AGM Recap: Expert Advice on Key Mediation and Arbitration Issues

The ADR Institute of Ontario ("ADRIO") held its Annual General Meeting (AGM) on Friday, June 20, 2014 at the Novotel Toronto Centre Hotel in downtown Toronto. Two expert panels showcased the expertise we have in our community with one panel on mediation and the second on arbitration.

By Mary Korica

MEDIATION PANEL:

Bunny Macfarlane, C.Med (Moderator)
Bunny is a mediator, trainer and restorative justice practitioner. She teaches conflict management and dispute resolution at Brock University and mediates insurance claims at Financial Services Commission of Ontario (FSCO).

Lynn Bevan, LL.B., C. Med.,
is based in Toronto and provides conflict resolution through investigation and executive coaching. She has been an Alternate Discrimination and Harassment Counsel, appointed by the Law Society of Upper Canada, since 2005. www.lynnbevan.com

Blaine Donais, LL.B., LL.M., C.MED, RPDR, WFA
Blaine is President of the Workplace Fairness Institute. They help organizations improve their health and profitability by enhancing workplace fairness. Blaine is author of "The Art and Science of Workplace Mediation."

Gary Furlong, B.A., C.Med, LL.M. (ADR)
has extensive experience in mediation, mediation training, alternative dispute resolution, organizational facilitation, negotiation, fact-finding, investigations and conflict resolution. Gary is author of "The Conflict Resolution Toolbox," and co-author of "The Construction Dispute Resolution Handbook". www.agreeinc.com

Cheryl Gaster, LL.B., C. Med
Cheryl is a highly experienced mediator, trainer and settlement counsel in the areas of human rights, employment and labour. www.cherylgaster.ca

Getting Mediations Back on Track

Bunny Macfarlane moderated the panel on "Getting Mediations That Are Going Off the Rails Back on Track: Game Plans for Managing Challenging Counsel and Difficult Parties." Panel participants, Gary Furlong, Lynn Bevan, Blaine Donais and Cheryl Gaster, discussed how to deal with parties who are aggressive or unreasonable.

Ms. Gaster recommended first checking if one's own buttons are being pushed to ensure you remain a fair and nonjudgmental mediator. She stated that discriminatory remarks must be stopped. This can be accomplished by asking the offending party to comment on whether they believe their remark to be helpful and the offended party what impact it has had on them.

Mr. Furlong noted that people do not see their own point of view as being unreasonable and the mediator's task is to understand the parties' perspectives. Mr. Donais added if a party is not acting in their own best interests, the mediator should review this with them in caucus. He mentioned that it can be much more difficult to speak frankly and perform reality-testing with self-represented parties but establishing credibility with both parties helps. Ms. Bevan emphasized using questions to keep the parties engaged and working. The mediator's own moments of uncertainty about how to proceed are helped by remaining first and foremost an advocate for the mediation process and considering what approach will move the process along.

Next for discussion was how to manage clients who present mental health issues. Mr. Donais mentioned mediators are not well trained to recognize mental health issues. Ms. Gaster related unrepresented parties exhibiting mental health issues should be encouraged to seek independent legal advice adding the mediator

is obligated to ensure a fair process. If the party is clearly not fully cognizant of the process the ADRIC's Code of Conduct for Mediators and the Code of Ethics is invoked and the mediator must consider whether to terminate the mediation. Mr. Furlong warned that people with mental health issues can appear entirely rational but their underlying assumptions are not. Ms. Bevan added that some parties perceive probing questions as evidence of bias in a mediator when in fact the party would not be satisfied with anything less than an advocate for their side. She suggested in some cases the mediator must determine whether the mediation can continue despite mediators' tendency to want to reach settlement. Mr. Furlong contributed one way to help parties is to explain early in the process that the role of the mediator is to assist the parties in good decision making. Mediators achieve this by assessing an issue from all angles and asking the difficult questions so all options can be considered. Mr. Donais stated in some cases the parties and their representatives may simply manipulate the truth. He recommended that the mediator use questions to gradually uncover the untruth, thereby allowing a face-saving opportunity once the party realizes the situation. Respect for a party's self-determination sometimes requires the mediator to inform the parties if they are taking a wrong course.

Stalemates in the mediation were touched on. Ms. Gaster recommended telling the parties that stalemates are not uncommon. Mr. Furlong likes to reach the point of stalemate as early as possible in the mediation as it is the point at which mindsets can begin to shift and the most significant work can begin.

ARBITRATION PANEL:

Les O'Connor, LL.B. (Moderator)
Les is a senior litigation lawyer at WeirFoulds LLP, and chair of the firm's mediation practice. He is a fully trained Mediator and Arbitrator, with extensive experience in all facets of construction related work.

The Honourable James B. Chadwick, B.A., LL.D, Q.C.
Retired from The Superior Court of Justice on January 1, 2004. Since that time he has been a partner in Ottawa Dispute Resolution Group Inc. conducting mediations, arbitrations, and private trials primarily in the commercial, construction and personal injury areas.

Stephen Richard Morrison, LL.B., C.Arb, C.Med, FCIArb
Stephen is a partner at Cassels Brock & Blackwell LLP. He is experienced in the resolution of commercial disputes, including matters in construction, finance, environmental, insurance, and breach of trust claims.

Kathryn Munn, LL.B., Cert. ConRes, C.Med, C.Arb, IMI Certified Mediator
Kathryn owns Munn Conflict Resolution Services based in London, Ontario.
Their services include mediation, arbitration, and facilitation for organizational, employment, estates, and commercial matters as well as teaching mediation and related skills.
www.munncrs.com.

Lynda C. E. Tanaka B.A., LL.B., FCIArb., C. Arb., ICD.D
Mrs. Tanaka is an experienced arbitrator and mediator who has led reform initiatives for improved adjudicative tribunal dispute resolution. She now accepts retainers as an arbitrator or mediator.

10 Steps to Greater Efficiency in Arbitration

A second panel discussion, on "10 Steps to Greater Efficiency in Arbitration," was moderated by Les O'Connor. Lynda Tanaka, the Hon. James Chadwick, Stephen Morrison, and Kathryn Munn began by discussing how to render pre-hearing arbitration more effective. In Mr. Morrison's opinion a meeting between the parties and arbitrator well in advance of the arbitration hearing to iron out issues is the single most important factor determinative of a successful arbitration, especially if the pre-hearing is attended by a representative from the parties in addition to their legal representatives. The meeting allows written consensual agreement on matters like the logistics of the process, electronic tools or human resources to be used and cost structures. The Hon. Mr. Chadwick added that this agreement may need to be enforced.

Discussion turned to how to limit production of documents when litigators are inclined to be expansive. Ms. Tanaka recommended

relying on the "reliance test" rather than the relevance test both in terms of what facts are in dispute and what information the arbitrator will need to see. Mr. Morrison described an approach where the pre-hearing disclosure process develops a database of all documents, scanned and coded using summation software, with parties reproducing only those they will rely on to establish their case. Parties should be provided a month to request from the other party additional reproduction. He only views those documents that are brought up through a witness.

The Hon. Mr. Chadwick prefers evidence to be introduced through affidavits rather than through witnesses. Mr. Morrison noted that affidavits deliver the benefit of forcing the parties to prepare and streamline their arguments for the case since those must be submitted ahead of the hearing. Moreover, if the parties are permitted to deliver reply affidavits these should be to address items in the opposing party's affidavit, not to introduce information additional to a party's own original affidavit. Ms. Munn indicated that as well as using affidavit evidence the parties should be encouraged to use an agreed statement of fact to sharpen the focus on the issues in dispute. If the arbitration is under the ADRIC Arbitration Rules an agreed statement of fact is required unless the parties have contracted out of the provision. Ms. Tanaka recommended pre-qualification of experts in advance of the hearing.

Regarding whether or not to rely on sequential resolution of issues, Mr. Morrison recommended in multi-issue cases it can be very efficient if issues are decided sequentially either individually or in clusters. He likewise recommended where this approach is adopted, organizing the issues not only sequentially but from largest to lowest dollar amount may promote settlement if a trend in the decisions develops.

In discussing "hot-tubbing" namely various formats for using expert testimony, the panel relied on Ruth M. Corbin's article "The Hot-tubbing Alternative to Adversarial Expert Evidence" (footnote: Ruth M. Corbin, "The Hot-tubbing Alternative to Adversarial Expert Evidence", The Advocates' Journal, Spring 2014, p.5). Ms. Tanaka noted the pre-arbitration meeting can usefully include experts for the sake of reaching agreement on basic issue. She also noted this can be followed up by a report written and signed by a group of expert witnesses for the sake of the arbitration, which can be useful in preventing expert witnesses from recommending other expert witnesses be consulted or returned to during the arbitration itself. A further step can be to then have opposing experts testify in tandem. Alternatively these options can be used individually. Mr. Morrison noted that a benefit of group expert testimony is that it facilitates the arbitrator retaining clearly the different strands of expert arguments.

The panel closed by discussing wrap-up issues at the end point of the arbitration process. Mr. Morrison related he gives the parties instructions prior to their submission of written arguments indicating they are welcome to present whatever they deem important for his decision but he is most concerned to see their perspectives and case law on a certain set of issues. Ms. Munn noted that when scheduling the oral hearing it is useful to also block off the time in your schedule following the hearing to write the decision.

Canada's Largest Searchable Database of ADR Professionals

Please update your ADR CONNECT Profile - How else will clients find you on our roster?

One of the most valuable benefits of membership is being able to list yourself as part of our roster on our search engine, "ADR CONNECT."

If you have not gone into your listing to provide key information, about yourself and your practice, you are missing out on a valuable advertising opportunity. Referring professionals, government, members of the private and public sector, regularly search ADR CONNECT to locate mediators, arbitrators and other ADR professionals, especially under specific specialty areas. Now is the time to make sure they can find you!

If you have not already done so we would urge you to go into your portal and provide all the information requested there, including your specialty areas.

Should you have any difficulty with the technology please feel free to call: Morgan Horst at 1-877-475-4353 extension 102.

Don't miss this excellent advertising opportunity. We look forward to seeing your updated listing on ***ADR CONNECT.***

Membership Profile Revision Instructions:

1. Click on ***http://adrcanada.force.com/***
2. Type your ***Username*** (your e-mail address) and ***password*** (if you cannot remember your password you can obtain it by clicking "Retrieve" on the bottom of the login screen).
3. Click on 'My Account' and then on the right side click on 'Contact Information' or 'Profile'.
4. In the 'Contact Information' tab you can change your address and phone number details.
5. In the 'Profile' tab you can change your 'Member Profile', 'Employment History', 'Education and Credentials', and 'Conflict and Resolution Training'.
6. Once all your changes have been made scroll down to the bottom of the screen and click on 'Save'. If you have any questions or need any assistance, please contact Morgan Horst at 1-877-475-4353 extension 102.