The shift towards CDR is far from beginning but far from over.”

Law schools and educators play a pivotal role in facilitating the next step. To recognize, support and adequately prepare law students for the current and future legal landscape, ADR theory and skills training must be taught universally as a mandatory foundational course and be integrated into the existing curriculum. This approach would be the most effective means to raise the profile and practice of ADR and to provide law graduates with a balanced and appropriate legal understanding of all forms of dispute resolution.

**LEGISLATION**
- Divorce Act RSC, 1985, c 3 (2nd Supp.), s 9(2)
- Environment Act CCSM c E125, s 6(10)d
- Family law Act [SBC 2011] c 25, Div 1
- Labour Relations Code [RSBC 1996] c 244, Part 7
- Queen’s Bench Act, 1998, SS 1998, c Q-1.01, Part VII

**SECONDARY MATERIALS**

**PERIODICALS AND REPORTS**


Daicoff, Susan Swaim “Expanding the Lawyer’s Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law” (2012) 52 Santa Clara L Rev 795


Duffy, James & Field, Rachel “Why ADR Must be a Mandatory Subject in the law degree: A Cheat Sheet for the Willing and a Primer for the Non-Believer” (2014) 25 Australasian Disp Res J 9, p 12


Wissler, Roselle L. “Barriers to Attorneys’ Discussion and Use of ADR” (2003) 19 Ohio St J on Disp Res 459


WEBSITES


Peter Allard School of Law “A Broad and Diverse Curriculum” (2014) University of British Columbia <http://www.law.ubc.ca/broad-and-diverse-curriculum>

Robson Hall Faculty of Law “Negotiation” (2014) University of Manitoba <http://law.robsonhall.ca/course-information/course-descriptions/second-year-only/112-negotiation>

Schulich School of Law “Course Information” (2014) Dalhousie University <http://www.dal.ca/faculty/law/current-students/id-students/course-information.html>

University of Alberta Faculty of Law, “Faculty of Law Prospectus” (2014) University of Alberta <http://issuu.com/lawcomm/docs/law_student_prospectus_5._for_dean?e=13115880/9739797>


44 MacFarlane (2005), supra note 19, at 225, 229.


51 Ibid, at 143.

52 Ibid, at 96.


55 Ibid, at 150.

56 Duffy & Field, supra note 35, at 12.

57 MacFarlane, supra note 19, at 125.

58 MacFarlane, supra note 19, at 96.


60 CBA Futures Initiatives, supra note 45.

61 CBA Futures Initiative, supra note 45, at 6; MacFarlane (2005), supra note 19, at 130, 144.


63 Roselie L. Wissler “Barriers to Attorneys’ Discussion and Use of ADR” (2003) 19 Ohio St J on Disp Res 459, at 479-481.

64 Beyond Wise Words (2013), supra note 6, at 3

65 Ibid, at 21.


67 MacFarlane (2005), supra note 19, at 144.


76 Ibid, at 12.


79 Beyond Wise Words (2013), supra at 6, at 14.

80 Ibid, at 8.

I was asked to speak recently at the fifth anniversary of the founding of the Toronto Commercial Arbitration Society. Many will remember it as the successor to the Arbitration Roundtable of Toronto. ART transformed into TCAS in late 2009 with the delivery of a Proposal for a Toronto Arbitration Initiative, put together by Sonia Bjorkquist, Earl Cherniak, John Judge and myself, with a lot of help from Bill Horton, Janet Walker, the late Randy Pepper and JL McDougall.

In working on my remarks I came to the conclusion that in the field of international commercial arbitration there continue to be opportunities to be seized, but we need to up our game. Global trade is not going away. Anyone selling a product from a website is an international trader. Trade treaties will not disappear. I believe this leads to two opportunities dealing with place and people and getting work.

Like most things in life, this field is a meritocracy and when I talk about place and people and getting work, I believe that central to these opportunities is education.

With respect to place, I believe Canada has a significant role yet to play in international arbitration. Our biggest attribute? As Marc Lalonde has said “We are North American but we are not American.” We are cheaper and easier to get to than any European or Asian city. Our target market has to be the U.S. If a U.S. party is getting pushback about holding an arbitration in the U.S., the next place they should think of should be Canada. The problem with the U.S. generally is not that they think ill of us, it’s that they just don’t think of us at all. Education of the U.S. users of arbitration should be a priority for us.

Some may ask why we care about Canada as a place for arbitration. The answer is obvious. If a city in Canada is the place of arbitration then the local court has jurisdiction under the appropriate international arbitration Act. The parties will inevitably look to hire local counsel, at least for opinions and advice, if not to sit as second chair.

The first attribute of a place for arbitration centres around bricks and mortar. It is a focal point. If you say, come to our city for arbitration, but then have to conduct a hearing in a hotel room, or a lawyer’s boardroom, you are not regarded as being in the first tier. In many cities we have court reporting services with office space. In others, specialized hearing centres have been established. I believe we have to work with each of them more closely and educate them about the arbitral process, then together move to educate our U.S. friends. I do need to single out Arbitration Place in Toronto. It has made a concerted effort and spent real money to establish a presence internationally, and it has worked. I am regularly asked at international conferences about the facilities at Arbitration Place and the fact that it has become home to many arbitrators.

The fact that we may end up partnering with one or another “for profit” commercial enterprises should not be of concern. It should be remembered that most of the arbitration centres globally are commercial, for-profit enterprises including the ones in London, New York and Singapore. We need to partner with others to educate our U.S. customers.

Over the years we have had the benefit of a number of Queen Mary Law School surveys concerning international arbitration. What they have shown is that in choosing a place for arbitration one of the most important criteria is that it have an arbitration friendly judiciary.

What we need is not just a friendly judiciary but a sophisticated and knowledgeable judiciary. In New York, Miami, Victoria in Australia and Singapore they have designated judges to hear cases dealing with arbitration. And they now advertise this fact. In Toronto we have gone part way by adding to the basket...
The existence of bricks and mortar and a knowledgeable judiciary go to the promotion of place. A court that has established an arbitration list is likely to be more aware of the specific issues that arise in the arbitration context. Also, a consistent body of arbitration related decisions can be developed by judges that have an interest and expertise in arbitration.

As the Supreme Court of Canada has said on more than one occasion: “arbitration is part of no state’s judicial system.” So if you are in court it means something has failed. Something has gone wrong. We have smart, hardworking individuals on the bench. The problem is they see so few cases that expertise can’t be built up through experience alone. There is simply not enough of a case load. But when it goes wrong and the court’s assistance is needed, it would be nice not having to explain what ICSID is to the judge. Again I suggest education is the key. We need to partner with the judiciary to make suitable courses available. This can be particularly useful to a judge in cases where the counsel who are appearing may not be that familiar with the subject matter. And while its nice to have the court “get it right”, I am here talking about promoting Canada, and promoting Canada means being written up in the Global Arbitration Review and the other international publications for the right reasons. Like other newspapers, the international arbitration press consider it news only when a court in a particular country has made a hash of things. You never see the headline “Judge gets it right”. I believe we need to work with the court to provide appropriate, neutral education for the judiciary.

The existence of bricks and mortar and a knowledgeable judiciary go to the promotion of place. I would like to now turn to the issue of people and talent: arbitrators and lawyers. We also need to be better educated. This means all of us. Not just the younger members of the bar.

Article 2 of the TCAS Constitution lists one of its purposes as follows:

To encourage continuing education and to provide a forum for the exchange of ideas in all aspects of international and domestic arbitration.

This should be pursued across Canada. Many lawyers will say they have no time to be further educated in a field that they have an interest in and enjoy, but which generates little work. They say they have 2000 hours to bill and collect and this fills their time. They know the basics of arbitration and presume they can learn the rest if and when they get a file. The problem with this attitude is this is a sophisticated market. Again referring to the Queen Mary surveys, in house counsel tend to hire outside counsel with arbitration expertise, not litigation counsel. Being a good litigator is not enough and resting on your court reputation doesn’t work. Beauty contests, RFP’s and job interviews are not unusual in this field. As has been said: “Experience is something you don’t get until just after you needed it.” To get that new file you have to demonstrate you know the field. And if you can’t get it with direct experience you need to get it indirectly through knowledge sharing with others.

We need to start talking more to each other. Not by only having a big conference so we can invite in house counsel in the hopes they will send us work. Smaller more modest sessions (like the Arbitration Round Table model) are needed. Other vehicles and forums should be developed for the exchange of ideas in keeping with our reality.

And here’s the opportunity: Canadians make great advocates in international arbitration. Just look at the Vis Moot, an excellent example where Canadian teams consistently make it to the final rounds and again this year won the overall competition in Vienna. Canadian lawyers have a combination of civility and an appreciation and sensitivity for other cultures, combined, for the most part, with a lack of hubris that not only sets us apart from lawyers from other jurisdictions, but makes us very effective in front of an international tribunal of mixed nationalities. This is an export we should be developing, whether Canada is the seat or not.

It is the same for those of us who practice as arbitrators. We can provide an exceptional product. As an old friend, Haig Oghigian in Tokyo used to say to me, “Brian, the sales pitch as a Canadian arbitrator is simple. Just explain that we are neutral, like the Swiss, but with a sense of humour.” But with respect to Haig, this is not enough. We may have the basics, but this field has also matured. There are nuances and party imperatives and a plethora of techniques to be employed by an arbitrator in running an arbitration. We need to be sharing those ideas and techniques on a much more regular basis. We need to educate each other.

The ICCA April Newsletter has an article on its front page titled: On the Emergence of a “Hong Kong” Brand of International Arbitration.

If we start talking to each other and educating each other, we can develop a culture as well. I believe it has already started. Call it the Toronto or Canadian Way, the Alberta School, or the Vancouver Brand, whatever you wish, but to develop this we need to provide a vehicle for the easy, informal, exchange of ideas and knowledge sharing.

Educating others about our excellent bricks and mortar, educating a friendly judiciary, educating ourselves as lawyers and arbitrators can put us on the map, but it takes action and commitment. They say a pessimist complains about the wind but does nothing, while the optimist sits there and says just wait, the wind will change at any moment, but also does nothing. The realist trims the sails…Let’s trim the sails. Start a dialogue. Talk to the TCAS Strategic Planning Committee or the TCAS Executive Committee, talk to those in WCART, take someone to lunch and talk about Kompetenz-kompetenz… whatever. But at this stage in our development we should not simply fall back on the comfortable.
CONGRATULATIONS TO THE 2015 WINNERS OF THE
LIONEL J. MCGOWAN AWARD OF EXCELLENCE!

2015 LIONEL J. MCGOWAN AWARD OF EXCELLENCE FOR NATIONAL SERVICE
Anne M. Wallace, Q.C., LL.B., C.Med, C.Arb, CTAJ, IMI Cert., Anne Wallace Legal Professional Corporation

Anne was awarded the National McGowan Award to recognise her vision, passion, and tireless work stewarding the development of the ADRIC National Introductory Arbitration and National Introductory Mediation Courses. Anne spearheaded ADRIC to develop these training courses for under-serviced areas across Canada. Following the tremendous efforts of the Training Task Force, which she Chaired, this initiative yielded results with multiple highly successful course offerings in 2015!

The National Training Task Force has evolved into the National Courses Committee, which Anne continues to Chair as well as the National Trainer Approval Committee. Anne is an ADR Institute of Canada Director, Past President of the ADR Institute of Saskatchewan, and continues to serve on the ADRSK board. She also serves on the Regional C.Arb/C.Med Accreditation Committee and the ADRIC Technology Committee.

Congratulations and thank you for your continued support of ADR, ADRSK and ADRIC, Anne!

2015 LIONEL J. MCGOWAN AWARD OF EXCELLENCE FOR REGIONAL SERVICE
Professor Jennifer L. Schulz, B.A., LL.B., M.Phil., S.J.D., University of Manitoba

Jennifer was awarded the Regional McGowan Award for her outstanding contribution to the support, development and success of the new ADR Institute of Manitoba, and the development of alternative dispute resolution in Manitoba.

Jennifer is the only law professor in Manitoba specializing in ADR, and is a leader in Manitoba’s ADR community. She was recently retained by the Government of Manitoba to provide an expert evaluation of Manitoba’s first personal injury mediation program. She has given hundreds of presentations on ADR and published numerous refereed articles and chapters on the topic. She is the only Manitoba fellow of the Winkler Institute for Dispute Resolution.

Jennifer is Vice-President of the ADR Institute of Manitoba, and represents Manitoba as a Director on the ADR Institute of Canada Board. She sits on the ADRIC Nominating Committee and Journal Committee, and represents Manitoba on the ADRC Newsletter Committee.

Congratulations and thank you, Jennifer!

THE MCGOWAN AWARDS ARE NAMED IN RECOGNITION AND HONOUR OF LIONEL J. MCGOWAN, THE FIRST EXECUTIVE DIRECTOR OF THE ARBITRATORS’ INSTITUTE OF CANADA. PRESENTATIONS TAKES PLACE ANNUALLY AT ADRIC’S ANNUAL NATIONAL CONFERENCE.

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This award is presented annually to an individual who has made an outstanding contribution to the support, development and success of the ADR Institute of Canada: its policies and programs and/or to the promotion of ADR on a national scale.*

REGIONAL AWARD OF EXCELLENCE
This award is presented annually to an individual to recognise outstanding contributions to the development and success of an affiliate of ADR Institute of Canada or to the promotion and development of alternative dispute resolution within a region.*

* Professional ADR teaching, simply hearing ADR cases, and/or other regular ADR practice activities do not qualify. Similarly, simply being on the Board of the ADR Institute of Canada or its affiliates does not qualify unless it included major contributions.

For more information, visit www.adric.ca/mcgowan
First of all I would like to thank the Executive of the Toronto Commercial Arbitration Society for the opportunity to speak to the Annual General Meeting.

The specific aspect of arbitration friendly that I want to talk about is the relationship between the courts and those who earn a significant portion of their income from participation in arbitral proceedings.

While I would certainly defer to all of you here on this question, it does seem to me as that court involvement in support of the arbitration process can occur in a variety of ways:

- at the commencement of the arbitration, court involvement can occur if there is a dispute over the appointment mechanism in the agreement;
- the court may be asked to make procedural orders that cannot be ordered or enforced by the arbitrator;
- the court can be asked to maintain the status quo while the arbitration is taking place;
- the court can be asked to make an order for protecting and taking evidence;
- the court can become involved if there is an appeal which is permitted by the arbitration agreement or by the contract which contains the arbitration agreement;
- the court can become involved with the enforcement of the award; and finally
- arbitration or anti-suit injunctions.

It is difficult to appreciate a situation in which the potential for court involvement would no longer exist.

The arbitral process and the court process are independent but at the same time interdependent.

As you know better than I do, the advantages of arbitration have long been recognized in commercial matters.

I did find it interesting that King Edward I mandated the use of alternative dispute resolution for foreign businessmen proclaiming in 1419 that “no foreign merchant shall be delayed by a long series of pleadings…”

So it seems on the one hand that the courts have been plagued by cumbersome proceedings for approaching 600 years and the arbitral process has been efficient or perceived as efficient for about that same length of time.

I doubt seriously that you and I are going to change all that in the next few years.

It is very important that at this moment the commercial advantage be exploited intelligently and in a commercially sensible way.

This means in part that the ability to get into court when necessary has to be clear and straightforward. There will always be someone who wants to delay things and if they think that getting into court will do that then there will be pressure to get into court.

As a result at an administrative level there needs to be an ongoing communication between TCAS and the Courts to facilitate the dealing with arbitration matters. It is to be discussed between the Society and the Regional Senior Judge in Toronto. The mechanism for making sure that there is a smooth transition to the court is a matter to be discussed at an institutional level.

I would respectfully submit, therefore, that it is in the Society’s interest to make sure that happens.

You should consider the process by which these matters get into court.

You should consider discussing with the Regional Senior Judge the possibility of assigning a judge to hear the proceeding shortly after the proceeding has been served and filed. This will involve consultation with the judge who heads the Commercial List.

No one will resort to the process for the...
purposes of delay if there is no delay associated with the process.

This issue is less significant today because the personalities with whom you have to engage are Regional Senior Justice Morawetz, Justice Newbould and myself. We are essentially of the same mind about the prudence of promoting Toronto as a Centre for commercial arbitration in such a way that it maintains the historical attractiveness that the English common law recognized 600 years ago.

Now is the time in a rational way to construct such an environment because in part we will not always be here.

I strongly urge you to take a look at the Civil Rules and you have people here like Derry Millar who has been on the Rules Committee, for many years. It may be prudent to look at whether specific rules should exist to deal with a situation where the court is asked to support, in some form or other, an arbitration agreement.

I strongly urge you to look at the Law Society Rules to see if they are appropriately attuned to arbitration proceedings.

It is prudent to try to educate judges in a dispassionate disinterested environment about the commercial advantages of the arbitral process and what has to exist to preserve the process, to preserve its integrity and preserve its efficiency.

At the same time internationally Canada is reaching out to the world and entering into trade agreements which have not yet really taken effect. This can only stimulate your practices.

I think there are some difficulties to be overcome. One of which is the loss of commercial decisions as a result of a private arbitration process. There must be a way to make helpful arbitral decisions available in some form. I would not presume to say how and I would not presume to tell you how to overcome all the difficulties associated with that because I do not have the expertise to do that but I perceive it as a problem.

Secondly I think every organization has to take seriously its social as well as corporate responsibility and I would urge you to think about what that might be. Perhaps it could be offering on a pro bono basis some form of arbitration service in a very specific targeted area where you can actually be useful. And then I would urge you to publicize this contribution back to the community.

That is my central message. It is not any more profound than that. I think the environment that we are in is changing in a way which will promote even further commercial arbitrations. I think the government will for economic reasons promote and protect arbitration.

Now is the time to collectively work to entrench arbitration and the Court in a commercially sensible framework.

I would urge the Society to give this serious consideration and to set out a plan for itself to bring this about.

I am certain that, if you think there is merit in what I have said, you will apply the same diligence and hard work, that you apply to everything you do every day, to what I think is a wonderful opportunity to create something of real value not only for you but for those who come after you.

Thank you very much.

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