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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 parties d'une dispute avec une tierspartie professionnelle 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.



Message from the President



*P. David McCutcheon,
C.Arb., President
of the ADR Institute
of Canada, Inc. /
Président de l'Institut
d'Arbitrage et de
Médiation du
Canada Inc.*

The Institute has just celebrated its 30th anniversary with a very successful annual general meeting and seminar launching the new National Arbitration Rules in Western Canada.

The success of this conference, which was attended by a considerable number of ADR professionals, was a confirmation that the Institute has reached a new maturity. The pioneering work has been done and the Institute is a well-established national platform for ADR professionals and users. The signing of the C2C agreement this year marks a new high in the strong relationship between the Institute and the business community. The designations of C.Arb. and C.Med. which are unique to the Institute are now receiving widespread recognition in a very competitive marketplace.

The development of new National Rules for arbitration and mediation is a key component in firmly establishing the national role of the Institute. What's next?

All of the above is merely the starting point for 2005. There are a number of business initiatives which I hope we will be able to implement within the next year to improve both the visibility and the reputation of the Institute. We can take a new approach in our 2005 Business Plan.

Although we are primarily a professional organization, the Institute is also a business serving the needs of both ADR professionals and ADR users in an effective and efficient manner.

We have established committees which will draw their membership not only from

national and regional directors, but also from the general membership. The committees will have the task of defining the priorities for the Institute for the next year in key business areas. These will include improving marketing and visibility for the Institute, and enhancement to member services and benefits.

There are a number of obvious objectives which are high on the priority list. We want to increase our administration business, and in doing so, build and re-establish links to the business and legal communities. The objectives also include increasing the number of members and increasing member communication and benefits. Thirdly, there are many members of the Institute and others who have not applied for the C.Arb. or C.Med. designations. We will be taking steps to encourage our qualified members and others to apply for, obtain, and use the designations.

If there is one unifying and efficient theme to this year's objectives, it is to firmly establish the Institute as a long-term reliable provider of first class ADR services across Canada. To that end, we will be talking directly with particular groups of users, and trying to engage them directly in the affairs of the Institute.

Finally, we hope to offer our membership access to more events during the course of the year, sponsored individually by the Institute and jointly with other organizations such as the Canadian Bar Association, Regional Affiliates, other ADR organizations and trade organizations.

I have asked each committee to provide a recommendation for one new initiative by the January board meeting. I will report regularly on our progress. In the meantime, I am asking every member to help by recruiting a new member, applying for a chartered designation, or offering to assist our hard working Board of Directors. We are setting the course for the next 30 years. We encourage you to join us.

P. David McCutcheon, C.Arb

Lionel J. McGowan 2004 Awards of Excellence

The Lionel J. McGowan Awards of Excellence are awarded annually for contributions to the development of ADR and the support of the Institute at the national and regional levels. The awards were presented this year at the Institute's AGM and conference held in Vancouver on November 19, 2004.

This year's winner of the Regional Award is Gary Fitzpatrick, a commercial mediator, facilitator, arbitrator and trainer in British Columbia. Not only has Gary contributed enormously to the development and success of the British Columbia Arbitration and Mediation Institute (BCAMI), he has also made an outstanding contribution to the promotion and development of ADR in British Columbia and other provinces.

Gary's career in dispute resolution is truly remarkable. As an arbitrator and mediator, he has successfully resolved over 2,500 business disputes and complex multi-party actions in an extensive variety of commercial matters across Canada. Gary was a successful litigator for more than 20 years, with a practice that spanned a wide variety of commercial disputes. Committed to resolving disputes outside the court room since his initial training in 1986, Gary is a leading practitioner and trainer in the field.

Gary has been a prominent member of BCAMI and the B.C. International Commercial Arbitration Centre rosters. He has trained BC Supreme Court Judges in skills necessary to the pre-trial settlement conferences / mediation initiative created by Chief Justice Bryan Williams. As coach and trainer, Gary has served the BC Justice Institute, Conflict Resolution Certificate Program, Continuing Legal Education, ICBC Evaluator Training Program, and the Forest Industrial Relations negotiation and mediation initiative. He chaired the mediation sub-committee of the ADR Task Force on Leaky Condos. He is a trainer in the BCAMI arbitration training program



*Gary Fitzpatrick,
winner of the
Regional Award.*

and generously lends his expertise to other BCAMI members as a mentor and trainer.

Gary joined BCAMI in 1986 and became a director soon after. He played a key role in developing standards and processes for the Chartered Mediator credential and chaired the Education / Credentials Committee for several terms. He was elected President in 2001 at a time of great change, and led the BCAMI contingent in lengthy talks with other ADR organizations in BC to explore an alliance to expand opportunities for members and eliminate confusion in the public perception of ADR. The cooperative relationships that developed led to another, in many ways more significant, opportunity. In June 2003, BCAMI took on the management of BCICAC.

Gary is a credit to our calling. He represents excellence in the practice and promotion of dispute resolution. His outstanding commitment and service to the growth and development of the Institute and ADR in British Columbia make him truly worthy of this honour.

The National Award winner is S. Noel Rea, Q.C. Noel has demonstrated a commitment to the development of excellence in the practice of commercial ADR for many years. He served as the Executive Director of the Canadian Foundation for Dispute Resolution (CFDR – one of the founding organizations of the ADR Institute of Canada) between 1995 and 1998. During that time, he had a significant role in a campaign to raise awareness of ADR as a valuable tool for resolving business disputes. He oversaw development of promotional and educational materials and the implementation of a mail campaign. He spoke at seminars, conferences, and other training sessions across the country. He assisted in the development of a resource library available to the corporate community, and he provided information to corporate and law

*Noel Rea (left)
accepting the
National Award
from Institute
President David
McCutcheon
(right).*



firm members to assist them in evaluating the value of alternative dispute resolution for particular cases. He also assisted them in identifying suitable clauses, rules, and third-party neutrals for disputes.

Noel served on the Board of Directors of CFDR prior to the formation of the ADR Institute. He has been a director of the ADR Institute since 2000. In this capacity, he has advocated for strategies and products to serve the business and legal communities. He assisted in the development of the new National Arbitration Rules, and he currently serves on a committee to develop new national mediation rules. He promotes appropriate dispute resolution, and he advocates the role of the ADR Institute of Canada as the leading ADR institution to assist with the resolution of business and other disputes.

In this past year, Noel made a significant contribution to dispute resolution in Canada. He served on the "Company to Company Task Force" which produced a report with a detailed protocol for dealing with disputes in the oil and gas sector. The protocol, which was published as the handbook, *Let's Talk*, was launched with the support of government boards and industry associations at a successful conference in Calgary. The protocol has significance for the ADR Institute, as it is the first major industry-wide commitment to ADR processes, with special recognition of the rules and services of the ADR Institute of Canada.

Noel clearly demonstrates his commitment to ADR and is a highly-effective advocate for the ADR Institute. His ongoing contributions are worthy of notice and recognition, and his significant contributions during the past year make him a worthy recipient of the National McGowan Award.

Are there “Interests” other than Money?

by Nabil Oudeh, C.Med., President and CEO of the Centre for Conflict Resolution International (CCR International)

Are there interests other than money in business disputes? Absolutely! But it is often up to the mediator to determine and draw out those underlying interests. In day-to-day business interactions, individuals rarely explore the process of moving from positions to interests. So, when a dispute erupts, the parties are often unaware themselves and are not able to articulate their real interests. When choosing to enter into a mediation to resolve a business dispute, individuals can usually identify their short-term objectives before they can identify their underlying interests. Consequently, the parties will say that they are seeking a faster resolution and they've heard that mediation can get “quick results”, and save them money on costly legal fees, not to mention the lost time that a drawn out process would involve.

At the recent ADR Institute of Canada conference on *Business ADR: Commercial Arbitration and Mediation* in Vancouver, British Columbia, a panel discussion on the theme outlined several other interests that the parties may not be able to articulate immediately but, in fact, may be more significant motivators than money.

They included:

- a desire to reach a finality of the process;
- predictability of outcome by reaching settlement as opposed to a litigation process;
- an importance placed on maintaining positive relationships;
- aspirations to build and maintain trust, respect, fairness, business reputation, personal reputation, prestige, personal integrity, “face”, professionalism, and competence; and
- a wish to avoid the trial-matters such as loss of confidentiality, the time expended to prepare and be in a trial, the energy

being used for the litigation, and the high stress levels are major interests.

It is clear that ignoring such underlying interests would be a matter of concern. But how does a mediator bring these interests into the discussion? The following is a summary of five key phases of helping parties move from positions to talking about the types of interests mentioned above.

1. Pre-meeting caucus.

Before a meeting occurs, in order to uncover interests, each party in dispute should be encouraged to think about the other's perspective. Asking each party separately what they think the other party's interests are, what they like about their ideas, what parts of their ideas are challenging, and generally asking them to do a role reversal in order to identify the factors that are blocking the other side from reaching settlement is a useful and enlightening process. By helping the parties to focus on these constructive questions, each party is able to focus on the other's interests instead of their own narrow position.

2. Set the initial meeting tone.

When beginning an interest-based mediation, the first and foremost task is to set the tone of the conversation in a way that allows for the parties to think beyond their own positions. The simple act of reiterating some of the common goals gleaned from the individual caucus will often remind the parties about the other's perspective and build a collaborative setting from the start. Developing and agreeing upon common ground rules provides a safe positive platform to fall back on when needed.

3. Define and prioritize issues.

After a collaborative tone is set and the session goals are outlined, it is possible to draw out the issues prior to in-depth discussion. Issues often blend, and disputing



Nabil Oudeh, C.Med.

parties must decide which issues are most important and warrant discussion. By avoiding discussion at this preliminary stage, issues can be isolated and prioritized.

4. Explore interests.

It is here that important perspective change can occur. By encouraging each party to review methodically and understand the other's interests, you will find solutions not far behind. This process includes the gathering and exchange of information, specifying each individual's underlying interests, identifying those interests that are common, and forming a neutral goal statement based around each interest.

5. Generate options and form an agreement.

The final stage of getting beyond the monetary interests occurs when disputants feel they can move to concrete solutions. The parties are able to review the goal statements, generate options for meeting the goals while recognizing the underlying interests, determine a criteria for fairness in meeting those goals, and make an agreement that specifies who will do what, when, where, and to what degree.

It is important to note that throughout this process it is the proficiency of the mediator and the manner in which he/she conducts the mediation that has a direct impact on the parties' ability to explore underlying interests. By following the stages identified above and keeping the parties' interests at the forefront, the mediator will be effective at facilitating agreements with a very high likelihood of implementation. There is no doubt such mediations will yield repeat business and referrals in a way that the oversimplified addressing of the monetary interests never could.

La Médiation Des Conflits De Travail Est-ce Qu'il Existe D'autres Intérêts Que L'argent?

par Nabil Oudeh, med. c.,
Président de CCR International

Existe-t-il d'autres points d'intérêts que l'argent dans les conflits de travail? Bien sûr que oui ! Toutefois, c'est souvent au médiateur que revient la tâche de déterminer et de mettre en relief les intérêts sous-jacents. Dans leur relation de travail quotidienne, les gens expérimentent rarement le processus de la prise de position vers les intérêts. Donc, lorsqu'un conflit éclate, les parties ignorent elles-mêmes leurs intérêts réels et ne peuvent les identifier. Lorsque les gens ont recours à la médiation pour résoudre un conflit de travail, ils peuvent généralement déterminer leurs objectifs à court terme avant de pouvoir identifier leurs intérêts sous-jacents. Par conséquent, les parties diront qu'ils cherchent un règlement rapide et qu'ils ont appris que la médiation procure des résultats en peu de temps, qu'elle fait réaliser des économies en frais juridiques, sans compter le temps consacré à un long processus.

Lors de la conférence tenue récemment à Vancouver, Colombie-Britannique par l'Institut d'arbitrage et de médiation du Canada ADR, intitulée: *Business ADR: Commercial Arbitration and Mediation*, on a identifié, en discussion plénière, d'autres intérêts que les parties pourraient ne pas être en mesure d'identifier d'emblée, mais qui pourraient être plus motivants que l'argent.

Ce sont les sujets suivants:

- la volonté de donner au processus un caractère définitif;
- prévoir le résultat par le biais d'une entente plutôt qu'un procès;
- l'accent mis sur le maintien d'une relation positive;
- l'aspiration à bâtir et à maintenir la confiance, le respect, l'équité, la réputation de l'entreprise, la réputation personnelle, le prestige, l'intégrité personnelle, "l'image", le professionnalisme et la compétence; et
- le désir d'éviter un procès. Les questions telles que la perte de confidentialité, les grandes périodes de temps à préparer le procès et à y assister, l'énergie dépensée à l'égard du litige et le haut niveau de stress sont des points importants.

Il est évident qu'ignorer de tels intérêts sous-jacents serait préoccupant. Comment un médiateur introduit-il ces intérêts dans une discussion? Ce qui suit est un survol des cinq étapes clés qui aident les parties à déplacer leurs positions vers un dialogue portant sur les types d'intérêts relevés ci-haut.

1. Une rencontre préliminaire.

Avant la rencontre, afin de relever les intérêts, chaque partie impliquée dans le conflit devrait être invitée à songer à la perspective de l'opposant. On isole les parties et on leur demande ce qu'elles croient être les intérêts des autres, ce qu'elles aiment de leurs idées, quelles portions de leurs idées sont motivantes et, en général, on demande d'inverser les rôles afin d'identifier les facteurs qui empêchent la partie adverse d'en venir à une entente. Ce processus est utile et fructueux. En aidant les parties à fixer leur attention sur ces questions positives, chacune des parties peut centrer son attention sur les intérêts de l'autre plutôt que sa position limitée.

2. Donner le ton à la rencontre initiale.

Lorsque que l'on débute une rencontre axée sur les intérêts, la première et la plus importante des tâches est de donner le ton à la conversation de manière à amener les parties à penser au-delà de leur position. Le simple fait de réitérer les objectifs communs recueillis durant la rencontre préliminaire individuelle rappellera généralement la perspective des autres et établira un climat de collaboration dès le départ. L'élaboration et l'adhésion à certaines règles communes permettent de revenir en terrain neutre et positif en temps opportun.

3. Définir et établir la priorité des questions.

Lorsque le climat de collaboration est établi et que les objectifs sont déterminés, on peut mettre les sujets en relief avant d'entamer une discussion détaillée. Les sujets sont souvent pêle-mêle et les parties doivent décider lesquels sont les plus importants et ceux qui doivent être discutés. À cette étape préliminaire, on doit éviter la discussion afin d'isoler les sujets et d'établir un ordre de priorité.

4. Étudier les intérêts.

C'est à cette étape que d'importants changements de perspective peuvent sur-

venir. Si on invite chaque partie à comprendre les intérêts des autres d'une façon méthodique, les solutions sont à portée de la main. Ce processus comprend la cueillette et l'échange d'information et l'énoncé des intérêts sous-jacents de chacun. De ces derniers, il faut identifier ceux qui sont communs et mettre sur pieds un programme d'objectifs neutres propres à chaque intérêt.

5. Produire des options et préparer une entente.

L'étape ultime pour en arriver à aller au-delà des intérêts monétaires débute lorsque les parties adverses sont confiantes de pouvoir passer à des solutions concrètes. Les parties peuvent réviser le programme d'objectifs, identifier des options afin de rencontrer les objectifs tout en reconnaissant les intérêts sous-jacents, déterminer des critères d'équité pour rencontrer ces objectifs et formuler une entente qui spécifie qui fera quoi, quand, où et à quel niveau.

Il est important de noter que durant toute la durée du processus, la compétence du médiateur ou de la médiatrice ainsi que sa manière de mener la médiation ont un impact direct sur la facilité qu'auront les parties à relever les intérêts sous-jacents. En suivant les étapes décrites et en plaçant les intérêts des parties à l'avant-plan, le médiateur sera en mesure d'instaurer une entente qui aura de fortes chances d'être appliquée. Les médiations qui suivent cette méthode garantiront sans doute une fidélité de la clientèle et des recommandations qu'une méthode axée sur les intérêts monétaires n'aurait pu procurer.



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Issues Concerning the Specialist Arbitrator

by Clayton Shultz, C. Arb.,
Clayton Shultz & Associates

This article has been edited. The original can be found at www.adrcanada.ca under *News and Information, Recent Publications*.

This paper will focus on the extent to which arbitrators selected for their specific expertise may properly rely on their education and experience in conducting their proceedings and preparing their awards. It will also touch on an approach to the dilemma faced by non-lawyers who must decide difficult legal issues during the hearing or while crafting their awards.

It is useful to reflect on the reasons that parties agree in advance to submit future differences to arbitration rather than relying on the court system. The (frequently wrong) perception that an arbitrated solution will be less costly than full court proceedings is a major motivator. In order to achieve this expected economy, it is common for them to identify a class of person with specialized talents to adjudicate disputes in the specific area that the agreement covers: engineers for construction issues, professional accountants for profit sharing determination, business appraisers for shareholder buyout matters and so on. It is in their minds that such persons will use their expertise to quickly isolate the relevant issues and solve their problem so that they may continue their endeavour in harmony or part company as friends. In short, at the agreement stage, all problems are remote and solvable with a bit of common sense.

Then the dispute erupts. A problem to be solved becomes a fight to be won – lawyers are retained and the matter proceeds to a hearing. The hearing takes on all of the characteristics of a courtroom trial: witnesses testify under oath, procedural objections are presented by both sides in 75 page bound briefs of the settled decisions on the topic, and all of the evidentiary aspects of the matter must be presented as though the arbitrator were a judge. Such parties now find themselves at the mercy of arbitrators who appear to be unable to apply the specialized expertise for which they were

appointed and lacking the legal knowledge that the process assumes they have.

These two issues may, however, be addressed with more authority and comfort than is generally understood.

The concept of adjudicators considering materials that are not proven at the hearing is called “judicial notice.” The “facts” so considered are called “notorious facts”. Both are defined as follows¹:

Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party.

Facts described at (a) are “facts which are known to intelligent persons generally”, and the convention of accepting them is necessary to prevent trials from becoming mired in endless testimony that advances neither case; it needs no further discussion.²

But those referred to at (b) are the more controversial. As one author put it: “The border-line between judicial notice and evidence is peculiarly ill defined.”³ Wigmore sets out the ability or perhaps even the obligation of the tribunal to resort to referring to “indisputable authority” as follows:⁴

But whether the matter is so accepted, or what its tenor is if accepted, may not be within his recollection, or even may not ever have been known to him. Hence, he is entitled to aid himself in reaching a decision by consulting *any sources* of information that serve the purpose – official records, encyclopedias, any books or articles, or indeed any source whatever that suffices to satisfy his mind



Clayton Shultz, C.Arb.

in making a ruling. (emphasis in the original)

As to whether these techniques are available to arbitrators, useful guidance is to be found in the *Statutory Power Procedures Act* (SPPA) which provides as follows:⁵

16. A tribunal may, in making its decision in any proceeding,
 - a. take notice of facts that may be judicially noticed; and
 - b. take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge.

Two important restraints on the wholesale use of this technique must be emphasized. First, the “facts” that the tribunal intends to include in its deliberations must be obtained from publications and sources that

...are indisputable and can be ascertained from sources to which it is proper for the judge to refer. These may include texts, dictionaries, almanacs, and other reference works, previous case reports,...

The facts cannot be known to the tribunal in his personal capacity. As Wigmore explains:⁷

There is a real but elusive line between the judge’s *personal knowledge* as a private man and these matters of which he takes judicial notice as a judge. The

... continued on page 12

1 Sopinka, Lederman, and Bryant: *The Law of Evidence in Canada*, 2nd Ed. 1999, p 1055
2 *ibid*
3 GD Nobes *The Limits of Judicial Notice*, LQR Vol 74 No 203 Jan 58
4 Wigmore, Vol IX, p. 720
5 R.S.O. 1990, c22
6 Sopinka, p. 1058
7 Wigmore, p. 722





30 1974-2004
Years / Ans

Celebrating 30 Years of Leadership

The Institute celebrated its 30th anniversary with a day-long program of events at the Hyatt Regency in Vancouver on November 19, 2004. The day began with an Annual General Meeting, followed by a cutting-edge conference on commercial arbitration and mediation. The McGowan Address and McGowan Awards were presented at the McGowan Luncheon. The day ended with a celebratory cocktail reception.



Barry Effler, outgoing President, accepting a token of appreciation from the new President David McCutcheon.



Tom Smith and Deborah Howes, C.Arb., C.Med. enjoy the catering during the AGM reception.

Annual General Meeting

Barry Effler, outgoing President, referred members to his remarks in the 30th Anniversary Journal. Looking back, he wondered if the founders of the Arbitrators' Institute of Canada in 1974 envisioned the Institute we have today, especially in regard to the new National Arbitration Rules and administration services. ADR is now a maturing field. This will create new challenges as we move into the future. One is solidifying our position as Canada's national dispute resolution centre. Another is embedding ADR strengths and practices in our local communities. Conflict resolution is not just the province of a few – the skills are needed by all professionals, communities, and families. But the need for competent professionals continues. Our Chartered Arbitrator and Chartered Mediator designations recognize advanced training and experience.

The Institute reported a successful fiscal 2003 and a promising 2004. Mr. Effler thanked outgoing Directors for their contributions. He named and welcomed the Directors who will serve in the coming year.

The Institute will continue to support a high level of dispute resolution in all fields, and will work with its clients to be sure they have the services they need. The expertise and contributions of Members and Directors will ensure success in the next 30 years.

BusinessADR: Commercial Arbitration and Mediation

Twelve of Canada's leading law firms joined the Institute in presenting a highly successful conference on BusinessADR: Commercial Arbitration and Mediation. The conference, which introduced the National Arbitration Rules in western Canada,



Spanning the years: Barry Effler, President 2002-2004, Donald Andrews 1990-1991, David McCutcheon 2004-Present.



Gerald Ghikas, Q.C., C.Arb., Edward Chiasson, Q.C., C.Arb., Donald Andrews, C.Arb.

was attended by leading ADR, legal, and business people. Sessions were sponsored by law and ADR firms and led by experts in the field. Excerpts from some of the papers are included in this Journal. Others will be posted on the Institute's website at www.adrcanada.ca under News and Information, Recent Publications.

The Institute values the participation of its corporate and law firm members and sponsors. Their generous support and stellar expertise are key to building responsive ADR services in Canada – a win-win for them and the Institute.

McGowan Luncheon

The McGowan Luncheon honours Lionel J. McGowan, one of the founders of the Institute and its first Executive Director. This year, the McGowan Address was presented by The Hon. Madam Justice Anne Rowles, B.C. Court of Appeal. The Court of Appeal introduced a pre-hearing judicial settlement conference pilot project November 1, 2004 which will run for two years, with a preliminary review after one year. A settlement conference is available to parties involved in all civil appeals, on



Carol-Ann Hart, C.Arb. with Sharon Kelly, C.Arb and Meldon Ellis at the 30th Anniversary AGM.



Randy Bundus, Sheila Begg, C.Arb. and Deborah Howes, C.Arb., C.Med.



John Wilson and Jo'Anne Streckf



Eric Sloan, C.Arb. and John Sanderson, Q.C.

consent of the parties and the Court. Justice Rowles described the intent of the pilot project and welcomed questions from the audience on the excitement and challenges of implementing it.

Each year, the Institute bestows the Lionel J. McGowan Awards of Excellence for contributions to the field and the Institute at the regional and national levels. This year's recipients were S. Noel Rea, Q.C. and Gary Fitzpatrick, both westerners. Their contributions are detailed in this issue of the Journal. Please join us in congratulating them on their achievements.

Celebration

Participants capped the day with a celebratory reception. Incoming President Dave McCutcheon thanked everyone who contributed to the success of the day. In particular, he recognized:

- special event sponsors Borden Ladner Gervais LLP, Fraser Milner Casgrain LLP, and Macleod Dixon LLP;
- seminar sponsors Bennett Jones LLP, Blake, Cassels & Graydon LLP, Burnet, Duckworth & Palmer LLP, Centre

for Conflict Resolution International Ltd., Davis & Company, Fasken Martineau DuMoulin LLP, Lawson Lundell, Miller Thomson LLP, and Nathanson, Schachter & Thompson;

- seminar leaders from the legal, business, and ADR fields;
- outgoing President Barry Effler for many years of support and leadership;
- Gerry Ghikas's team from Borden Ladner Gervias LLP, and particularly Amy Bowen, for leadership in planning and logistics for the conference;
- BCAMI, and particularly Rosemary Mohr and Leã Jang, for marketing and on-site support;
- and everyone who brought their wisdom and experience to share with others at the conference.

The Institute has much to celebrate. Everyone was invited to relax and enjoy the celebration with us – and they did.



Bernard McMullan, Noel Rea, David McCutcheon, Barry Effler, Judy Ballantyne and Donald Short.

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Recent Mediation Matters in Ontario

by Donald E. Short with Rosaline Bkila and Jennifer Goulin,
Fasken Martineau DuMoulin LLP Toronto

Bumps Along the Road: Mandatory Mediation in Ontario

In July of 2001, 100% civil case management was initiated in Toronto in an effort to address the perceived inefficiency of the civil justice system, as demonstrated by undue cost and delay. The objective of the changeover to case management was expressed in Rule 77.02,

The purpose of the Rule is to establish a case management system throughout Ontario that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of a proceeding.

A key element of the case management system was the requirement that every case be the subject of a three-hour mediation prior to the examinations for discovery. While this was theoretically sound and consistent with trends toward providing greater access to justice, the members of the bench and bar raised numerous concerns relating to rising costs associated with the increased number of formal steps in the Toronto litigation process. These steps contributed to increased waiting times for interlocutory motions and trials and ultimately resulted in a significant change to the mandatory mediation program in the Toronto area.

On October 22, 2004 Justice W.K. Winkler, the Regional Senior Justice of the Toronto Region, released a practice direction outlining drastic changes to the case management system. The practice direction will not apply to actions in Ottawa and Windsor, or to Toronto civil cases exempt from Rule 77 pursuant to Rule 77.01(2) of the Ontario *Rules of Civil Procedure*.

"Sort-of-Mandatory" Mediation in Ontario

The most notable change for members of the ADR Institute is that Rule 24.1 relating to Mandatory Mediation will cease to apply to Toronto actions commenced after February 1, 2005. However, litigants will still be required to conduct mediation at some point prior to trial.

Now parties are free to determine the timing of the mediation, but will nonetheless be expected to conduct it "at the earliest date at which it is likely to be effective". Lawyers, being by nature procrastinators, will likely postpone mediation to a much later stage in the process.

In fact, mediation may be left until the case reaches the pre-trial. The Court will order the parties to conduct mediation before trial if they have not already done so, or if it appears that further mediation is necessary.

Two positive changes that are of note are that a mediator's fees will no longer be limited by regulation. Also, there is now a requirement that mediations shall be required in Simplified Procedure for cases under \$50,000.

Are Mediators Compellable Witnesses?

This question was raised in the case *Rudd v. Trossacs Investments Inc.*, which required a mediator to give evidence to rectify written minutes of settlement of an action. The Court granted the motion and held that where an actual settlement is achieved in a mediation session, communications may be tendered in proof of that settlement. Essentially, the Court ruled that mediators are compellable witnesses in certain circumstances.



Donald Short

The policy rationale for confidentiality of mediation sessions is to encourage a candid discussion between litigants. In *Rudd*, Justice Lederman held that this rationale is not undermined if a mediator testifies to the specific terms of an agreed upon settlement. Therefore, once a settlement is achieved, but its interpretation is in dispute, disclosure of mediation discussions may be necessary to ensure substantive justice.

Is Mediation a Confidential Process?

The short answer to this question is no. However, this is not a "hard and fast" rule as there is little jurisprudence in this area and the reasoning used to reach this conclusion is highly malleable. Lawyers and mediators often tell parties participating in mediations that the process is confidential. However, such advice may not be entirely accurate in light of the 2003 Ontario Court of Appeal decision in *Rogacki v. Belz*.

The main implication of *Rogacki* for lawyers is to emphasize the importance of preparing confidentiality terms in the mediation agreement that are appropriate to the circumstances of the dispute. However, well-drafted confidentiality terms in mediation agreements do not provide an absolute guarantee of confidentiality or a right to remedy in case of a breach. Thus, it is important that mediators and lawyers ensure that parties are properly informed and that the confidentiality of the mediation process is enhanced.

Conclusion

A more detailed description of these changes in practice and the corresponding differences in responsibilities and duties that result is available on line from the ADR Institute website at www.adrcanada.ca.

A Tapestry or Patchwork Quilt?

by Murray A. Clemens, Q.C.,
Nathanson Schachter & Thompson

This article has been edited. The complete article is available at www.adrcanada.ca under *News & Information, Recent Publications*.

Each Canadian province and territory, as well as Canada, has legislation governing domestic arbitrations.¹ This paper will examine similarities and differences among this legislation with respect to a number of important issues including:

- jurisdiction;
- limits on Court intervention;
- powers to stay Court proceedings in the face of an arbitration agreement;
- arbitral procedure;
- interim measures of protection;
- enforcement and recognition of awards; and
- penalty for an arbitrator's excessive fees.

The legislation which I have examined includes all of the provinces and Canada. Similarity in approach has been influenced by the 1995 United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration (Model Law). This is particularly evident with respect to the limitation on judicial interference and the incorporation of the principle of *kompetenz-kompetenz* codifying the principle that arbitrators have jurisdiction to rule on their own jurisdiction and on issues or objections taken with respect to the validity or existence of an arbitration agreement.

Jurisdiction

Consistent with the Model Law, the statutes which incorporate provisions with respect to the determination of is-

¹ *Commercial Arbitration Act*, R.S.C. 1985, c. 17; *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55; *Arbitration Act*, R.S.A. 2000 c. A-43; *The Arbitration Act*, 1992, S.S. 1992, c. A-24.1; *The Arbitration Act*, C.C.S.M. c. A120; *Arbitration Act*, 1991, S.O. 1991, c. 17; *Arbitration Act*, S.N.B. 1992, c. A-10.1; *Commercial Arbitration Act*, S.N.S. 1999 c. 5; *Arbitration Act*, R.S.N.L. 1990, c. A-14; *Arbitration Act*, R.S.P.E.I. 1988, c. A-16; *Arbitration Act*, R.S.Y. 2002 c. 8; and *Arbitration Act*, R.S.N.W.T. 1988, c. A-5. Provisions concerning arbitration are found in Quebec's Code of Civil Procedure, Book VII.

sues concerning jurisdiction codify the principle of *kompetenz-kompetenz*. An arbitrator's source of jurisdiction arises from the parties' agreement and/or from legislation which also limits the Court's inquiry into whether an arbitration agreement is void and inoperative or incapable of being performed, to circumstances where an application is brought for a stay of legal proceedings.

The statutes which incorporate the provisions of the Model Law include Canada, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, and Nova Scotia. They provide:

- that an arbitral tribunal may rule on its own jurisdiction;
- that an arbitration agreement, for the purposes of a ruling on jurisdiction, shall be treated as an independent agreement (separability);
- that a jurisdictional objection must be timely; and
- that an arbitral ruling on jurisdiction raised as a preliminary question is subject to a court review upon application within 30 days.

On the question of timeliness, most legislation requires the issue to be raised in the statement of defence. In Manitoba, the objection must be made no later than the commencement of the oral hearing.

While the British Columbia legislation contains no express provision concerning jurisdiction, the Model Law provisions were included in the 1992 revision of the BCICAC Rules for Domestic Commercial Arbitration at Rule 16. While the BCICAC Rules are not a statutory instrument, s.22 of the British Columbia Act mandates those Rules "[u]nless the parties to an arbitration otherwise agree".

Limits on Court Intervention

The legislation of Canada, British Columbia, New Brunswick, Newfoundland, Prince Edward Island, Yukon, and Northwest Territories expressly removes the inherent jurisdiction of the Superior Courts



Murray Clemens, Q.C.

to supervise arbitral proceedings. The sections which address the courts' intervention are derived from Article 5 of the Model Law and provide that judicial intervention in arbitral proceedings is limited to that which is specifically authorized. The most robust provisions are found in the British Columbia and New Brunswick legislation which provide [quoting s.32 of the British Columbia legislation]:

Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

The provisions in the statutes of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and Nova Scotia express the restriction differently, reserving for the courts a supportive role such as found in the Alberta Act, which provides that:

No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

- (a) to assist the arbitration process;
- (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
- (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
- (d) to enforce awards.

The legislation in Newfoundland, Prince Edward Island, Yukon, and Northwest Territories contains no similar provisions expressly limiting the power of the court to intervene; however, the statutes do limit the right of appeal from an arbitral award to circumstances where a reference was made by the court or where the parties have agreed.

All of the legislation provides that an arbitration award may be set aside where

the tribunal exceeds its jurisdiction, denies the parties a fair hearing, where the decision maker is biased, or where an award was procured as a result of corrupt or fraudulent conduct.

In Alberta, Saskatchewan, Manitoba, Ontario, and New Brunswick, the parties are entitled to bring an appeal with respect to a question of law, a question of fact, or a question of mixed fact and law if the arbitration agreement so provides, and may appeal on a question of law with leave of the court. British Columbia limits the right of appeal to questions of law with the consent of the parties or with leave of the court. The legislation in Newfoundland contains no statutory right of appeal.

Powers to stay court proceedings in the face of an arbitration agreement

All legislation except the Canadian Act provides for the power of a court to stay legal proceedings in the face of an arbitration agreement. In all provinces, with the exception of Newfoundland, Prince Edward Island, Yukon, and Northwest Territories, the court must stay proceedings unless the court determines that the arbitration agreement is void, inoperative, or incapable of being performed. The legislation in Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, and New Brunswick enables a court to refuse a stay in the additional circumstance where the matter is a proper one for default or summary judgment. There is no right of appeal with respect to an order staying a proceeding in Alberta and Saskatchewan. In Newfoundland, Prince Edward Island, Yukon, and Northwest Territories, the court has a discretion to make an order where there is no sufficient reason why the matter should not be referred to arbitration and where the applicant was and still is ready and willing to do all things necessary for the proper conduct of the arbitration.

Arbitral procedures

All statutes, with the exception of British Columbia, Newfoundland, Prince Edward Island, and Yukon Territory, provide that the Rules of Procedure are to be determined by the arbitral tribunal. British Columbia is unique in enacting a provision which mandates the *BCICAC Rules for Domestic Commercial Arbitration* unless the parties have agreed otherwise. Section 41 of the Northwest Territories Act provides that the

Rules of the Supreme Court apply “with such modifications as the circumstances require.” The legislation in Alberta, Saskatchewan, Manitoba, and Nova Scotia provides that an award may be set aside where the procedures followed in the arbitration did not comply with the Act or the arbitration agreement. See also Canada’s Article 34(2)(a)(iv). New Brunswick and Ontario have slightly different parameters within similar provisions.

Interim measures of protection

Legislation in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, and Nova Scotia allows the courts to provide interim measures of protection. Some of the statutes expressly provide that obtaining such relief is not inconsistent with the parties’ rights to obtain a stay of proceedings.

Enforcement and recognition of awards

All legislation provides for the enforcement of an award through that jurisdiction’s superior courts. Section 50(4) of both the Ontario and New Brunswick Acts and Quebec’s Rules 948-951 enable a court of those jurisdictions to enforce arbitral awards made in another province.

Penalty for an arbitrator’s excessive fees

By way of caution, perhaps the most important legislative provision to be considered by arbitrators is s.38 of the Yukon Act which provides:

38(1) An arbitrator who, having entered on a reference, refuses or delays after the expiration of one month from the publication of the award to deliver the award until paid a larger sum for fees than is permitted under this Act or who received for an award or for fees as an arbitrator such larger sum, shall forfeit and pay to the party who has demanded delivery of the award or who has paid to the arbitrator such larger sum in order to obtain the award or as a consideration for having obtained it, an amount three times the excess demanded or received by the arbitrator contrary to this Act.

(2) The penalty referred to in subsection (1) may be recovered by action before a judge. *R.S.Y., c.7, s. 38.*

Happily, this provision is unique to the Yukon.

La législation nationale canadienne sur l’arbitrage Tapisserie ou courte-pointe en patchwork?

*par Murray A. Clemens, Q.C.,
Nathanson Schachter & Thompson*

Cet article a été édité. L’article complet peut être lu à www.adrcanada.ca sous *News & Information, Recent Publications*.

Chacune des provinces et chacun des territoires canadiens aussi bien que le Canada lui-même ont une législation régissant l’arbitrage national.¹ Cet article examinera les similarités et les différences entre ces législations en ce qui concerne un certain nombre de questions importantes comprenant ce qui suit:

- la juridiction;
- les limites de l’intervention du tribunal;
- les pouvoirs de suspendre une action en justice face à une convention d’arbitrage;
- la procédure arbitrale;
- les mesures conservatoires de protection;
- l’application et l’identification des décisions; et
- la pénalité pour les honoraires excessifs d’un arbitre.

La législation que j’ai examinée comprend toutes les provinces et le Canada. La similarité de l’approche a été influencée par la loi type de la Commission des Nations Unies pour le droit commercial international 1995 (UNCITRAL) sur l’arbitrage commercial international (loi modèle). Ceci est particulièrement évident en ce qui concerne la limitation sur l’interférence juridictionnelle et l’incorporation du principe *kompetenz-kompetenz* codifiant le principe que les arbitres ont l’autorité de statuer sur leur propre juridiction et sur des questions ou des objections prises en ce qui concerne la validité ou l’existence d’une convention d’arbitrage.

¹ *Loi sur l’arbitrage commercial*, L.R.C. 1985, c. 17; *Loi sur l’arbitrage commercial*, R.S.B.C. 1996 c. 55; *Loi sur l’arbitrage*, R.S.A. 2000 c. A-43; *Loi de 1992 sur l’arbitrage*, S.S. 1992, c. A-24.1; *Loi sur l’arbitrage*, C.C.S.M. c. A120; *Loi de 1991 sur l’arbitrage*, 1991, S.O. 1991, c. 17; *Loi sur l’arbitrage*, S.N.B. 1992, c. A-10.1; *Loi sur l’arbitrage commercial*, S.N.S. 1999 c. 5; *Loi sur l’arbitrage*, R.S.N.L. 1990, c. A-14; *Loi sur l’arbitrage*, R.S.P.E.I. 1988, c. A-16; *Loi sur l’arbitrage*, R.S.Y. 2002 c. 8; et *Loi sur l’arbitrage*, R.S.N.W.T. 1988, c. A-5. Les dispositions concernant l’arbitrage se retrouvent dans le Code de procédure civile du Québec, volume VII.

Juridiction

Conforme à la loi type, la législation qui incorpore les dispositions à l'égard des questions concernant la juridiction codifie le principe *kompetenz-kompetenz*. La source de juridiction d'un arbitre résulte de l'accord des parties et/ou de la législation qui limite également l'interrogation du tribunal quant à savoir si la convention d'arbitrage est nulle et inopérante ou inapte à l'exécution, dans des circonstances où une demande est présentée en vue d'une suspension de la procédure judiciaire.

Les législations qui incorporent les dispositions de la loi type comprennent le Canada, l'Alberta, la Saskatchewan, le Manitoba, l'Ontario, le Québec, le Nouveau Brunswick et la Nouvelle-Écosse. Elle prévoient:

- qu'un tribunal d'arbitrage peut statuer sur sa propre juridiction;
- qu'une convention d'arbitrage visant à statuer sur la juridiction sera traitée en tant que convention indépendante (séparabilité);
- qu'une objection juridictionnelle doit se faire au moment opportun; et
- qu'une décision arbitrale sur la juridiction soumise comme question préliminaire est sujette à une révision par un tribunal dans les 30 jours suivant une demande.

Sur la question du moment opportun, la plus grande partie de la législation exige que la question soit soumise dans l'exposé de défense. Au Manitoba, l'objection doit être présentée au plus tard au commencement de l'audition orale.

Bien que la législation de la Colombie-Britannique ne contienne aucune disposition expresse au sujet de la juridiction, les dispositions de la loi type ont été incluses dans la révision 1992 des règles du BCI-CAC pour l'arbitrage commercial national à la règle 16. Bien que les règles du BCICAC ne soient pas un texte réglementaire, l'art. 22 de la Loi de la Colombie-Britannique exige ces règles "à moins que les parties à un arbitrage en conviennent autrement".

Les limites de l'intervention des tribunaux

La législation du Canada, de la Colombie-Britannique, du Nouveau-Brunswick, de Terre-Neuve, de l'Île-du-Prince-Édouard, du Yukon et des Territoires du Nord-

Ouest enlève expressément la compétence inhérente des cours supérieures en matière de supervision des procédures arbitrales. Les articles qui traitent de l'intervention des tribunaux tirent leur origine de l'article 5 de la loi type et stipulent que l'intervention judiciaire au cours des procédures arbitrales se limite à celle qui est spécifiquement autorisée. Les dispositions les plus robustes se trouvent dans la législation de la Colombie-Britannique et celle du Nouveau-Brunswick qui stipulent [citation de l'art. 32 de la législation de la Colombie-Britannique]:

Les procédures arbitrales d'un arbitre et toute ordonnance, règlement ou décision arbitrale prise par un arbitre ne doivent être ni remises en question ni révisées ni restreintes par le biais d'une procédure en vertu de la Loi sur la procédure de révision judiciaire ou autrement sauf dans l'étendue permise par la présente loi.

Les dispositions dans la législation de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario, du Québec et de la Nouvelle-Écosse expriment la restriction différemment, réservant aux tribunaux un rôle de soutien tel que celui que l'on trouve dans la Loi de l'Alberta, laquelle stipule que:

Aucun tribunal ne peut intervenir dans les questions régies par la présente Loi, sauf aux fins ci-après telles que stipulées dans la présente Loi:

- (a) aider au processus d'arbitrage;
- (b) veiller à ce qu'un arbitrage se déroule conformément à la convention d'arbitrage;
- (c) éviter un traitement manifestement inéquitable ou inégal d'une des parties d'une convention d'arbitrage;
- (d) appliquer les décisions.

La législation de l'Île-du-Prince-Édouard, du Yukon et des Territoires du Nord-Ouest ne contient aucune disposition semblable restreignant expressément le pouvoir d'intervention des tribunaux; toutefois, ces législations limitent effectivement le droit d'appel à propos d'une décision arbitrale aux seules circonstances où une référence a été faite par la cour ou lorsque les parties ont conclu une entente.

Toute la législation stipule qu'une décision arbitrale peut être renversée dans le cas

où un tribunal excède sa juridiction, refuse aux parties une audition équitable, où le décideur est partial ou lorsqu'une décision arbitrale a été obtenue suite à une conduite corrompue ou frauduleuse.

En Alberta, en Saskatchewan, au Manitoba, en Ontario et au Nouveau-Brunswick, les parties ont le droit d'interjeter appel à propos d'une question de droit, une question de fait ou une question impliquant un mélange de faits et d'aspects légaux si la convention d'arbitrage le stipule, et peut interjeter appel sur une question légale si la Cour l'autorise. La Colombie-Britannique restreint le droit d'appel sur les questions de droit avec le consentement des parties ou si la Cour l'autorise. La législation de Terre-Neuve ne renferme aucun droit d'appel accordé par la loi.

Les pouvoirs de suspendre une action en justice face à une convention d'arbitrage

Toute la législation sauf la Loi canadienne prévoit le pouvoir d'un tribunal de suspendre la poursuite en présence d'une convention d'arbitrage. Dans toutes les provinces, sauf à Terre-Neuve, à l'Île-du-Prince-Édouard, au Yukon et dans les Territoires du Nord-Ouest, le tribunal doit suspendre la poursuite à moins que le tribunal ne détermine que la convention d'arbitrage est nulle, inopérante ou inapte à l'exécution. La législation de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario, de la Nouvelle-Écosse et du Nouveau-Brunswick permet au tribunal de refuser une suspension dans la circonstance additionnelle où la question est pertinente en vue d'un jugement par défaut ou un jugement sommaire. Il n'y a aucun droit d'appel dans le cas d'une ordonnance de suspension de poursuite en Alberta et en Saskatchewan. À Terre-Neuve, à l'Île-du-Prince-Édouard, au Yukon et dans les Territoires du Nord-Ouest, le tribunal peut à sa discrétion émettre une ordonnance lorsqu'il n'existe pas de raison suffisante pour laquelle la question ne devrait pas être référée à un arbitrage et lorsque le demandeur était et est toujours prêt à faire tout le nécessaire pour une conduite appropriée de l'arbitrage.

Procédures arbitrales

Tous les statuts, sauf ceux de la Colombie-Britannique, Terre-Neuve, l'Île-du-Prince-Édouard et le territoire du Yukon

stipulent que les règles de procédures doivent être déterminées par le tribunal arbitral. La Colombie-Britannique est unique en édictant une disposition qui mandate *les règles d'arbitrage commercial national* du BCICAC à moins que les parties ne se soient entendues autrement. L'article 41 de la Loi des Territoires du Nord-Ouest stipule que les règles de la Cour suprême s'appliquent avec les "modifications requises par les circonstances". La législation en Alberta, en Saskatchewan, au Manitoba et en Nouvelle-Écosse stipule qu'une décision peut être renversée lorsque les procédures suivies au cours de l'arbitrage n'étaient pas conformes à la Loi ou à la convention d'arbitrage. Voir également l'article 34(2)(a)(iv) de la Loi canadienne. Le Nouveau-Brunswick et l'Ontario ont des paramètres légèrement différents à l'intérieur de dispositions similaires.

Mesures conservatoires de protection

La législation de la Colombie-Britannique, de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario, du Nouveau-Brunswick et de la Nouvelle-Écosse permettent aux tribunaux de fournir des mesures conservatoires de protection. Certains statuts stipulent expressément que l'obtention d'une telle mesure de redressement n'est pas incompatible avec le droit des parties d'obtenir une suspension des procédures.

Application et identification des décisions

Toute la législation prévoit l'exécution d'une décision par le biais des cours supérieures de chaque juridiction. L'article 50(4) des deux Lois, celle de l'Ontario et celle du Nouveau-Brunswick ainsi que les règles 948-951 du Québec permettent à un tribunal de ces juridictions de mettre à exécution les décisions arbitrales prises dans une autre province.

Pénalité pour les honoraires excessifs d'un arbitre

Par mesure de prudence, peut-être que la disposition législative la plus importante à considérer par les arbitres est l'art. 38 de la Loi du Yukon qui stipule:

38(1) Un arbitre qui, après avoir entrepris une référence, refuse ou retarde au delà de l'expiration d'un mois à partir de la publication du jugement arbitral de délivrer la décision jusqu'à ce que soit payé un montant d'honoraires supérieur

à celui permis par la présente loi ou qui a reçu pour un jugement arbitral ou à titre d'honoraires en tant qu'arbitre une telle somme supérieure, paiera à la partie qui a demandé le jugement arbitral ou qui a payé à l'arbitre ladite somme supérieure pour obtenir le jugement arbitral ou en considération pour l'avoir obtenue, un montant trois fois supérieur à l'excédent contraire à la présente loi demandé ou reçu par l'arbitre.

(2) La pénalité à laquelle il est référé dans le paragraphe (1) peut être recouvrée par une poursuite devant un juge. *R.S.Y., c. 7, s. 38.*

Heureusement, cette disposition est exclusive au Yukon.

Issues Concerning the Specialist Arbitrator continued from page 5 . . .

latter does not necessarily include the former; as a judge, indeed, he may have to ignore what he knows as a man and contrariwise.

The second restraint is that the parties must know what notorious facts the tribunal plans to refer to and be given an opportunity to refer it to additional or, perhaps more importantly, later references that should be considered.

My approach to this issue is as follows. When the statements of claim, defense, and counterclaim are in my hands along with the parties' expert reports, I review them to ascertain the supplemental reference sources, including websites, that I *might* wish to consult. Before the hearing starts, I circulate the list and invite comment, additions, or objections. If, in the crafting of my final award, I find it desirable to refer to materials not previously identified, I write to the parties and advise them of my intentions and, again, invite comment.

Disputed legal issues can be particularly troublesome to the lay arbitrator. The problems are of two types: those where interim rulings are required and those that arise during the award drafting stage. An example of the former is an objection to the admissibility of an expert report or to the capacity of the expert to give opinion evidence. The arbitrator must make the ruling without delay but must consider and understand leading cases and principles that are second nature to experienced counsel. In complex technical cases the financial and

time consequences of a ruling of inadmissibility can be huge. It is equally frustrating for lay arbitrators to find themselves with a lack of understanding of the differing positions of counsel after the hearing has terminated.

The techniques that I employ to address these challenges are as follows.

- At the first hearing management meeting when protocols and deadlines are being established for the delivery of documents, expert reports and so on, I set time limits for counsel to object to the *admissibility* of their opponent's experts or their reports. This process enables me to take the time necessary to digest the material, understand the matter, and provide a considered ruling without delaying the hearing.
- I remind counsel that I do not have legal training and that I will not make rulings without, at a minimum, considering them overnight. This technique stimulates counsel to provide me with their written submissions in advance so that I can better understand the oral submissions and rule without delay. Even then, I recess the hearing for as long as I need to satisfy myself that I have no further questions before deciding.
- When counsel are relying on decisions, I ask them to exchange the cases with each other and with me at least 48 hours in advance of their oral submissions. I then have a better understanding of what I do not understand when the application is made. As well, I become comfortable that the lawyer opposing the application has provided me with a comprehensive objection.
- I remind counsel that they should not assume that I will apply legal principles that they have not expressly introduced into the hearing.
- Finally, if all else fails, I remind counsel of my right to call a legal witness on my own motion to help me interpret the issue. Not surprisingly, this stimulates cooperation between opposing counsel.

I hope this paper will encourage ADR practitioners to be creative in applying imaginative and non-traditional techniques to give the parties and their clients the full benefit of the flexibility of an arbitration process that they expected when they initially agreed to it.

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