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Who are we?

The ADR Institute of Canada, Inc. was created from the Arbitrators' Institute of Canada, Inc. in 1974 as the first Canada-wide professional association for dispute resolution. Its primary function was to provide the public with the means of resolving disputes and to act as a national centre of information, education and services in the field of alternative dispute resolution.

The Institute is a non-profit organization which brings together not only arbitrators, mediators and other ADR professionals, but also major corporations and law firms who work together to promote the creative resolution of conflicts and disputes. This broad membership base brings diverse skills and experience to the Institute and contributes to the development of the field of dispute resolution in Canada.

The National Institute works in collaboration with seven Regional Affiliates throughout Canada to develop and promote standards for practice. The Regional Institutes develop programs and services targeted to regional needs.

All members throughout Canada adhere to the Institute's Code of Ethics and are subject to its disciplinary policies. Members who have achieved the required education and practical experience may apply for recognition as a Chartered Arbitrator or Chartered Mediator.

In 2002, the ADR Institute of Canada launched new national rules for administered ADR. These new rules provide parties to a dispute with a professional third-party neutral (as have past rules). The new national arbitration rules also provide for administration of disputes by the Institute.

With an expanded membership and expanded ADR services, the National Institute and its Regional Affiliates are poised to become the dispute resolution leaders in Canada.

Qui sommes nous?

L'Institut d'Arbitrage et de Médiation du Canada, Inc. est originaire de la Fondation des Arbitres du Canada en 1974 comme la première association professionnelle de RED canadienne. Sa fonction primaire était de fournir le public avec les moyens de résoudre des disputes et de servir comme centre national d'information, d'éducation et d'améliorer les services dans le domaine.

L'Institut est une organisation à but non-lucratif qui réunit, non seulement des médiateurs et des arbitres, mais aussi les autres gens de la profession, les sociétés commerciales et les cabinets d'avocats. Ils travaillent ensemble pour promouvoir les règlements afin de résoudre des conflits. Leurs expertises apportent des techniques et expériences diverses à l'Institut et contribue au développement du domaine au Canada.

L'Institut National travaille en collaboration avec sept Affiliées Régionales à travers le Canada pour développer et promouvoir des normes de pratique. Les Instituts Régionaux développent des programmes uniques à leurs besoins régionaux.

On exige de tous les membres qu'ils se soumettent au code de déontologie de l'Institut et aux procédures disciplinaires adoptées par celui-ci. Les membres qui ont acquis de l'expérience et de la formation requises, conformément aux normes de l'Institut peuvent se demander de la reconnaissance comme un Médiateur Certifié ou Arbitre Certifié.

En 2002, L'Institut d'Arbitrage et de Médiation du Canada a lancé des nouvelles règles nationales pour le RED administré. Ces nouvelles règles fournissent aux partis d'une dispute avec une tierspartie professionnel neutre (comme aux anciens règlements); mais, les nouvelles règles d'arbitrage nationales pourvoient aussi à l'administration de conflits par l'Institut.

Avec un sociétariat divers et des services augmentés, l'Institut National et ses Affiliées Régionales sont sur le point de devenir les dirigeants de résolution de dispute au Canada.

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President's Message



*Barry C. Effler, LL.B., C.Arb., President of the
ADR Institute of Canada, Inc./ Institut
d'Arbitrage et de Médiation du Canada Inc.*

We are now in interesting times – a period of change in the Institute. Our Directors are looking at how the Institute can grow, and how we can create a flexible organizational structure for growth that will benefit our members and provide great service for users. At our recent strategic planning meeting the Directors and representatives from our regions have identified three themes:

National Identity

The Institute holds a unique position in the ADR field. Our regional Institutes are well placed to respond to local needs and build programs and services of regional value. Our national Institute works with them to provide information and programs that are relevant across the country. Together we offer the public easy access to information and services that improve the practice of ADR in Canada. We recognize that more can be done. Our strategic intent is to develop resources and initiatives that can be used across Canada to increase knowledge of ADR and awareness of our programs and services.

National Standards

We are, and always have been, committed to raising the standard of practice in ADR. The regional Institutes offer education and training programs or help people

find them. The national Institute has designations to recognize members with significant education and experience in mediation and/or arbitration. Regional and national conferences and seminars are important vehicles for communicating advances in the field. We will ensure that our members continue to have access to information and training to grow and be recognized as professionals.

National Services

We are also unique in the mix of our membership, which includes ADR practitioners, corporations that use ADR services, and law firms that assist clients considering or involved in ADR processes. Their diverse perspectives help us keep users' needs in mind when we are designing educational programs and other services. A key initiative in this area is the new *National Arbitration Rules*, which were launched in Toronto in October 2002 and will be launched in other areas in the near future. The new *Rules* allow us to provide all users in Canada with a "made-in-Canada" service. We ask that you assist us in promoting them within your professional networks and communities.

The vision of the Institute is to be the pre-eminent organization for professionals who provide dispute resolution services and the individuals and organizations that use those services. That is where we intend to be and that is what our strategic planning is addressing.

In order to do so, we are working with our regional Institute partners to improve the links between our organizations. We have formed joint committees to address all three themes and from them develop specific plans to meet the needs of our membership and users of our services.

All of our members are invited to participate in moving us towards our goal. We are exploring options, so please send us your ideas. Please contact our offices or call me directly at (204) 945-0445. We look forward to hearing from you.

I have recently had the opportunity to meet with officials of several federal government departments to discuss ADR issues. I am also the immediate Past Chair of

continued on next page . . .

the Canadian Bar Association Alternative Dispute Resolution section and attended these meetings in both capacities. The focus of the meetings was as follows:

Indian Resolution Schools Resolution Canada

Minister Ralph Goodale, then the minister charged with responsibility for the Indian Residential Schools settlement process. Recently, a detailed process was announced to provide a tribunal of adjudicators to hear and resolve claims. I along with representatives of the Canadian Bar Association met with the Minister, Deputy Minister Mario Dion and senior officials to discuss concerns regarding the potential independence of the adjudicators and the timing of releases from the claimants. I am happy to report the Minister was very receptive and provided information to address our concerns. This process has the potential to provide an efficient, timely resolution using a procedure that is sensitive to the needs of the claimants.

Justice Canada Dispute Resolution Services

In meetings with the Federal Department of Justice's Dispute Resolution Services I provided copies of the *National Arbitration Rules*. They are in the process of reviewing the *Rules* for approval to be used by federal departments. As well, General Counsel David Merner attended the Annual General Meeting of the Institute and provided very interesting information about dispute resolution services in the federal government.

Public Works Canada

I met with senior legal staff of Public Works Canada to discuss arbitration and the *National Arbitration Rules*. We had an excellent discussion about the pros and cons of arbitration from their perspective and how the *Rules* might be helpful to resolving disputes involving their client department.

I wish everyone a safe and happy holiday season and a prosperous New Year.



Barry C. Effler, LL.B., C.Arb., President
ADR Institute of Canada, Inc./Institut
d'Arbitrage et de Médiation du Canada Inc.

Lionel J. McGowan

Memorial Awards of Excellence Winners



Randy Pepper being presented with the McGowan Regional Award by Ontario President Barbara Benoliel.

The Lionel J. McGowan Memorial Awards of Excellence presentation took place at the Institute's Annual General Meeting held in Toronto, Ontario on October 18, 2003.

This year's winner of the Award for Regional service is Randy Pepper. Randy is a lawyer with the firm of Osler, Hoskin & Harcourt LLP. In presenting the Award, President Barry Effler noted his service as a Director and Officer of the Ontario Institute and in particular his contributions as Chair of the Case Management Committee. Randy took a lead role in drafting case management rules for mediation and arbitration, and in identifying the opportunity to reap greater benefits from them if they became a national product with greater visibility and value to the business and legal communities. Randy represented the Ontario Institute in planning for the Toronto launch of the new *National Arbitration Rules*. Because of Randy's vision and work, the Institute has new *Rules* that have the support of major law firms in Ontario and are being written into contracts prepared there. The result will be expanded opportunities for the Institute's member practitioners and new revenues for Ontario – and the National – Institute.

The National Award winner is David McCutcheon. David, a partner in the firm of Fraser Milner Casgrain LLP, has been an active member of the Institute since



David McCutcheon, C.Arb. (left) accepting the National Award from Barry Effler, President, ADR Institute of Canada, Inc.

1990, and a member of both the Regional and National C.Arb. Accreditation Committees. As Chair of the National Rules Committee since September 2000, he has been instrumental in ensuring that existing rules of procedure for arbitration and mediation (both those of the Arbitration and Mediation Institute of Canada Inc. and The Canadian Institute for Dispute Resolution) were brought forward into the new ADR Institute of Canada. This work included the Institute's adoption of the UNCITRAL rules for international disputes and the clarification of responsibilities and fees for administration under the rules. More significantly, David co-chaired the development of the new *National Arbitration Rules*. He provided vision and inspiration – and much leg-work – for The Essential ADR Seminar launching the new *Rules* in Toronto in October 2002. These *Rules* are a major contribution to the Institute, our members, and the business and legal communities in Canada. They truly are a Canadian solution for Canadian disputes, providing high-quality, up-to-date processes for arbitration. Their quality and availability give the Institute credibility in the business and legal communities and in resolution of commercial disputes. David continues to build a vigorous and responsive National Institute. Most recently, he conceptualized and led "The Power of Change" seminar for this year's AGM.

Mediation Confidentiality Revisited

A case comment on the Ontario Court of Appeal decision in *Rogacki v. Belz et al* <http://www.ontariocourts.on.ca/decisions/2003/october/rogackiC38522.htm>

by Richard J. Weiler, LL.B., C.Med, F.I.A.Med.

The decision of the Ontario Court of Appeal in *Rogacki v. Belz et al* released October 3, 2003 requires everyone interested in the mediation process to reconsider the oft-made assertion that, "mediation is a confidential process".

The Court allowed an appeal of an Order granted by a motions Judge holding the appellant in contempt of court in respect of a breach of confidentiality arising from a mandatory mediation conducted pursuant to Rule 24.1 of the Rules of Civil Procedure. The mediation took place in the context of a libel action brought by the respondent concerning certain articles published in a Polish language newspaper known as *Gazeta*, of which the appellant was the editor and publisher.

The mediation session took place on January 15, 2002 before Toronto mediator William R. McMurtry. The parties and their lawyers were present. Prior to the commencement of the mediation, counsel for the parties signed a standard form mediation agreement. Clause 4 of the agreement provided:

4. CONFIDENTIALITY

The mediator will not disclose to anyone who is not a party to the mediation any information or documents submitted to the mediator, EXCEPT:

- (a) to the lawyers, or any experts retained by the parties, as deemed appropriate by the mediator;
- (b) where ordered to do so by judicial authority or where required to do so by law;
- (c) with the written consent of all parties.

The parties agree that they will not require the mediator to testify in court, to submit any report for use in legal proceedings or otherwise to disclose any written or oral communication that has taken place during the mediation.

The Court accepted that Mr. McMurtry explained to the parties that it was fundamental to the mediation process that discussions forming part of it be kept confi-

dential. At the end of the mediation agreement he added in handwriting the following clause, which was signed by the parties:

The parties agree that everything that is said or done in the mediation is strictly confidential and privileged, and no reference will be made to anyone other than the parties or their solicitors of anything that is said during the process.

On the day following the mediation, the appellant wrote and published in the *Gazeta* newspaper an article reporting on the mediation session which read, in part, as follows:

No reconciliation was reached in the action brought against *Gazeta* and its Editors Alicja Gettlich and Zbigniew Belz. After a mediation session that lasted for a few hours last Tuesday, Ms. Elzbieta Rogacka, the Plaintiff (let us refresh our memory: a private action taken, corporate money used) rejected the *Gazeta* editors' proposal which might have served as a basis for reconciliation of the parties.

In his well-reasoned decision Borins JA concludes that a contempt Order is not available for a breach of confidentiality in the context of mandatory mediation. In his reasons he notes, "Had the Civil Rules Committee, in the exercise of its powers under s. 66(2)(s) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, intended to provide that the contempt power may be used to enforce the obligations imposed on litigants under rule 24.1, it would have done so expressly."

Abella, JA, in her concurring reasons goes further to observe, "I agree with Borins J.A. that rule 24.1.14 does not create an enforceable guarantee of confidentiality, but that does not mean that there do not exist significant public policy reasons for keeping the mediation sessions confidential". She goes on to say,

"Mandatory mediation is a compulsory part of the court's process for resolving disputes in civil litigation. Willful breaches of the confidentiality it relies on for its legitimacy, in my view, represent conduct that can create a serious risk to the full and frank disclosures the mandatory mediation process requires. It can significantly prejudice the administration of justice and, in particu-

lar, the laudable goal reflected in Rule 24.1 of attempting to resolve disputes effectively and fairly without the expense of a trial."

The decision highlights the need for clarity of thought about the concept of confidentiality as it relates to the mediation process and, some suggest, the decision also highlights the need for a legislative response. In a recent letter to the Ontario Rules Committee the Ottawa Local Mediation Committee says,

"The Ottawa Local Mediation Committee unanimously asks that Rule 24.1 be amended at the first opportunity to provide litigants with the assurance that communications made in mandatory mediation are confidential and that breaches of such confidentiality will attract consequences as serious as those that would flow from a breach of the implied undertaking in connection with discoveries."

In the meantime mediators need to reconsider their Mediation Agreements in light of this decision. One suggested approach is to revise the standard confidentiality clause along the following lines:

The Parties and the Mediator each hereby undertake to the Superior Court of Ontario that mediation communications (meaning statements, whether oral or in a record or verbal or nonverbal, that occur during a mediation or are made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator) shall be kept confidential except to such extent, (a) as expressly agreed by the Parties and the Mediator, (b) as required by law or (c) for purposes of enforcing any settlement agreement reached. Each Party and the Mediator and the Observer acknowledges and agrees that breach of such undertaking may give rise to sanctions being imposed by the said Court including a finding of contempt of Court.

Mediators routinely advise participants in mediation that the process is confidential. The Ontario Court of Appeal has made clear that it isn't necessarily so. One hopes that the revisiting of the concept of confidentiality that appears inevitable in the wake of the *Rogacki* decision will strengthen the mediation process and its role in the administration of justice.

The Power of Change

The AGM

The 29th Annual General Meeting of the ADR Institute of Canada recognized both continuity and change. Barry Effler, President, reflected on the Institute's proud history of setting standards of practice. The Institute is committed to professional excellence, and the increasing sophistication of our members – both providers and users of services – drives growth and change and will continue to do so. The Institute itself is in the midst of strategic planning with Regional Affiliate Institutes to strengthen our position as Canada's leader in ADR solutions. The resources expended on planning for change are expected to pay dividends in increased profile, increased use of services, and increased membership in future years.

The Institute is committed to professional excellence, and the increasing sophistication of our members – both providers and users of services – drives growth and change and will continue to do so.

Mr. Effler thanked outgoing Directors for their contributions. He named and welcomed the new and continuing Directors and Officers who will serve in the National Institute in the coming year. He commended the work of the National / Regional strategic planning group and noted the three strategic priorities they have set: national identity of the Institute and the field, national standards of practice, and national services for professional members and the corporate community. Members were encouraged to keep informed and to get involved in initiatives that emerge from this strategic planning.

Panel Presentation

The field of alternative dispute resolution has undergone dramatic changes over the last decade. Rapid change continues. The Power of Change seminar held in conjunction with the AGM was the Institute's tour of the future. The presenters, who were selected to represent different interests, experiences and perspectives in the field, described some of the forces driving change, demands of the marketplace, and innovations in practice that are emerging.

David Merner, General Counsel and Head of Dispute Resolution at Justice Canada, spoke of the dispute resolution policies and programs in the federal government. (*His remarks are available starting on page 8.*)

A panel of members described the changes emerging in commercial ADR. The panel was chaired by David McCutcheon, a lawyer with Fraser Milner Casgrain LLP who also mediates and arbitrates; Gary Furlong, a mediator with Agree Dispute Resolution; Jack Marshall, a lawyer with Macleod Dixon LLP who represents clients using a range of dispute resolution processes, and Lynda Tanaka, a lawyer with WeirFoulds LLP and Ontario's new Racing Commissioner.

A number of themes emerged.

Institutionalization of ADR

Governments recognize that significant savings can be had in early identification of problems and efficient management of disputes. Regarding external disputes adjudicated by boards and tribunals, more and more of these quasi-judicial bodies are looking at, and implementing, dispute resolution processes such as mediation and shuttle diplomacy before the hearing. What drives the support in the public sector for

ADR is the need to save money, and the perception that hearings are an expensive way to make decisions.

In-house capacity for dispute resolution

Regarding internal disputes, many government agencies have implemented full Dispute Resolution (DR) systems for their staff, including Canada Customs and Revenue Agency, Department of Defence and Parks Canada. In addition, with the passage of a recent bill that requires every federal government department to implement ADR, dispute resolution will become common. There is a strong move toward delivering ADR services internally, by staff people. In many cases this works and should be encouraged, especially for smaller, organizational conflicts. While this may be perceived as reducing work for practitioners, it can create significant opportunities in dispute resolution consulting, training, and system design.

Professionalism

Canadian neutrals are well-regarded internationally. In Canada, the growth of professionalism among mediators has been particularly noteworthy, in part because of the wide range of sophisticated training programs now available. It is now possible to find skilled mediators in virtually every industry which makes up the fabric of international business. Ten years ago, we looked to a more judicial model of mediation which was largely the province of lawyers who dabbled and judges who had retired. Today many non-lawyers with industry experience and mediation training have become outstanding mediators and ADR specialists. That trend will continue.



Panel presenters (l-r): David McCutcheon, Gary Furlong, J. J. Marshall and Lynda Tanaka.

High value dispute resolution

There is also a move towards high value dispute resolution, where outside neutrals provide services on important or difficult conflicts that are critical to the organization. Examples of this include things like partnering and long-term relationship management skills. Another area is the use of ADR skills in organizational matters such as mergers and acquisitions and strategic alliances. These are happening more and more, and there is much the ADR field can contribute.

Commercial mediation

Mediators are also showing up in unusual places. In some instances, particularly large international contracts where there may be cultural as well as commercial problems in performance of the contract, it is now not unusual for the parties to name a “deal facilitator” in the contract. That person is often engaged at the time the deal is negotiated, attends the closing and then continues to be available for a period of time after the closing to resolve disputes relating to the performance of the agreement. In many cases, these embedded individuals have knowledge and experience of living in different countries and cultures. They speak a number of languages and have international business experience. In effect, business people are now using this type of person to immunize their contracts from ever reaching dispute resolution processes, let alone the courts.

Neutral expertise

One of the greatest frustrations for a sophisticated commercial party is to have a dispute heard by someone who does not understand their business and does not understand the complexity of the business



BC Director Sheila Begg with guest speaker David Merner.

relationships which have developed in their industry. The appointment of arbitrators with considerable experience and expertise in the subject matter in dispute facilitates the use of inquisitorial techniques – that is, techniques that lead to early clarification of the facts of the dispute by the arbitrator with the parties. The process of educating the arbitrator is not necessary and the arbitrator can expertly assess the strengths and weaknesses of the issues presented. There is a move to industry-specific neutrals, especially in energy-related arbitrations. Establishment of electronic databases containing the credentials and experience of ADR specialists across the country will be essential if we are to realize the full potential of matching ADR specialists to the dispute in question. The efforts of the ADR Institute of Canada and its regional affiliates in this regard is a pioneering step on the way to a national database of skilled professionals.

Control of costs

In the private sector, parties are very concerned about the costs of the arbitration model, especially the three-member arbitration panel. They don't always want to negotiate an “arbitration agreement” but they are willing to negotiate panel size and process so as to minimize costs. They are very concerned about preserving ongoing relationships, but want decisions and some fairness without a lot of expense. Standardized rules, carefully structured agreements, and neutrals who can get to agreements and decisions efficiently add value.

Paper arbitrations

There are now numerous examples where, having picked an arbitrator, prepared reports, and collected the evidence



David Merner accepting a token of appreciation from President Barry Effler.

into a common format, the case can be submitted to an arbitrator on the basis of the paper alone. The arbitrators have the power to make a decision either on the basis of the written material only, or to call in the parties, some witnesses, or all of the witnesses to give evidence. In some cases, the evidence is given by inquisition by the arbitrator without lawyers present. The expenses associated with a formal hearing, including the cost of hearing rooms, transcripts, and even cookies and coffee are reduced or eliminated. The place of the arbitrations is considerably less significant.

Electronic transfer of information

Electronic exchange of documents has become a standard practice. It saves money and creates enormous time efficiencies. The Internet has opened unique opportunities for ADR. It provides a platform for educational activities and serves as a search medium to find appropriate neutrals, suitable rules, and general information concerning ADR processes. Some ADR processes are now conducted through the Internet on the basis of electronic documentation, obviating the need for the parties to meet on a face to face basis. For small disputes the administrative cost savings of using the Internet effectively can be dramatic. It is a safe bet that use of the Internet as an electronic medium for ADR processes will continue to grow, and further that it will form an essential part of ADR education and practice in the future.

Inquisitorial model

In commercial matters the trend to interest-based processes – including inquisitorial techniques – as opposed to

continued on next page . . .

adversarial processes has become particularly evident. It can be a more cost effective and appropriate process for determining commercial issues, particularly where the decision will depend in large measure on expert evidence or trade custom. Parties are now incorporating inquisitorial techniques such as: immediate delivery of expert reports to the arbitration panel after there have been exchanges and without further proof; convening a pre-arbitration meeting after expert reports are filed, but before any evidence is adduced to allow the arbitrators to ask questions for clarification of potential witnesses and experts; expanding the role of arbitrators in settling and narrowing issues before the panel to the point where arbitrators often in effect mediate the existence and scope of the issues to eliminate extraneous matters before the panel; and holding paper arbitrations. The use of non-lawyer experts to perform the role of arbitrator permits the introduction of short form evidence, including summaries of relevant facts, key excerpts from documents, and summaries of argument. The benefits are obvious.

It is still unusual to see an inquisitorial process almost completely take over from the adversarial process. More commonly, inquisitorial processes are now used in place of what would otherwise be interlocutory proceedings. The practice of holding one or more pre-arbitration meetings serves the purpose not only of streamlining the process by setting timetables for preliminary steps, but also creating an early forum where issues can be questioned and refined well in advance of the actual hearing. This often has the effect of defining the dispute in a manner where the parties can actually make progress towards settlement or at least eliminate some of the peripheral issues before the matter is heard.

Flexibility – parallel tracks for mediation / arbitration

What originated as a sequential process of negotiation, then mediation, then arbitration, has evolved to a much more complex set of interlocking processes which, when used imaginatively by the parties, can establish creative and efficient business solutions to problems which would be otherwise locked in the adversarial process. The sequential model is valued because

disputes are often resolved at the negotiations level. When they are not, the process can be long, time consuming, and costly. Many ADR professionals now advocate parallel tracks for the mediation and arbitration portion of the proceeding. In some instances the parties may even keep the services of a professional mediator on standby during the hearing to guide negotiations which may lead to a settlement as a result of information revealed in the hearing. The most attractive aspect of this new med/arb process is that it retains the prospect of settlement through to the arbitration hearing, because the parties know that a mediator is available to meet with them at night, even though they are locked in mortal combat by day.

Embedded ADR

Many of today's standard arbitration clauses lack imagination and sophistication. When faced with deficient agreements, experienced ADR counsel often agree to modify the stipulated process by agreement. Parties can maintain control of the process from the start by tailoring contract clauses that allow for flexibility in the process. The drafting of inquisitorial features into the traditional arbitration process has a bright future in this regard. Some contracts now name neutrals and involve them from the moment the dispute arises. The neutral can then assist in managing the resolution process rather than simply responding in traditional ways.

Predicting the future

We can already see that the trends described above are rapidly reaching a point of general acceptance. We are approaching market maturity for the ADR industry. There is general acceptance by business and government of ADR as the preferred dispute resolution model. The flexibility of designing a dispute resolution process which is uniquely suited to the needs of the parties, their contract and even the needs of the particular dispute which arises will prevail over the "one size fits all" approach traditionally taken by more adversarial processes. Lawyers will be better informed and will write better contracts. Parties to ADR processes will save money by properly designing the process in the first place, by using specialized ADR professionals, and by adopting innovative approaches such as the inquisitorial model, and the

embedded deal-based ADR professional. It is also safe to predict that a new breed of ADR consultants will emerge who will specialize in supporting the ADR process by providing education, designing effective ADR processes, selecting appropriate ADR professionals, but not necessarily acting as ADR neutrals.

In a great many cases, these consulting roles can be encouraged, adopted or performed by the ADR Institute of Canada. It has available to it the expertise, and experience, which can enabled it to perform these tasks. Its true advantage is its national reach and stature as the pre-eminent ADR institution in Canada, coupled with its culture, which encourages innovation and an inclusive approach to ADR.

One final prediction which can be made confidently is that the ADR Institute of Canada will encourage the changes that have arisen in this area that it will be a primary ADR service provider, and an innovator in the development and adoption of the best new practices in our brave new ADR world.

The McGowan Awards

A highlight of the AGM is the McGowan Luncheon, the presentation of the Lionel J. McGowan Memorial Awards of Excellence in Dispute Resolution, and the McGowan Address.

The Awards are named in recognition and honour of Lionel J. McGowan, the first Executive Director of the Arbitration Institute of Canada, one of the founding organizations of the ADR Institute of Canada. There are two awards: one for contributions at the Regional level and one for contributions at the National level.

This year's winner of the Award for Regional service is Randy Pepper. The winner of the Award for National service is David McCutcheon. A summary of their contributions is available on page 2.

McGowan Address

(This article was prepared from notes of the talk. We apologize for inevitable shortcomings.)

We are indebted to Allan Stitt, President of the Stitt Feld Handy Group and a Past President of the National Institute, who presented the McGowan address. He challenged the group to move past competence to creativity in dispute resolution.

Allan framed his remarks with two Star Trek story-lines. The first was about the original Star Trek crew going to a planet where everything appeared to be peaceful and perfect. But after a time, the crew realized that nothing there had changed in thousands of years. Without conflict, the society had failed to evolve.

He reminded us that we, in the Institute, have always thought of ourselves as the champions of change. But our challenge now is to stay on the leading edge and not get stuck in the rut – the rut he described as being a hammer, and seeing everything as a nail.

With regard to arbitration, Allan noted that, in some circles, it has a bad name. One of the ways we can counteract this is to move away from the adversarial to the inquisitorial, to focus on the complaints and solve them. He advised that, before an arbitration starts, consideration be given to the number of arbitrators needed, the experience the arbitrator needs, and what need there is for the arbitrator to have a legal background. He recommended a pre-arbitration meeting to decide how the process would work best: what information needs to be exchanged ahead of time, if there should be pleadings, if there should be discovery, if the issues can be narrowed, what experts are needed, and to whom they should be delivered, if parties have to prove facts or can put in short form summaries, if lawyers can make arguments and present facts that way, what the rules for admissibility of evidence will be, what limits are placed on witnesses and questioning witnesses, and/or if a reporter is needed.

More radical questions he posed included: Should there be an oral hearing? What is the jurisdiction of the arbitrator? Should there be reasons? He described a process of final offer selection, in which the arbitrator announces he wishes to make an award by selecting the most reasonable of the offers the parties put forward. The parties are then given a short amount of time to decide on their final offer, and the arbitrator chooses the one he considers most reasonable. The intent is to force parties to be reasonable – and to prevent the arbitrator from a serious misjudgment!

Arbitrators might agree with parties to stop the process and become a mediator in the middle, or have another person standing by to mediate. The issue is that arbitra-

tions need not be rule-bound. The beauty of arbitration is that disputants can set and agree on the rules.

Mediators take pride in being innovative. Allan asked if thinking we're already innovative could lead us to become stagnant. Mediators must be vigilant about being open, creative, and adaptive. They should constantly challenge the "rules" of mediation, and not fall into the trap of setting a process that doesn't work. There are really only two rules in mediation: the first is to do no harm, and the second is that there are no other rules. Allan gave a number of examples from his own practice in which breaking the "rules" – with the agreement of the disputants – was an effective way to get to an agreement.

The design of ADR processes is another area where we have to be creative. It isn't enough just to put a standard ADR clause into an agreement. We should think about whether or not to name the neutral, how much time to allow for processes, and what processes to use.

And we can no longer talk about the power of change without talking about the Internet – for finding neutrals, training, and doing ADR.

What role is there for the Institute? We already provide a database of neutrals. We need to move towards being truly a one-stop shop. We can't promise to find work for members, but we should continue to act in ways that will generally work for them – but that can't be our reason for being. We need to be the voice of neutrals and we need to promote the interests of neutrals. Most importantly, we must remember that we can't get stagnant; we must stay open-minded.

Allan's closing Star Trek story was about the universe's greatest mediator who, though deaf and dumb, was brought to another planet for a dispute. The mediator worked through a chorus of interpreters that translated information back and forth, but one of the parties became so upset he shot the chorus. The mediator, now unable to hear or speak, went back to his own planet. But the parties urged him to return. And he did, with the expectation that he would teach them to interpret for him. And they all discovered that, in the struggle to learn how to do that, they found the answer to their dispute.

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The State of Dispute Resolution in the Federal Government

Speaking Notes for David Merner,
General Counsel, Dispute Resolution
Services, Department of Justice, Ottawa

I've been asked to speak about the state of dispute resolution in the federal government. This is a good news, bad news story.

The bad news is mainly for the lawyers in the room. (How many of you are lawyers? I see that over 50 per cent of you have raised your hands.) All members of the ADR Institute know that "ADR" stands for "Alternative Dispute Resolution" or for "Appropriate Dispute Resolution". Unfortunately, too many lawyers still believe that "ADR" stands for "Always Declining Revenues".

The good news is for the taxpayers in the room. (How many of you are taxpayers?) It's good to see ADR Institute members are prospering and paying their taxes. Those of you who have not raised your hand – please stay after the meeting. The Canada Customs and Revenue Agency is an important Department (CCRA) of Justice client. I'm sure my CCRA colleagues would like to know more about you.

Seriously, the development of dispute resolution in government is very good news for taxpayers, who are the ultimate beneficiaries of the ADR successes in government. I will describe some of those successes later; however, as requested, I will start with the bad news.

I have four pieces of bad news for dispute resolution practitioners seeking to do business with the federal government. Traditional interest based dispute resolution techniques (like positive sum negotiation, generating options, separating the people from the problem) are particularly difficult for government decision-makers who deal with very political, highly publicized environments.

Ministers must answer for the actions of their departments in Parliament and in public. Decision-making by the courts can be very attractive in such political environments because it places responsibility for difficult issues in someone else's hands: the hands of the courts.

Fundamental differences of principle are inherently difficult to resolve through interest-based processes. The transaction costs of litigation are enormous; however, government decision-makers often see these costs as insignificant in the context of the very high value attached to positive legal precedents relating to matters of principle.

In this context, the risk to decision-makers of characterizing an issue as a matter of principle can be much greater than the risks associated with sincerely seeking common interests. It is easier to explain the failure of lengthy and costly litigation over points of principle, than the failure of lengthy and costly negotiations over points of common interest.

Reconciliation is particularly difficult in the context of complex relationships and historical patterns of distrust. The tens of thousands of Indian residential schools cases, mainly launched in the Prairie provinces, are an example of the extraordinarily difficult and emotional litigation that fits into this pattern.

Many would argue that it is inappropriate to victimize victims a second time by dragging claimants who allege horrendous abuse through the courts. However, Ministers must also answer for the proper use of public funds. We know from experience in Nova Scotia that Ministers face serious



David Merner at the ADR Canada's 2003 Annual General Meeting.

consequences if they pay out applicants without safeguards and fail to manage public funds carefully.

Again, our challenge is to build trust and ongoing relationships while simultaneously meeting the demands imposed by our democratic (and largely adversarial) political processes. I should note that the federal government is in the final stages of setting up the Indian residential schools dispute resolution program and we very much hope to be able to settle a significant proportion of these claims through the dispute resolution process.

The courts are an attractive alternative for those seeking a counterweight to the power of the state.

The creative use of the doctrine of constructive trusts in *Guerin* and the decision of the Supreme Court in *Marshall* are good examples of courts delivering significant victories to aboriginal peoples – victories that were not available through other dispute resolution processes.

The best alternative to such processes is usually recourse to Courts. Therefore, successful outcomes depend on identifying solutions that are "better than" or "close to" outcomes that could be achieved through litigation. This brings us back to the old news that we lawyers are hard to avoid.

The good news is that we do have some great Dispute Resolution (DR) success stories in Government. The Department of Justice is beginning to gain a picture of the "return on investment" related to the \$6.9 million in seed money spent through the DR Fund.

We have now quantified over \$6.8 million in savings in the first two years alone since the termination of the Fund. These savings are repeated annually. We regard this as an enormously successful program.

The seed funding from the DR Fund has grown in many different ways. Among our biggest success stories are the million dollar savings realized at the Canadian Human Rights Tribunal through the implementation of its mediation program.

The Department of National Defence (DND) has decided to spend \$7 million annually on an integrated DR program to deal with human resources issues. Sixty-seven people now staff the DND internal conflict management program – the broadest program in the Government of Canada.

The Department of Fisheries and Oceans dispute resolution program has identified a \$5 million return on investment in its first two years of operation. I could go on with other examples, but I'd prefer

to turn to the single most important DR program currently under way in the federal government.

The Government of Canada is currently preparing to implement the biggest DR project in the history of the country. Under the *Public Service Modernization Act*, Deputy Ministers in Ottawa have until November 2004 to implement informal conflict management systems.

What's that? Essentially, it's a way of streamlining human resources dispute resolution. The traditional grievance process is very expensive and cumbersome. Certain departments estimate that a traditional four stage grievance costs approximately \$25,000 in direct costs, not counting the impact on productivity.

The Public Service Modernization Initiative will build on the successes we've had at DND, Justice and elsewhere. One key risk factor for this initiative is the question of capacity – our ability to deliver the

training, mediation and other DR services we need to implement this system across Canada. We need strong, sustained leadership to avoid the "safe" recourse to adversarial, rights based dispute resolution processes, as opposed to consensual, interest-based processes.

Strong leadership has made a difference. My sense is that the Public Service Modernization Initiative is evidence that senior politicians and public servants in Ottawa are committed to DR. If we are able to implement this program, our public service will change in very important ways.

Also, the fact that all of you dispute resolution leaders have taken the time to hear me out on a sunny Saturday morning is a great sign that we have the kind of private sector leadership we need to make DR work on such major programs as Public Service Modernization. Thank you for your attention.

New Arbitration Rules gain national support . . .

In an unprecedented collaborative venture, seventeen national law firms and representatives of major corporations joined the ADR Institute of Canada in the launch of their new rules for administered arbitrations and mediations. The business and legal communities agree that they will become the national standard.

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K. W. Perrett, Managing Director, Litigation, Bank of Montreal

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ADR Developments in the Energy Sector

by Dan Gallagher, Bennett Jones LLP

(This is an excerpt from Mr. Gallagher's original article. The article in its entirety will be available January 2004 on the National website at www.adrcanada.ca/news/publications.html.)

Current Trends in ADR

While this paper will largely focus on ADR developments and future directions in the Province of Alberta as it relates to the energy sector, it has to be kept in mind that the energy sector is also affected by developments seen in other parts of Canada, including those seen in British Columbia (where there are a great number of gas wells being drilled, in many cases at high cost due to the depths and locations of the wells), Saskatchewan (where there is also a great deal of oil and gas activity), as well as Newfoundland, Nova Scotia and New Brunswick (where we have not only drilling for oil and gas but numerous issues regarding pipeline facilities). Clients who previously had focused in the energy sector in Alberta, now appear to have interests in all or most of the jurisdictions mentioned above.

Movement towards ADR in the energy sector in Alberta is illustrated by the revised form of joint operating procedure presently being proposed by The Canadian Association of Petroleum Landmen (the CAPL Operating Procedure) which forms part of most joint operating agreements between oil and gas companies operating in Western Canada. The CAPL Operating Procedure that was last revised in 1990 is about to undergo a revision that will contain a dispute resolution procedure involving negotiation, mediation and arbitration. In all of the various revisions of the CAPL Operating Procedure up to and including 1990, there was no such dispute resolution procedure and the parties were simply left to litigate in the ordinary course unless the parties agreed otherwise.

Another major move in the energy sector using ADR can be seen through the involvement of the Alberta Energy and Utilities Board (EUB) setting up an ADR process which it describes as "Appropriate Dispute Resolution". The EUB has a regula-

tory role regarding oil and gas wells, pipelines, production facilities, electrical substations, and transmission lines in the Province of Alberta. It also has a role in resolving issues and disputes among affected parties, such as between energy companies and landowners. The move of the EUB to emphasize ADR, and in particular mediation, reinforces the fact that the Canadian energy sector is strongly moving towards an ADR model.

Following in the footsteps of the EUB, the National Energy Board (NEB), on July 18, 2003, announced its Appropriate Dispute Resolution Guidelines. The NEB is an independent federal agency that regulates several aspects of Canada's energy industry. Its purpose is to promote safety, environmental protection and economic efficiency in the Canadian public interest within the mandate set by Parliament in the regulation of pipelines, energy development, and trade. Much like the EUB, the NEB deals not only with matters that involve disputes or potential disputes between industry participants, but also deals with disputes between industry participants and landowners.

Very recently, a number of petroleum industry interests have come together to form the Company to Company Dispute Resolution Task Force (the C2C Task Force). The EUB, the NEB, and CAPL are represented on the C2C Task Force as are at least seven other petroleum industry interests. The C2C Task Force has a broad mandate which includes providing feedback on the proposed new CAPL Operating Procedure, including the dispute resolution clause, and promoting ADR generally in the energy industry.

As well, over the next 6 to 12 months, it is anticipated that there will be a pilot project in Edmonton and Lethbridge under which any party to litigation within those two judicial centers of the Alberta Court of Queen's Bench will, after the filing of defences and the 90 day period for filing an Affidavit of Records, be able to require the other parties to the litigation to participate

in a mediation. The onus will be on the party objecting to the mediation to go to Court in order to either postpone the mediation or to prevent it from occurring altogether.

In addition, the use of ADR clauses in Canadian, North American and international energy sector agreements, and in particular operating agreements, seems to be expanding fairly rapidly. This is particularly true where there are projects where large sums of money are invested. While such ADR clauses may have existed in the past and most certainly have been used in gas pricing contracts, the emphasis today on the larger projects appears to be to use a well thought out ADR clause that is not simply "boiler plate". In negotiating operating agreements, representatives of parties in the energy sector now appear to be willing to devote time to the ADR clause. Commercial mediation and arbitration rules are often referenced or set out in detail. As well, many clients are interested in exploring or using the appointment of an "expert", including the use of the ICC International Centre for expertise to select the expert if parties cannot agree on the expert to be used to resolve their dispute.

Overall, there appears to be a heavy move in the energy sector to move towards ADR as parties within that sector seek to find a resolution to their disputes that is both quicker and confidential, and helps to preserve business relationships.

ADR Clauses and Agreements

While arbitration has long been used as a means of resolving disputes under gas pricing contracts, there is an increasing use of dispute resolution provisions in other contracts used in the energy sector; and, in particular, in relation to operating agreements on significant energy sector projects. Typically, such dispute resolution provisions call for either negotiation, mediation and arbitration, or mediation and arbitration. In some such contracts in which the writer has had involvement in drafting the ADR clauses, disputes under certain

continued on page 15 . . .



Why Every Construction Project Needs a DRB

by Edward Gluklick

Construction disputes are often a result of the terms and conditions of some contracts being so lopsided in favor of their maker and manifestly unfair in the assignment of responsibility and risk to other parties as to render them an invitation to have a dispute rather than an instrument to facilitate the accomplishment of the purpose for which the contracts have been drawn.

Some construction disputes stem from errors, contradictions, ambiguities, omissions in the plans or specifications. Others arise out of the failure to anticipate and provide for delays (due to weather, labour shortages, etc.) when the time schedule for the project is determined.

Contract provisions are expected to be reasonable and fair to all parties. In some contracts that I've read, the provisions suggest that the reasonable and fair concept does not enjoy wide acceptance among contract drafters. In trying to protect the interests of their clients, contract writers tend to shift the liability for the cost of unknown circumstances to others.

To illustrate my point, here is what I found in a standard form of agreement between an owner and a construction manager that I recently reviewed:

The agreement was 16 pages long. It contained 11 articles, 14 pages of text, 31 sub-paragraphs, 87 sub-sub-paragraphs, and 53 sub-sub-sub paragraphs. There were approximately 1,100 lines of text and 8,500 words. In addition there were 11 pages of amendments and deletions to 63 of the aforementioned provisions.

This vision-testing language in small print was not, mind you, for someone that was going to do any of the work, but simply a manager – essentially a broker – of construction services who would help employ and manage the contractors that would do the work.

The contract's thrust was to hold the construction manager responsible not only for the knowable but the unknowable as well. The idea of reasonableness and fairness all but vanished in the ocean of its verbiage.

If you grant that brevity limits loopholes and verbosity has the opposite side effect, why then, write everything that can be thought of into a contract? Is there nothing that can be left to trust or confidence that parties will meet their obligations?

When should a DRB be appointed?

There being no shortages that can result in a construction dispute, it is not my intent to posit an overall cure for all of the conditions that can be encountered. It is, rather to suggest that a Dispute Resolution Board (DRB) set in place as early in the game as possible can be a positive factor in identifying and preventing problems that are likely to arise.

If put in place before contracts are let, the DRB will have time to examine the drawings for accuracy and to edit the documents and make recommendations for amendment or deletion of the provisions.

The stages at which a DRB can be set in place are when:

1. Preliminary drawings and draft documents are reasonably complete.
2. Drawings and documents are finished and ready for bids.
3. Contracts are in place and the work is ready to begin.
4. The first dispute has arisen.
5. All hell has broken loose and everyone wants out of the fire.

Stage one is easily the best time for setting up a DRB. The owner engages a person or a three-person board to look over the shoulders of those preparing the documents and drawings as the work progresses. The DRB thus has a chance to

make recommendations before the work is fully developed.

In stage two, the DRB has, after reviewing documents and drawings, the opportunity to ask questions like "How do you hide the 6-inch pipe in the 4-inch walls?" or "Do you think you can get the water to run uphill like it's shown on this grading plan?" or "How can you expect the excavator to pay for any underground conditions encountered that aren't noticed in the plans?" or perhaps "The roofer won't be finished until September and you plan the painting to be finished in August?"

However preposterous these questions may sound, you wouldn't have to go far to find the content or context of these questions and countless others like them in testimony or other documents that surface in cases that have gone to arbitration.

A DRB, at stage three, essentially serves as a referee that the principal parties to the contract have accepted to resolve disputes that arise. The advantage of having a DRB investigate and provide a recommendation cannot be overstated. But, like in a lawsuit or an arbitration, the arbitrator fights an uphill battle if, as has been suggested above, the provisions of the contract documents or drawings in respect of the dispute are faulty to begin with.

The DRB is obligated to treat everyone with as much reasonableness and fairness as can be mustered. However, when the contract documents are unreasonable or unfair, the DRB is saddled with having to be party to the enforcement of provisions that are, sometimes on the face, manifestly inequitable.

The DRB is, of course, not precluded from examining the documents and drawings for error or fault as is suggested above in stage one or two. But, with everyone's contract armor already in place, it is difficult for the DRB's recommendations for change to enjoy acceptance.

continued on next page 15 . . .

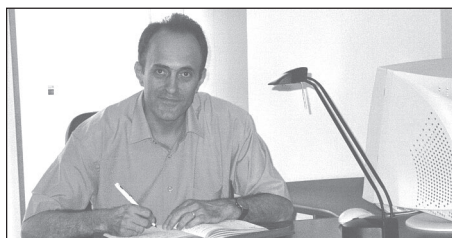
International Reports

Albania Commercial ADR Centre Project – Update

by Richard J. Weiler, LL.B., C.Med., F.I.A.Med.



ADR Centre Arbitrators and Mediators at the Opening Reception, June 5th, 2003.



Executive Director Fatbardh Ademi at the ADR Centre offices.

Readers will recall the article by Rob Nelson in the Winter 2002 issue of the Journal reporting on this ground breaking project to introduce commercial ADR to Albania. Quite a lot has happened since that report and this article summarizes those developments.

The World Bank financed Project, administered through the Albanian Ministry of Justice and executed by Gowlings Consulting Inc. had four main components: drafting modern mediation and arbitration legislation; creating an effective ADR Centre in Tirana, Albania; training mediators and arbitrators; and preparing a business and marketing plan to introduce ADR to Albania.

The implementation team, headed by Rob Nelson of Gowlings (a former executive director of the ADR Institute) included New York based ADR training design specialist, David Cruickshank, well-known international commercial arbitrator Andrew Berkeley of London, England, Professor Julie Macfarlane of the University of Windsor Law School, international

project management specialist Hugh Wilkinson of Burlington, Vermont and the writer. The team also included highly regarded Albanian lawyer, Përparim Kalo.

Activity and achievement on all aspects of the Project characterized developments in 2003, with the highlight being the official opening on June 5th of a fully functional Commercial ADR Centre in Tirana. The opening reception for representatives of the legal community, judiciary, government and private sector was widely reported on Albanian TV and other media.

Everything necessary for the smooth operation of the Centre including the development of business and marketing plans, a new logo, ADR Rules, forms, service agreements with neutrals, fee schedules and promotional materials evolved through the effective collaboration of the Centre's executive director, Mr. Fatbardh Ademi, the Centre's Board of Directors, Ms. Ariana Fullani, Ms. Tefta Zaka, Mr. Dashamir Korë, Mr. Vangelj Kosta and Mr. Artan Hoxha and the Centre's arbitrators and mediators all working in close consultation with Project team members.

Outreach has been and will continue to be a key theme for the Centre as the Executive Director continues to bring the benefits of ADR to the attention of the business and legal community, conducting numerous presentations and one-on-one interviews.

At the same time as these developments were unfolding another Project activity came to fruition. The Kuvendi Popullor or People's Assembly enacted Law 9090 on June 26th significantly broadening the scope of mediation in Albania. A previous law had provided for "social" mediations and was being successfully used as a framework for the mediation of a variety of community and family disputes. The new law is largely based on the new UNCITRAL Model Law on International Commercial Conciliation. The Project team believes that this is the first enactment of a national law based on the new UNCITRAL model. It is hoped that the more complex commercial arbitration law proposed by the Project team will be enacted soon.

Much has happened between the April 2002 Project inception mission and the October 31, 2003 conclusion of this phase of the ADR Centre's development. Much remains to be done, with the primary focus being on getting cases in the Centre's door for mediation and arbitration. As this is being written it is expected that the Gowlings team will continue to be involved in the next phase of the Centre's growth.

UNCITRAL Report

In 2002, the United Nations Commission on International Trade (UNCITRAL) adopted a *Model Law on International Commercial Conciliation*. The adoption of the UNCITRAL Model Law by States will provide a common framework for dispute resolution in an international commercial context. Canada and its provinces and territories could adopt the model law in the future.

Adoption of the UNCITRAL *Model Law on International Commercial Conciliation* by Canada and the provinces and territories could assist in the creation of a global approach to commercial dispute resolution. It could also provide government with a framework for dispute resolution. However, there are some issues relating to the kind of enforcement mechanisms that would be necessary to support any agreements reached through the process mandated by the Model Law which will have to be resolved first.

Model Laws have been adopted in Canada in the past. As part of a 1985 UNCITRAL initiative, the Canadian federal, provincial and territorial jurisdictions adopted the UNCITRAL *Model Law on International Commercial Arbitration*. That model law facilitated the conduct of international commercial relationships by providing a common framework for arbitration in an international commercial context. At the federal level, adoption of the *Commercial Arbitration Act* (which implemented the UNCITRAL *Model Law on International Commercial Arbitration*) provided a federal standard for arbitration involving the Government of Canada.

Regional Reports

British Columbia

The British Columbia Arbitration and Mediation Institute (BCAMI) has had an exceptionally busy and challenging time of late.

Last June the British Columbia International Commercial Arbitration Centre, faced with the termination of all provincial government funding, approached the BCAMI to explore the possibility that the BCAMI could administer the activities carried on by the Centre. Following brief but intense negotiations between the Centre's trustees and BCAMI directors, an agreement was reached that enabled the two organizations to retain their independent identities while making it possible for both to survive financially by occupying common premises and combining administrative costs.

Patrick Williams, C.Arb., a former BCAMI president and current director, assumed the role of Governing Trustee, and several BCAMI directors also became trustees of the Centre. Pat subsequently resigned as a voting member of the BCAMI board but remains an ex-officio member. Similarly, Clayton Shultz, C.Arb., the current BCAMI president, has become an ex-officio member of the Board of Trustees.

The continuing separate existence of the Centre is of considerable importance to the ADR community in British Columbia because, among other things, section 22 of the BC Commercial Arbitration Act provides that unless otherwise agreed between the parties, the Centre's rules apply to domestic commercial arbitrations conducted in the province.

We have some distance to go before we can call the combined operation an unqualified success, but Rosemary Mohr and her hardworking staff, the Centre's trustees, and BCAMI board members are doing their best to deliver the benefits of coordinated ADR to the community. We also have to acknowledge the special contribution of the two former Centre staffers: Peter Grove, Executive Director, and Suzanne Kieley, Administrator. Peter has

been unstinting with his assistance, on a voluntary basis, and Suzanne delayed personal plans for three months to share her expertise with us.

This new, close cooperation between the two senior ADR organizations in BC will provide many potential benefits for both practitioners and users of ADR services in this province.

Ontario

In the last issue of the Canadian Arbitration and Mediation Journal, the Ontario Institute signalled a focus on education and standards. Our Institute does not deliver core mediation or arbitration training. Instead, we review courses offered by our members against our standard for forty hours of core training and advertise those that meet or exceed the standard as Approved Courses. Member trainers who wish us to review their courses make formal application to the Institute, and we advertise those we accept on our website and in other Institute materials and recommend them to callers looking for training programs.

Our Institute does, however, have an interest in continuing education and offers seminars and events with an educational component several times a year. In October this year, we were fortunate to have Chris Moore with us for a full day of advanced mediation training with an emphasis on managing complex, multi-party disputes. We will have Bernie Mayer with us in February 2004 for a training session on the heart of mediation – dealing with the conflict in the room.

Ontario often combines learning with celebration. The most recent event of this nature was our 2nd annual Meet 'N' Greet in November, an opportunity to recognize Chartered Members and encourage Chartering. It was enlivened by a presentation, "W(h)ither Mediation?", a panel discussion on the present status and future direction of mediation in the Province of Ontario. Four well-known Ontario practitioners – Calum MacLeod, June Maresca, Richard Russell and Rick Weiler – led a

discussion of such questions as: Where is mediation going? What lessons have we learned over the past 15 years? Are mediators constrained by their success? How can mediators stay "fresh"? What happened to "pure mediation"? What has been the real impact of OMMP? Needless to say, it was thought provoking and humorous and had lots of opportunity for audience participation.

The next event on our schedule is our December Board Meeting, a seasonal celebration of the busy and productive year behind us and our hopes for the year ahead of us. We will certainly take the opportunity to remember our affiliate Institutes. We wish all of you across Canada a very happy holiday season and successful ventures in 2004.

Atlantic

(The following is an excerpt from the President's address at the ADR Atlantic AGM)

At the ADR Atlantic AGM, held October 17th in Halifax, President Harrison Goodwin described the challenges facing the Institute and the progress made during the year. He reported that recent National/Regional strategic planning opens the door to new opportunities for the Region.

ADR Atlantic's Board of Directors has been working throughout the year. Directors met the third Monday of every other month, whilst the Executive Committee met between months. Courses and programs continue to run. The Nova Scotia Small Claims Court Student Mediator's Program has been well received, and the Education Committee is looking at ways to may it better. There is growing support for a new business plan which should make both National and the Regional Institutes relevant to not only service providers, but – of equal importance to the future of ADR – the users of the service also.

The Atlantic Region participated in both face-to-face weekend National/Regional strategic planning sessions held this year. Strategic planning has been ongoing since before the amalgamation of the Arbitration and Mediation Institute of Canada (AMIC), with the Canadian Foundation for

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dollar amounts are dealt with by a single arbitrator, while disputes over certain dollar amounts are dealt with by a three-arbitrator panel. As with the CAPL Operating Procedure, it is common to see in such agreements a provision that either party can ask for mediation, but the same provision normally provides that if a mediator is not agreed to, no mediation takes place and the parties proceed to arbitration.

Dispute resolution clauses in the significant energy sector agreements also are increasingly making reference to disputes that are not to be or attempted to be resolved by arbitration or mediation but are to be resolved by an "expert", with such expert to be chosen by the ICC International Centre for Expertise if the parties cannot agree on whom that expert should be. The use of an expert as opposed to arbitration or mediation (or both), usually involves a dispute that is a very narrow technical issue that may arise under the operating agreement, leaving the balance of the potential disputes under the agreement to be dealt with through mediation and/or arbitration. In developing such "expert" dispute resolution processes, some form of fair procedure still has to be incorporated; including the expert meeting with the parties jointly to define the future conduct of the matter, ensuring that all communications between the parties and the expert are made in writing with copies of such material provided simultaneously to each party to the dispute, and prohibiting meetings between the expert and either party unless both parties have a reasonable opportunity to attend any such meeting.

Conclusion

Private industry, administrative tribunals and governments are moving within the energy sector as a whole to an ADR model for resolving disputes. The energy sector, due to both its nature and governmental requirements, needs constantly to look for a means of resolving disputes between industry participants and with the public. As a result, there are few industry sectors that come to mind that are more in need of establishing appropriate dispute resolution processes than the energy sector. Increasingly, the energy sector is recognizing the benefits of more efficient

resolution of disputes, confidentiality, and preservation of business relationships that are associated with ADR. The increased use of experts to resolve certain narrow areas of dispute under operating agreements used in the energy sector raises interesting issues as to whether this process can be controlled so as to be fair to all parties concerned and whether or not such expert decisions will avoid judicial review, with the parties viewing the possibility of such judicial review (at least when they sign the agreement) as being something that is highly undesirable.

Overall, the move towards ADR in the energy sector is strong and is already producing benefits in both industry/industry and industry/public disputes.

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Parties who appoint a DRB at stage four or five do so at their own risk. By then, the DRB would be refereeing disputants who are already engaged in a battle and unlikely to heed intervention. It is best to have a set process and backup DRB in place in advance of the dispute. Citing a comprehensive dispute resolution process (like those of the ADR Institute of Canada, Inc. rules for administered arbitrations) and mandating a DRB at the earliest stages of contract development will help you prepare well in advance of a dispute.

The following will give you an idea of a few of the situations that actually happened and the questions as a DRB might have asked had it been employed at the beginning of a project:

1. The soil tests cover the whole site and their centres are too far apart.

Why aren't more test holes drilled in the roadways, parking areas, and building foundation locations on small enough centres to tell us where the good stuff is and where there's nothing but bearing problems to solve?

2. The finished floor elevations will produce acres of land balancing to do and mountains of soil to be removed.

Why can't the elevations be changed so that a king's ransom doesn't have to be spent on moving dirt around without any possibility of benefit?

3. The fast-track scheduling is based on finished drawings for in-ground construction elements being done early enough to allow for construction in warm weather.

With the staff the architect has available, how can the hundreds or details needed be put on paper soon enough to prevent the job from sliding into winter conditions?

4. The original cost estimate has expanded by a factor, not a percentage.

What accounts for the extreme disparity between what the estimate was at the beginning and what it is now?

The conditions described were real. The questions posed were asked. Alas, the answers in the questions became irrelevant. The damage had already been done.

Advantages of Appointing a DRB

The appointment of one or more people who are thoroughly seasoned in construction to serve as a DRB can be a blessing because:

1. The selection of the individual(s) is made by mutual agreement of the principal parties to the contract. The likelihood that the interest of all parties will be served and that disputes will be resolved is improved.
2. A DRB brings to the table the real possibility of infusing a high level of trust among the parties.
3. The periodic presence of "on-call" status of the DRB provides the comfort of knowing that an incipient dispute can be quickly investigated and monitored until the matter has been resolved.
4. Good news and bad news can be delivered early enough for the disputants to "bite the bullet: and get on with the job."

Personal Experience

Recently I sat on a panel of arbitrators with a veteran construction lawyer and a retired architect / construction company executive.

Throughout the hearings, the lawyers for both the claimant and the respondent conducted themselves as if they were in the courtroom. They were expert in the advo-

continued on next page . . .

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cacy, skilled at answering their opponent, and thorough in their presentation of their proofs.

All through the many days of the arbitrators' polite and friendly admonishments to "get on with it" the excruciatingly repetitive testimony with the objections continued unabated. There were five binders containing hundreds of exhibits. They included documentation of almost everything that happened on the project. There assembly was, indeed, a feat to be admired.

Contemplating the time, energy and expense of bringing the matter in a conclusion, my fellow arbitrators and I agreed that the dispute was a prototypical construction quarrel: on in which an effective DRB would have made justifiably short shrift of the proclamations of culpability trumpeted by both sides and virtually all, except for main arguments, of all other allegations made. At almost any stage of the dispute before the arbitration took place a DRB could have saved a ton of money and valuable time for both parties.

Conclusion

The DRB concept is, alas, like a voice in the wilderness. When suggested with a viable case administration plan, it is dismissed as an unnecessary expense: a duplication of the effort of and a challenges to the authors of the documents and the creators of the plans. Even if the idea takes root, it is often viewed as an usurpation of the authority of those who must, at all times, be boss. Thus the opportunity to avoid much of the conflict that arises during a construction project is lost.

A long time ago a flying instructor gave me a piece of good advice. It was "Learn from the mistakes of others. You probably won't live long enough to make them all yourself." Keeping that in mind, whenever you can, plug for the use of competent contacts, rules for administration and a DRB. You can be sure that construction practitioners who may sit on the board will have a treasure chest filled with tales of mistakes that you can try to avoid in whatever construction project you or your clients may become involved.

Regional Reports continued from page 13 . . .

Dispute Resolution (CFDR) in 2000. Regional Institutes have asked that the Memorandum of Understanding under which we affiliate be brought into line with new perceptions and realities. Directors have been working to renew the organization in ways that recognize and value the Corporate Members and the business and legal communities they represent. The new *National Arbitration Rules* are a step in this direction, but they must be promoted. Image is important, and a set marketing package will be essential so everyone hears the same message in the same, impressive, way. Practitioner members involved in active promotion of the *Rules* have an opportunity to make themselves as well as the *Rules* well known in the Region.

There are a significant number of corporations operating in Canada, from the lowly landlord in Come By Chance, to the major brand oil company, headquartered in Calgary, that automatically include arbitration clauses in their contracts. The same is true for a host of other business categories. Many provincial and federal government departments and agencies have a use, or even a need, for qualified, independent arbitrators and mediators.

Federal and provincial spokesmen have acknowledged that they will favour the use of the services of members of the Institute, especially those who hold the C.Arb. and C.Med. designations. This bodes very well for the candidate member at the entry level who is desirous of gaining creditable field experience.

During the ensuing year, we shall be asking members of this Institute, and/or even friends of the Institute here in Atlantic Canada, on an individual basis to liaise, one-on-one, with friends they may have in various governmental departments and agencies, to promote the use of C.Arbs. and C.Meds. from within the region. An immediate consequence of this will be cooperation between this Institute and various government sources, to provide education leading towards the C.Arb. and C.Med. designations.

Most of us have joined this Institute to enhance our business prospects. This can happen now, but in order to reap the rewards of being arbitrators and mediators, each one of us must first invest some time and effort.

We have the course programs. Our curricula and standards are the best in the land, and they are recognized, and now we have *National Arbitration Rules*. What a golden opportunity! Let's get to work!

Mark Humphrey
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Benefits of Membership with the Institute

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- Competency and Ethical Standards
- Eligibility for listing in ADR Connect
- Preferred Liability Insurance Coverage

For Corporate Members

- In-house presentations in local offices
- Arbitration and mediation practice handbooks
- Profile in our materials and a link on our website
- Involvement at the national and local levels
- Identification as a leader in ADR

For All Members

- Journal, handbooks, rules for administered ADR
- Learning and networking opportunities
- Exchange of knowledge and experience
- Member reductions on some products and services
- Annual conference and annual general meeting
- Advocacy and promotion of ADR
- A say in governance of the Institute



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