ADR Update

Spring 2012, Newsletter of the ADR Institute of Ontario

With contributions from: ADR Atlantic Institute, ADR Institute of Saskatchewan, and Arbitration & Mediation Institute of Manitoba

Inside this issue:

The ADR Atlantic Institute, ADR Institute of Ontario, Inc., ADR Institute of Saskatchewan, Inc. and Arbitration & Mediation Institute of Manitoba, Inc. are regional affiliates of the ADR Institute of Canada. They are non-profit, private organizations established to provide leadership in the promotion of alternative dispute resolution for ADR professionals and users of ADR services.

President's Message

Joyce Young, MSc., C.Med, President

Many of the projects we have been working on are coming to fruition.

The Toronto Construction Association Roster has been called and the selection committee will be wading through the applications. We will also shortly be marketing Lunch and Learn sessions, using a professionally developed presentation, first to accounting firms, then to associations. We hope members of the Presenter Roster will be busy spreading the word about ADRIO and ADR to these two target markets.

We are nearing completion of our Mediation Ethics course which I personally can't wait to take. We thank Elaine Newman for her hard work in making this course a reality. Don't worry. There are no right or wrong answers, but you will have an approach to ethical issues and focus a lot more on what your mediation values are and how they can shift from situation to situation.

We have also been able to enjoy section meetings, in person at the Institute, and by webinar. Topics have included everything from: an Insurance Section Mock Mediation to a Restorative Justice Section - Aboriginal Persons Court ("Gladue" Court). If you have any topics of interest that you would like to share, please contact Mena. It's wonderful to see members outside the GTA able to participate in these sessions and we will continue to invest in the technology that makes this possible.

The Winter Skill-Builder's Retreat was a huge success. All rooms were sold out. Presentations were excellent. The networking and discussion opportunities alone

ADRIO AGM and Professional Development Program

Join us for our exciting 2012 AGM and PD program: ADR Issues and Opportunities in Health Care.

Friday June 22, 2012, 8:00 am - 2:00 pm,

Novotel Toronto (45 The Esplanade).

Also available by webinar.

The AGM starts at 8:45 am, and the PD program at 9:15 am.

Registration and continental breakfast at 8:00 am.

We also have a great luncheon scheduled, with the presentation of the Roger Fisher Negotiation Training Scholarship Award, and a Presentation by incoming President Anne E. Grant on Enhancing Profile and Professionalism in ADR.

For more details and a registration form, please visit: www.adrontario.ca

made this a worth-while experience.

We would like to thank the Advocacy Committee and Michael Erdle for their work on the UNCITRAL paper dealing with online dispute resolution and Barbara Benoliel and Heather Swartz for their work on the paper being drafted on changes to the Education Act with respect to bullying. To follow up my presentation at the OBA, our Advocacy Committee will also be working on a position paper on Judicial Mediation.

We are thrilled to announce that we had an excellent response to the survey created by Anne Grant, our V.P., President Elect. The results will be used to chart our future direction according to the interests and needs of our members.

Finally, our thanks to the members of the Newsletter Committee: Anne Grant, Colm Brannigan, Jim Musgrave, Jennifer Schulz, Ken Gamble and Larry Herman who have worked long and hard to create another excellent issue of the ADR Update.

Yours truly,

Joyce Young

Attention Newsletter Contributors Deadline for Summer Issue - May 4th 2012:

Just a reminder, submissions:

- Should be no longer than 1,000 words in length
- MUST be submitted in WORD (not PDF)
- MUST be accompanied by the author's short bio and high resolution photo with contact information

janet@adrontario.ca

Congratulations to the following Members who received their designation of Certified Family Mediator, Chartered Mediator, Chartered Arbitrator or Qualified Mediator:

New Cert.F.Med - Ontario
Charles (Chuck) D. Matheson, Cert.F.Med

New C.Meds
Elser Lee Archer, C.Med (ON)
Albert Benesh, C.Med (SK)
Lynn Catzman, C.Med (ON)
Catherine R. Downer, C.Med (ON)
Kelly Jones, C.Med (MB)
Kathleen J. Kelly, C.Med (ON)
Helen Lightstone, C.Med (ON)
Danielle Martin, C.Med (ON)
Stephen R. Morrison, C.Med (ON)
Corinne L. Sklar, C.Med (ON)
Isolina Varano, C.Med (ON)
Joann Webb, C.Med (ON)
Karen Wilcox, C.Med (SK)

New C.Arbs
Kathleen J. Kelly, C.Arb (ON)
Stephen R. Morrison, C.Arb (ON)
Charles (Chuck) D. Matheson, C.Arb (ON)
George W. Taylor, C.Arb (ON)

New Q.Meds - Ontario
Calabrina Boyajian, Q.Med
Michael L. Davidson, Q.Med
Jonathan Elston, Q.Med
Robert G. Gernon, Q.Med
Harold S. Lenfesty, Q.Med
Ethan (Jerry) Mings, Q.Med
Robert Neron, Q.Med
Katherine A. Popaleni, Q.Med
Denise Robertson, Q.Med

Increasing Ombudsman Effectiveness:
The Value of Using Mediator Strategies

Lawrence Herman (Larry), C.Med (***www.hermanmediations.com***), is a Toronto-based mediator, lawyer and former ombuds staff member and investigator. He may be reached at ***lawrence@hermanmediations.com***.

Ombudsmen[1] and mediators are facilitators of non-binding ADR processes. However, their appointment mandates, the parties' perception of their neutrality and the results they achieve differ in several key areas. In this paper, I propose that ombuds professionals might expand their skills menu by incorporating some basic mediator tools. I will discuss how this new approach may assist the ombudsman in both overcoming the parties' frequent perception of institutional bias and avoiding problems in the implementation of an ombuds recommendation.

The recruitment of the ombudsman often results in neutrality challenges. While the mediator is voluntarily chosen by all parties after they have conducted a due diligence process over her neutrality; the ombudsman is an employee hired by the ombuds organization without user (of his services) consultation. He is often drawn from the ranks of the very institution that the ombuds organization is a division of. For example, Canadian banks have ombuds programs for the purposes of providing an informal mechanism for the resolution of client disputes[2]. Typically, Canadian banks look to experienced operations personnel in staffing their ombuds offices, taking the view that these employees will better understand the policies and procedures of the financial institution. Not surprisingly, the client is often frustrated by an unfavourable outcome to the resolution of her complaint, alleging ombuds bias after reading her report. The ombudsman usually has limited communication with the complainant. It is rarely face to face, generally confined to one or two telephone conversations. There is little opportunity to build rapport with the complainant.

Mediations are not commonly conducted. In my experience, I have never seen an ombuds complaint mediated. The complaint is typically investigated by ombuds staff through fact-finding. The ombudsman will usually speak to the organization's operations personnel responsible for the decision that is the subject matter of the complaint in order to obtain more information or to better understand the complainant's written material. She may then engage in shuttle diplomacy to attempt to broker a settlement. Since she is an employee of the organization, often with years of service, she may be unconsciously guilty of "groupthink" favouring her colleague's position in defending the organization in its proposed response to the complaint. She may be hesitant to challenge an operations manager senior to her within the ranks of the organization.

By seizing upon mediation opportunities that arise during the course of the investigation, the ombudsman may be successful in changing the client's bias perception. The ombudsman can

convene a mediation session with operations staff and the complainant actively participating in and taking charge of how the complaint should be resolved. She will no longer be seen as the organization's spokesperson, but as a neutral facilitator.

The ombuds investigation outcome is recorded in a written report and, where the ombudsman finds in favour of the complainant, he will make a recommendation to the organization. Most ombuds' terms of reference provide that both law and fairness principles should be equally considered[3], yet the report is often similar to a judgment (except that it is neither binding nor legally enforceable[4]), with a "winner take all" result. Ombuds investigators are often lawyers or operations staff experienced in rights-based processes but they are not career neutral facilitators. Although they receive ADR training, they are generally not hired from the mediation community. The resulting report, especially when there has been no recommendation in favour of the complainant, often leads to complainant confusion over whether the finding was that of the organization or the ombudsman. Sadly, both ombudsman and the organization are frequently seen as one and the same. Mediating the subject matter at any stage of the investigation, even after a non-recommendation report, may lessen this perception.

...potential difficulties with an unfavourable (to the organization) ombuds recommendation may be avoided...

While ombuds staff and investigators do act as shuttle diplomats, they rarely meet with either party. Often, resource limitations prevent ombuds staff from travelling. They engage almost exclusively in investigative fact-finding; taking telephone call notes, reviewing them together with both parties' files and report writing. They generally do not take advantage of opportunities of brainstorming settlement options[5], demonstrating empathetic listening, reframing, reality testing and deploying the wide range of mediator techniques (especially those used in caucus) to increase the chances of bringing the complainant and the organization closer and facilitating a potential dispute resolution[6]. The unfortunate result of not meeting with the complainant, even where easy to arrange (both ombudsman and complainant are in the same city) and that might be especially useful where the complainant has language difficulties, is that the ombuds report is incorrect because of communication breakdown. Although it is more challenging for the neutral facilitator to use these mediator techniques, absent interfacing with the complainant, telephone mediations can be successful[7].

While organizations are inclined to comply with the ombuds finding, two potential difficulties with an unfavourable (to the organization) ombuds recommendation may be avoided if the organization and complainant reach their own settlement rather than resolution being ombuds imposed. Firstly, organizations tend to push back. After receiving an unfavourable report, organizations may attempt to negotiate (with the ombudsman) a watered down revised recommendation, less onerous to comply with from its perspective. This "dance" slows down the process. It is unfair to the complainant, being both time consuming and less than transparent. Second, the recommendation itself may be confusing or difficult to comply with, particularly when the ombudsman has not worked closely with the organization in arriving at a recommendation that may in fact not fully take into account the nature of the organization's business.

Complainants are rarely represented when they seek the assistance of an ombudsman. They are often unable to afford counsel, or are intimidated by the formality of a process that was intended to be informal. Often, they simply need an explanation or they want to feel empowered after having had an unpleasant encounter with the organization. If the ombudsman resorts to a full-blown formal investigation as a knee jerk response to every complaint when a more mediation friendly approach could be used, consumer buy-in will be discouraged, potentially resulting in the elimination of a valuable tool in organizational ADR.

1 For the purposes of this paper, I use the masculine reference for the word "ombudsman": it is the accepted nomenclature. No gender preference is intended.
2 In 1996, working through the Canadian Bankers Association, member banks created and implemented a model for client dispute resolution in the form of an ombuds program, both at the individual bank level and industry-wide. In 2002, financial services reform legislation expanded the industry model to apply to all financial institutions.
3 For instance, see Ombudsman for Banking Services and Investments (www.obsi.ca) and ADR Chambers Banking Ombudsman (www.bankingombuds.ca), terms of reference, posted on their websites.
4 Ibid. The organization that does not comply with a recommendation may be "outed" on the ombuds website and the non-compliance indicated in the ombuds annual report.
5 Roger Fisher and William Ury, ***Getting to Yes: Negotiating Agreement Without Giving In***, (New York: Penguin Books, 1983).
6 Ibid.
7 Mediations of motor vehicle statutory accident benefits claims are in large measure successfully conducted over the telephone in the dispute resolution section of the Financial Services Commission of Ontario.

Mediating at an Uneven Table: Mediating Ethical Dissonance-

Finding a Role for ADR in Health Care Sector Disputes

L. Ruth Klein, LL.M., C.Med, is currently National Director of the League for Human Rights of B'nai Brith Canada. This article is a part of a wider study entitled "Building Supports for Interdisciplinary Teams: Is There a Role for ADR When Values Clash?" The field work for this study was undertaken at a major Toronto hospital through participation in the Clinical Ethics Committee, patient rounds and team conferences, as well as discussions with individual staff members on the palliative care team.

Alternative Dispute Resolution (ADR) is increasingly being used to address conflict in a number of diverse settings. Mediation has already been recognized as an alternative to litigation in medical malpractice suits, but it also has the potential for other applications in the health care sector. With technology advancing rapidly in the field, new and complex ethical quandaries are arising. There is now increasing discussion on whether ADR can be adapted to assist health care professionals mediate the value-based conflict that often arises in the shifting sands between technology and the law.

This article summarizes the first part of a study that assessed opportunities for ADR to be integrated into ethical decision-making in health care settings such as palliative care wards, Intensive Care Units (ICUs) and long term care facilities. The study looked at the incidence of ethics-based conflict, with particular focus on how it affected the functioning of interdisciplinary teams, in order to assess opportunities for the use of proactive ADR processes.

Given the inevitable presence of conflict in many workplace interactions, it is to be expected that value differences will be particularly likely to arise in the volatile, crisis-driven and often emotionally charged setting of a health care facility. The ongoing challenge of complex life-and-death decision-making provides an environment that is ripe for ethical uncertainty, moral distress, simmering tensions and, ultimately, varying levels of conflict among team members. Indeed, the psychological and emotional cost of ethical uncertainty in such settings is considerable as noted in a 2007 investigation that found "severe burnout syndrome … is present in about 50% of critical care physicians and in one third of critical care nurses …"[1]

On the other hand, a study looking specifically at communication between physicians and nurses noted that "[increased] collaboration and communication can result in more appropriate care and increased physician/nurse, patient, and family satisfaction."[2] Another study emphasized the importance of "balanced communication, negotiation, and mediation in end-of-life care",[3] a clear indication that ADR is recognized as a possible intervention, even if just as an informal adjunct to existing processes.

Introducing ADR techniques into clinical decision-making is, however, challenging. In addition to differences amongst the various health care professions, it is recognized that there is a range of practitioner attitudes within each discipline. One study contends that an individual's beliefs can "differ substantially from the recommendations of their professional bodies and from majority opinion in bioethics."[4] As just one example, "[n]ursing ethics, heavily influenced by the ethics of care, may be particularly reluctant to accept the authority of the biomedical ethics establishment on such questions as withdrawing and withholding [treatment]."[5] In this study, some nurses reported that dissension over the obligation to provide medically futile treatment if dying people and/or their families demanded it "causes more discord

among clinical teams ... than any other issue".[6]

Aside from such intra-team conflict, disputes can also arise when practitioners disagree with the wishes of a patient or his/her family. Or health care professionals may receive mixed or even conflicting messages from different family members, and may be unsure of the hierarchy within the family if no specific decision-maker is appointed.

The incidence of interpersonal conflicts over end-of-life decision-making is also higher than is generally understood. As one study found:

> At least 1 health care provider in 78% of the cases described a situation coded as conflict. Conflict occurred between the staff and family members in 48% of the cases, among staff members in 48%, and among family members in 24%. In 63% of the cases, conflict arose over the decision about life-sustaining treatment itself. In 45% of the cases, conflict occurred over other tasks such as communication and pain control.[7]

The authors of this study concluded: "By identifying conflict and by recognizing that the treatment decision may not be the only conflict present, or even the main one, clinicians may address conflict more constructively."[8] This call for a broader approach to analyzing and acknowledging conflict is a recurrent theme in the literature on health care management, mirroring the positions of the major theorists of ADR, who urge that conflict be studied in its broader dimensions.

When designing an ADR model that might work in this sector, a particular element that must be taken into account is the issue of power differentials on teams that operate according to a primarily medical model, which places the doctor firmly at the top of the decision-making hierarchy. There are "many types of power differences ... (e.g., professional status, gender, ethnicity, historical dominance of particular health delivery models, patient vs. clinician) ... [that] can affect how effectively an individual can participate in priority setting processes".[9] This is perhaps why the health care setting has been held up as an example of "negotiating at an uneven table".[10]

Nor are these disparities likely to change, partly because doctors have primary legal liability for medical decisions. But the perpetuation of such power differentials will complicate attempts to establish an appropriate ADR process in situations that revolve around ethical dilemmas, since 'leveling the field' is such a key feature of ADR thinking.

In spite of this caveat, even if parties to a value-based conflict in this sector will never entirely be equals in terms of making final decisions, there is still some room to maneuver in terms of involving all stakeholders in the process. Building on Daniels and Sabin's four-part "accountability for reasonableness" framework,[11] which is designed to address ethical quandaries over resource allocation, it has been suggested that a fifth element, an "empowerment condition", is necessary "to minimize power differences in the decision-making context and to optimize effective opportunities for participation".[12] Furthermore, it is noted that "people are more likely to accept such [difficult] decisions if the decision-making processes are reasonable, open and transparent, inclusive, responsive and accountable ..."[13] This line of thinking, gleaned from the lessons of the SARS pandemic, demonstrates there is considerable promise in expanding the use of ADR-type processes to help mediate the increasingly complex ethical challenges of the health care sector of today.

The incidence of interpersonal conflicts over end-of-life decision-making is also higher than is generally understood.

1 N. Embriaco ***et al***, "Burnout syndrome among critical care healthcare workers" (October 2007) Current Opinion in Critical Care 13:5 at 482-488.
2 K.A.Puntillo & J.L. McAdam, "Communication between physicians and nurses as a target for improving end-of-life care in the intensive care unit: challenges and opportunities for moving forward" (November 2006) Crit. Care Med. 34:11.
3 K.W. Bowman, "Communication, negotiation, and mediation: dealing with conflict in end-of-life decisions (October 2000) J. Palliat. Care16:Suppl. S at 17-23.
4 D. Dickenson., "Practitioner Attitudes in the United States and United Kingdom toward decisions at the end of life: are medical ethicists out of touch?" (2000) J. Med. Ethics 26 at 254-260.
5 ***Ibid.***
6 ***Ibid.***
7 C.M. Breen ***et al***, "Conflict associated with decisions to limit life-sustaining treatment in intensive care units" (May 2001) J. Gen. Intern. Med. 16:5 at 283-9.
8 ***Ibid.***
9 Jennifer L. Gibson, Douglas K. Martin and Peter A. Singer, "Priority setting in hospitals: Fairness, inclusiveness, and the problem of institutional power differences" (December 2005) Social Science & Medicine 61:11 at 2355-2362.
10 Pam Marshall, "Conflict Resolution in Healthcare: An Overview" (Fall 2003) in Interaction: Sharing Ideas, Innovations and Perspectives on Conflict Resolution in Canada, online: Conflict Resolution Network <http://www.crnetwork.ca>.
11 Norman Daniels & James Sabin, ***Setting Limits Fairly: Can We Learn to Share Medical Resources*** (New York, NY: Oxford University Press, 2002).
12 See Gibson ***et al, supra*** note 9.
13 ***Stand on Guard for Thee: Ethical considerations in preparedness planning for pandemic influenza: A report of the University of Toronto Joint Centre for Bioethics Pandemic Influenza Working Group*** (Toronto: University of Toronto Joint Centre for Bioethics, November 2005).

Customized Tools for Working and Understanding Diversity in the Context of Family Mediation

Elser Lee Archer, Trainer, Facilitator, Social Worker, Mediator and Diversity Specialist, Sage Diversity Management Counselling and Mediation ***www.sagedcm.com***
416 358-9945

While visible minorities are involved in the family court process, many do not utilize court based mediation services. Targeted outreach among ethno-specific service providers reveals that diverse community perceptions of confidentiality influence their willingness to participate in family mediation. As a result a significant number of diverse communities do not access the substantial benefits of family mediation.

In 2017 the number of visible minorities in Canada will likely increase and Ontario will have approximately 75% of its population represented largely by South Asians, Blacks and Chinese (Multiculturalism and Human Rights Program at the Department of Canadian Heritage – study initiated 2004). How do we as social work practitioners, lawyers and ultimately mediators affect a paradigm shift of cultural competence within the context of our work as we enrich collaborative services to families in conflict?

A study conducted by Punjabi Community Health Services (August 2009) was presented at the Symposium Enriching Collaborative Services to Families in Conflict (September 16, 2009). In this study South Asian respondents to an on-line survey were asked about primary reasons for familial conflict. The study indicated that the role of extended family members and spousal roles were impacted by the clash of eastern and western cultural differences, "Transformation (acculturation) of loved ones not understood".

The top 5 reasons for divorce were sited as follows:

1 Spouse listening to own parents, sisters or brothers

2 Spouse becomes violent

3 Too much in-law interference

4 Too many value differences between spouses

5 Spouse does not stand beside the other spouse when "accusations" are leveled against the spouse by the relatives

Generally speaking mediation by nature provides creative and more co-operative parenting solutions for the key types of disputes including custody and access, vacation plans, parenting communication and more. However, cultural perceptions of confidentiality seem to affect open participation in the mediation process. While facilitating training in fall 2008 for ethno-specific service providers and, main stream professionals working with families experiencing separation and divorce, tools and strategies for cultural competence in Family Mediation were examined. These tools enable practitioners to realize a paradigm shift in their cultural competence tool box, as they work and understand diversity in the context of family mediation.

The following tools were examined and explored:

1 Neutrality -The practitioner maintains neutrality by asking open ended questions. These questions allow the mediator to challenge the parties in mediation and facilitate self-reflection in relation to cultural biases that can promote or support the abuse of power being exercised in the family due to entrenched norms or values.

2 Examining Intersectionality & Self Reflection - The practitioner can effectively utilize client screening and intake to examine how intersectionality of the issues of race, spirituality, age, ability, gender, sexual orientation, and immigrant or refugee status affects the parties in mediation. Professional reflection on these issues may also need to be done, after intake or throughout the mediation process. This is an opportunity for the practitioner to determine if they themselves have personal biases that will challenge their ability to provide neutral service.

3 Evaluation - The practitioner may work in an organization where systemic discrimination is upheld or promoted within a cultural context, that may adversely impact the party or client because of their gender, race, ability or spiritual observance. Consequently, working and understanding diversity requires the practitioner to evaluate how systemic changes can be made within their organization to increase access to service or support for diverse communities needing mediation

or counseling.

4 'Strengths Model' - The practitioner can incorporate ground rules for mediation premised on a 'Strengths Model' approach while working with the parties. The 'Strengths Model' is the belief that all individuals have internal assets that can be drawn upon to help them change their lives and build to promote health and wellness in an active way (Saleebey D 2002, The Strengths Perspective in Social Work Practice ***Allyn and Bacon)***. Mediation is a process that promotes change through dispute resolution among the parties who draw on internal strengths and common ground to facilitate cooperation in the midst of separation and divorce. This approach acknowledges the positive strengths that each party brings to the process to assist in the identification of common ground and cooperative solutions.

5 Exploring Cultural Acceptance - The practitioner may use key questions to help clarify options for resolution that are culturally acceptable to both parties. Identifying what is culturally acceptable to the parties will facilitate more robust options. These questions aim to clarify the positions and interests of the parties based on the principle that their culture impacts their decision making which is in turn influenced by intersectionality.

"Diversity is many things - a bridge between organizational life and the reality of people's lives, building corporate capability, the framework for interrelationships between people, a learning exchange, a strategic lens on the world." Harris Sussman, The Future of Diversity and the Work Ahead of Us.

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Classified Advertising and Announcements of Interest to ADR Professionals

Accounting Services / Announcements / Courses / Court Reporting Services / Mediation Rooms / Office Space / Professional Opportunities / Positions Available / Positions Wanted / Transcription Services / Translation Services

ANNOUNCEMENTS

ADR Institute of Ontario AGM
June 22, 2012 – 8:30am
Professional Development Programme follows: "Opportunities in Healthcare"
www.adrontario.ca

COURSES

Co-operative Solutions
Conflict Management Levels 1 and 2 - July 9-11 and July 12-14
Advanced Family Mediation Skills - May 24-27
Domestic Violence Screening Refresher - June 12
Family Law 101: An Overview: Property - May 8 / Support - October 16 / Custody & Access -November 20 www.coop-solutions.ca

Riverdale Mediation
Basic Family Negotiation and Mediation Cases (40 hours) - May 3, 4, 7, 8 & 9
Fundamentals of Family Arbitration (21 hours) - June 14 & 15
Power Imbalances in Family Law Cases (10 hours) - June 18
Advanced Family Mediation and Negotiation Theory and Skills - November 9, 10 & 11
www.riverdalemediation.com

Murray H. Miskin: Comprehensive Arbitration Course
June 11 to June 15 - 9:00 am to 5:15 pm
Downtown Toronto
$2000.00 plus HST (includes course materials, certificate of completion, refreshments and lunch)
www.adrworks.ca

ADR Institute of Ontario: Civil Procedure Workshop for Non-Lawyer Mediators
June 23 - 9:00 am to 4:30 pm
234 Eglinton Ave. E., Suite 405
www.adrontario.ca

Family Dispute Resolution
Family Mediation - November 4, 5, 6, 7, & 8
Family Mediation Skills - November 13, 14, & 15
Family Arbitration - November 20, 21, 25, 27, 29
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Terms: All ads must be pre-approved. Payment is due 30 days prior to publication. Any late payment without prior arrangement with the Institute will result in the advertisement being placed in the subsequent publication.

Gary Noesner's *Stalling for Time*: Lessons for Mediators

It isn't often that I am so absorbed in a book that I miss my subway stop. But that happened as I was reading Gary Noesner's *Stalling for Time: My Life as an FBI Hostage Negotiator* (Randon House, 2010).

The book is fascinating reading, whether or not you are the sort of person (as I am) who can be transfixed by movie scenes of high stakes negotiations. Aside from being an absorbing read, Noesner's memoir contains some important lessons for mediators, even for mediators who hope never to negotiate with armed criminals.

The importance of coaching: FBI negotiators usually work in teams. While one officer negotiates, another listens and may offer suggestions via a passed note. The "coach" will often sense an opening or possibility that the active negotiator, listening and working in the moment, has not noticed. For example, FBI negotiators tried for weeks to persuade followers of David Koresh to leave their compound at Waco. Some did leave, including many of the children, but negotiations were slow and difficult because Koresh had a strong psychological hold on his followers. One woman got the courage to leave after the negotiator told her that her son, who had been released earlier with a group of children, "needs a hug from his mom." The primary negotiator told her this only because Noesner, acting as a coach, had been monitoring the ongoing conversation and sensed that this remark would be effective in getting her to think of her son's emotional well-being and thereby weaken Koresh's influence. Any mediators involved in complex, multi-party negotiations might benefit from working with a co-mediator.

Jeanette Bicknell is a mediator and business ethics consultant, based in Toronto. She is the owner of Principled Dispute Resolution and Consulting (***www.pdrc.ca***), and she writes widely on a variety of issues. You can reach her at: ***jeanette.bicknell@gmail.com***.

Trust and credibility: Noesner sometimes had to work hard to establish trust with his negotiating partners. His work brought him into contact with violent prison inmates, men who were angry and abusive towards women, religious fanatics, right-wing extremists, and mainstream political activists. Often, these were people from very different backgrounds with whom he had little in common. In every case, he treated those on the other side with respect and strove to make them feel like he cared about their well-being. Noesner tried at all times to project the view that he genuinely wanted to help them get out of their predicament with security and dignity.

De-briefing and support: When negotiations have gone well – and especially when they haven't – negotiators meet to discuss which techniques worked and which were less successful. FBI negotiators often work long hours in extremely stressful conditions, sometimes far from their families and the comforts of home. When a job is over, staying in touch with co-negotiators and talking things over is an important part of maintaining good mental health.

Safety: Although they are physically tough and confident around firearms, FBI negotiators place a high priority on their personal safety and do not put themselves at unnecessary risk.

Mediation works: Noesner tells us about some very challenging cases, and not every story has a happy ending. Still, it is truly inspiring to read about his successes. A trained negotiator has important skills and the power to do good, to avert violence and to help resolve even those situations that might seem hopeless. This is important for all mediators to keep in mind, even if the only high-stakes negotiations we are ever exposed to are in the movies.

'Get In, Get It Done, Get It Done Right, Get Out' -
Managing Construction Disputes through Expedited Arbitration

Robert Bales, P.Eng., PMP, LL.B., provides construction, engineering and technology-related arbitration and mediation services. His arbitration and applied construction experience extends from residential through commercial and institutional buildings to civil works. Contact: ***www.constructionarbitrator.ca***

Disputes are a 'business problem', not a 'lawyer problem'.[5] Controlling the dispute risk must be included in the contract documents at the start, when cooler heads prevail, with a wisely-considered process designed to push the dispute to closure.

The Contractor's mantra for profitability, 'Get In, Get It Done, Get It Done Right, Get Out'[1], also works for the Owner - in essence, both parties to a commercial relationship profit by avoiding delay, controlling costs and maintaining quality. Successful projects, and the inevitable changes within them, are planned, executed, controlled and completed[2] quickly and efficiently by the owner, contractor, sub-trades and consultants. For little reason other than habit and tradition, project disputes don't follow that path. Uncontrolled, project disputes can destroy a project budget and schedule, and run on for years. With the right process included in the contract documents, forcing the parties to focus on and expedite disputes, mediators and arbitrators can plan and control the execution and closure of disputes with certainty and in a timely and cost-effective way.

Risks such as flooding or storm damage, changes to the broader economy, or discovery of unanticipated site conditions cause an immediate response by the parties - a risk assessment with consequential changes to the project constraints (scope, budget, schedule or quality) to mitigate or maintain control over those identified risks. This is one of the primary business interests of the owner and contractor - to identify and respond to risk, thus maintaining profitability.

Why are project disputes treated differently? When a dispute arises, after a negotiation between the parties, each party packages up the file and sends it to their respective lawyers - fateful words, albeit wrongly targeted: "It's in the lawyer's hands now."

Where is the dispute risk analysis - what will be the impact on the project constraints of that dispute risk? What is the scope of the dispute itself? What is the range of cost to conclude the dispute? What is the probable time duration of it? Who will drive the timely and cost-effective resolution of the dispute?

Disputes are effectively outsourced by each party, typically to mediation, arbitration or litigation. Those processes are controlled outside the project by counsel until the hearing, and are most often deferred until after the project is finished.[3] The project is closed, the project manager is long gone[4], and the dispute takes on a life of its own. The mediator and arbitrator sit and wait for each party's counsel to put his or her case together.

Disputes are a 'business problem', not a 'lawyer problem'.[5] Controlling the dispute risk must be included in the contract documents at the start, when cooler heads prevail, with a wisely-considered process designed to push the dispute to closure. After the project is underway and the pressure is on to get it done and get out, a dispute quickly brings the parties to a boil, and both parties typically instruct their counsel to go for the jugular.

The contract documents should:

- include expedited procedural rules to designate at the outset of the project a specific project mediator and arbitrator to manage the dispute should a negotiated resolution fail.
- place as a first priority on the

parties, and on the mediator and arbitrator, the assessment of the scope, cost, time and quality of the dispute, and the development and execution of a plan for pushing the dispute to a conclusion.

- deal with every dispute immediately when the problem is fresh and of immediate consequence to all parties, and the evidence and witnesses are available.
- provide the arbitrator with ample discretion to deal with all aspects of the dispute, including the number of witnesses, volume of evidence, dispute schedule, etc. - some disputes may be resolved quickly, some may require extensive analysis and take much more time.
- provide for no appeals.

Natural justice must always be assured, and there are trade-offs, including the 'rightness' or the 'wrongness' of the outcome of the dispute - the parties obtain finality at reasonable cost and duration by giving up the possibility that one or the other might have been able to prove at the Court of Appeal that they were right.

What are the costs of a typical construction dispute? Can a party save money by litigating? David Bristow, Q.C., then at Fraser & Beatty, analyzed a construction lien matter[6]. The total fees and disbursements for the lawyers and opportunity costs for the time of the parties was almost double the $100,000.00 value of the claim. With typical costs awards to the successful party, the best the winning party can do is to get back to zero, applying its successful judgement against its unrecovered costs - and this does not take into account the time and costs of appeals.[7] Fighting and winning a dispute but without any net gain is not a wise business decision. ***See Chart 1***

After a project is underway, one party wants to expedite a dispute, while the other party wants to delay. Yet many of our forms of commercial contract institutionalize the opportunity for a party to delay, increasing the dispute risks, perhaps the most common being the appointment of a mediator and an arbitrator by 'mutual agreement of the parties' after the dispute has crystallized.[8, 9]

In a thought-provoking article, Peter Morton, a Partner in the International Arbitration Group, K&L Gates LLP, London, UK asks "Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?".[10] He identifies six procedural issues, and two other factors, generally unspoken, in response to a client's question about the procedural timetable:

- Tribunal availability: Use a sole arbitrator, base the selection on 'availability' rather than waiting for the perceived 'best', and consider the level and timing of the arbitrator's involvement.
- Counsel availability: Same as for Tribunal availability.
- Expansive disclosure process: It is counsel's natural inclination [and duty - see note 5] to 'leave no stone unturned', but the trade-off of arbitral speed and efficiency [and cost effectiveness] for limited documentary disclosure is rarely presented to the client.
- Expansive witness evidence: Similar to documentary disclosure - allow only key witnesses and experts, with shorter witness statements or summaries.
- Witness availability: Consider written statements, video links, real necessity for cross-examination - expediting enhances witness availability due to the shorter time from dispute initiation to hearing.
- Dilatory tactics and their accommodation by the Tribunal: One party is a reluctant participant, while opposing counsel is anxious to proceed. Arbitrators are reluctant to rule against requests for additional time, fearing possible recourse against themselves or their award for failing to observe due process. Default mode for many counsel and arbitrators is to follow a somewhat leisurely timetable which end-users find frustrating. Expedited arbitration imposes significant stress on both counsel and the arbitrator for the duration of the dispute, but that is the cost of meeting the demands of the customer.
- Habits or preconceptions: How to get counsel, arbitrators and institutions to change their mind-set and approach to arbitration procedure, and their expectations as to how long is reasonable for each step to take and how quickly things should move in arbitration? Before the pre-hearing, the process ought to direct consideration of the number and extent of submissions and how much time - at a minimum - is really necessary.
- Self-fulfillment: Cynically, it may be said that the pace of an arbitration is largely controlled by those being paid on an hourly basis. It is human nature

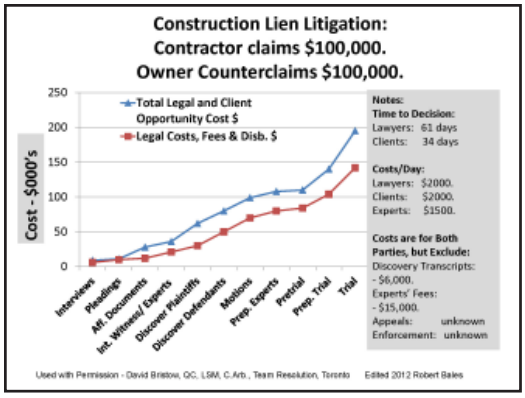

Chart 1

that submissions to be completed within a prescribed time period are, at best, completed at the period end, and would present substantially the same points if the time period were shorter.

In effect, Peter Morton suggests shifting the process, and the mind-set, toward expediency - make the expedited process the default, while allowing counsel to argue for and justify requests for greater time or detail. In my view, imposing a truly expedited process will focus the parties, and the mediator and arbitrator, on a business-wise, risk-mitigated conclusion to the dispute.

Governor-General David Johnston and retiring Justice Ian Binnie of the Supreme Court of Canada have recently re-iterated, in effect, that 'justice delayed is justice denied'.[11] There are certainly trade-offs, but the costs and delays arising from allowing disputes to run on for years are huge. At least in commercial matters, we as arbitrators need to step up to the bar and assist owners, contractors and their counsel to design and implement expedited arbitration procedures in their contracts. Before the first shovel is in the ground - when both parties are happy - including a truly expedited procedure in the contract documents will help them to, successfully, 'Get In, Get It Done, Get It Done Right, and Get Out'.

1 Loosely attributable to Donald Trump's father, Fred C. Trump
2 Generally, Project Management Institute, "A Guide to the Project Management Body of Knowledge, 4th Ed." (PMBOK® Guide)
3 Canadian Construction Documents Committee "CCDC 2 Stipulated Price Contract", General Condition GC8.2.8 includes as a default that an arbitration shall be held in abeyance to the end of the contract. Public Works and Government Services Canada (PWGSC), RPCD Construction Contract General Conditions GC6.4, arbitrations consolidated and held in abeyance 'unless otherwise agreed'.
4 PMBOK® Guide, supra note 2, 12.4 Close Procurements: "Unresolved claims may be subject to litigation after closure."
5 In Ontario, the lawyer for each party has a duty to his or her client set out in the Rules of Professional Conduct of the Law Society of Upper Canada, Commentary to Rule 4.01 Advocacy:
"The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."
6 David Bristow, Team Resolution, Toronto, 'Cost of a $100,000.00 Construction Litigation', originally prepared twenty years ago but recently presented to a meeting on 'Legal Project Management', ADR Ontario Construction Section, 25 May 2011 - see graph attached.
7 A recent case with similar claims made it all the way to the Supreme Court of Canada (leave to appeal denied): Tri-Way General Construction Ltd. v. Hans, Kruzick J., 2008 CarswellOnt 2391
8 Canadian Construction Documents Committee "CCDC 40 Rules for Mediation and Arbitration of Construction Disputes", s.8 Appointment of Arbitrator; Ontario Provincial Standards for Roads and Public Works, "OPS General Conditions of Contract", GC 314.03 Appointment of Arbitrator; ***Commercial Arbitration Act***, SNS 1999, c 5 Consolidated Statutes of Nova Scotia, Schedules A, B & C; PWGCS GC811.5 Appointment of Tribunal, devolves into a costly and lengthy selection process.
9 The National Arbitration Rules of the ADR Institute of Canada, Inc., available on-line at http://www.adrcanada.ca/rules/arbitration.cfm, caps the delay by providing a default back to the Institute where the parties fail to agree within the time prescribed.
10 Arbitration International (March 2010), 26 (1), pg. 103-113. Although copyright is held by the London Court of International Arbitration, Peter may be able to provide a limited number of copies of his article to those interested in expedited arbitration. I shall provide his contact details on request - rob.bales@sympatico.ca
11 "Forceful Governor-General tells lawyers, 'Heal thyself'", Richard Foot, Ottawa Citizen, 15 August 2011; "Binnie's wise words on unclogging courts", Globe & Mail Editorial, 27 September 2011

Canada: A prime situs to arbitrate International Commercial Dispute

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When looking for a location for arbitration for international commercial disputes, one of the major criteria should be a location that conveys a feeling of impartiality amongst all the parties involved.

A neutral location should facilitate the agreement to engage in the process. What is needed is a location within a country whose legal framework is designed to facilitate the arbitration procedure. Such a country is Canada. With a long history of neutrality, multiculturalism and diversity, Canada is also a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Because of this, Canada enjoys reciprocated rights of enforcement of arbitral awards with any other jurisdiction in a member state which is a party to this convention. As of October 1, 2009, this accounted for 142 of the 192 member states of the United Nations.

The provincial and territorial governments, as well as the Canadian

Federal government, have adopted international arbitration laws based on the 1985 model the United Nation's Commission on International Trade Law drafted. Because of this, the various Canadian international arbitration laws reflect this model law with minor variations. Also, Canadian courts give strong deference to international arbitration agreements by staying court proceedings and enforcing rewards.

Arbitration is initiated by an agreement between parties in writing. In Canada, one party may compel another party into arbitration if it is within their initial or subsequent contract to do so. If there exists one or more clauses of an agreement to arbitrate in a broader or more comprehensive document, the clause to arbitrate will survive the termination of the main contract. The tenor of the United Nation's Commission on International Trade Law's 1985 Model Law is such as to limit court intervention in international commercial arbitration. A Canadian court must pass any case onto arbitration when any of the international commercial arbitration legislative acts apply; unless it finds that an arbitration agreement is null and void, defunct or non-performable.

An oral hearing is not required under the Canadian international commercial legislation...

Jurisdiction

Whether or not a dispute comes under the jurisdiction of an arbitration agreement, is often a source of conflict in itself. In Canada, the arbitral tribunal has the authority to determine whether it is authorized to resolve the dispute. However, such determinations are reviewable, and a party may go directly to a court to challenge an arbitration tribunal's jurisdiction.

Parties may enter into arbitration at any time, whether there is a former agreement to do so or not. Once an agreement has been initiated, it is not uncommon for a pre-hearing conference to occur between the parties in dispute. This pre-hearing is required by some of the rules of the various international arbitration institutes. During this hearing, the service of documents, the scope of pleadings, how uncontested facts will be managed, rights to privacy, the exchange of witness lists, and the other facets of the hearing will be discussed and decided. If interim relief or protective measures are needed, these may also be a part of the pre-hearing.

An oral hearing is not required under the Canadian international commercial legislation and may be performed by the submission of documents, orally, or a combination of the two. The main focus is to impartiality, practicality and expediency.

An award is usually given in writing and will include the reasons for the finding under the international commercial arbitration legislation. A settlement by the parties during the course of arbitration will be recorded as an award.

If the parties expressly agree to an appeal of the arbitrator's decision, then there is an opportunity for review. However, this is not generally the case. Article 34 of the 1985 UNCITRAL Model Law states that an award may be set aside explicitly for these reasons:

- The arbitration agreement is invalid within the jurisdiction it is heard or if a party is unable to plead their case.
- Improper notice of the appointment of the arbitrator, the hearing or the prevention of a party from the presentation of their case.
- The award is given for reasons outside the scope of the arbitration agreement.
- A discrepancy of the arbitral tribunal or the proceedings from the arbitration agreement or the Model Law.
- The law of the jurisdiction where the hearing is held states that the subject-matter of the dispute is not within the realm of arbitration.
- There is some conflict with the award and the statutes of the jurisdiction.
- In order to set aside an award, application must be made within three months of the date the party receives the award within the awarding jurisdiction.

With an outstanding legal framework, Canada offers further incentives as a prime situs for international arbitration. Located between the Eastern countries and Europe, this centralized location is convenient to many areas as a meeting point. As the world's second largest country by area, a location can be found either closer to the East or the West to further facilitate this feature. Canada is a modern country with easy access to any of its major centers of commerce. As a multilingual nation, its people and facilities are accustomed to accommodating and eliminating barriers.

Canada, with its excellent framework for international commercial arbitration, is an attractive location for this process. With the international intertwining of today's business, the need for such a site is becoming more applicable. In order to facilitate the arbitration process, it makes sense to utilize a venue geared toward providing all the avenues necessary to ensure an impartial and binding result with a minimum of difficulties.

An Infusion of Mediation

For many, the first introduction to the concept of mediation is through collective bargaining. The tried and true process of distributive bargaining has not worked. Conciliation, mandated by legislation, has been grudgingly attempted, and has not resulted in an agreement.

John Box is a newcomer to the mediation process. He has over thirty years of experience in the field of Human Resources management, in areas such as labour relations, job evaluation and pay equity, and organizational design and review. While he has worked in mainly the not-for-profit sector, he has also worked in the private sector in the gaming industry. For the past several years, John has been working as a Human Resources Consultant, starting his own firm, **JM Box Consulting Services,** in Windsor, Ontario. As a result of his increasing interest in the field, he has decided to utilize more of his problem solving skills through work as a mediator. John can be reached at john@jmboxconsulting.com.

The strike/lockout option may also have been used. Still no final resolution. And so, out of what may be a feeling of desperation, mediation, agreed upon by both parties, and therefore more likely to succeed, is tried.

Traditional collective bargaining is a distributive bargaining process. It is confrontational at its core, and basically relies on a 'win/lose' scenario. Many point to a trend away from this kind of mind numbing negotiations in the form of integrative negotiations, whereby the parties work together, based on complete information (and therefore trust) toward dealing with issues of mutual interest. Sound utopian? It's not.

As time goes on, and new faces appear on the negotiations scene, they often look at what has happened traditionally in negotiations, and realize that it may work, but at a cost. Part of that cost is that, because of the reputation that old style collective bargaining has, many do not want to participate in it or, if they have to, don't necessarily do it well. So perhaps it is time for a change.

One major obstacle to change in collective bargaining is that the immediate change from distributive to integrative collective bargaining, or any kind of negotiations, is difficult. The change requires a different approach and a different mindset, and is particularly difficult when one or both of the parties are reluctant or fearful of making the change. Old school negotiators often do it because they enjoy it that way, and may be concerned that the change will make them obsolete. How can these issues be dealt with?

How about introducing someone new into the negotiations process?

Traditionally, when collective agreement negotiations break down, a mediator is introduced. This usually occurs after the negotiating parties have tried and failed to reach resolution, and the mediator is brought in to help look at the outstanding issues from a different perspective, and focus the parties on looking through the debris of their negotiations to see where the deal really lies.

But what if that same mediator was brought in from the very start, if not before, the negotiations? What if the mediator was brought in to assist the parties sort through and identify what is really important to them, teaching them how to work together on resolving common issues? Sound interesting?

The use of a good mediator as part of the negotiations process could allow the parties to make that transition from distributive bargaining to integrative bargaining, by showing them how it can be done. The mediator, particularly one using Principled Negotiations techniques, would, by example and through the utilization of mediation skills, show the parties how to work together, and how to streamline negotiations.

Here is an example. In many traditional negotiations, both parties will put into their initial bargaining proposal items that they don't really care about. They

are in the proposal so that they can be withdrawn, so it looks to the other party that a major concession has been made. A good mediator may suggest that this not be done, so that more time and energy can be spent by the parties dealing with their real issues. To paraphrase a mediator: "cut the b.s. - what do you really want?".

A mediator could be very useful, right from the start, at helping both sides understand each other's position, an issue that often clouds negotiations. After all, a successful mediator will try to do that when they are brought in at the end of negotiations, so why wouldn't that same philosophy be helpful earlier on?

Some might be concerned about the additional cost of bringing in a mediator right at the start of the negotiations, but that could be looked at another way. If it shortens negotiations, improves the relationship of the parties, results in a better agreement, and provides a way of transitioning into integrative negotiations, wouldn't it be worth the cost?

As we look around the labour relations world today, we are seeing that distributive bargaining is destructive and can result in not just poor collective agreements, but the end of the employment relationship entirely. Poor negotiation results are not just the result of external pressures, but the lack of trust and cooperative attitude that needs to exist between unions and management in today's beleaguered workplaces. There needs to be a change to a more joint approach to achieving the results necessary for survival against the world's economic trends and changes. Perhaps this form of mediation can help that transition into a new work environment, one that can assist in the survival of Canadian industry.

Mediation Pilot Project - Automobile Injury Mediation Office (AIM)

Automobile Injury Mediation Office

An independent agency of the Manitoba government

Evelyn Bernstein, B.A., LL.B, has her admission to both the Manitoba and California Bar. She is currently the Project Manager for the Automobile Injury Mediation Office. She is the former Ombudsman at the University of Manitoba. Evelyn is also a trained mediator and operated her own mediation firm for several years. You can reach her at 204-942-4957 or evelyn.bernstein@hp.com

The Province of Manitoba has recently launched a 2 year Mediation Pilot Project that offers the option of mediation to claimants who are injured in motor vehicle accidents. The option of mediation is available to claimants who have filed an appeal with the Automobile Insurance Compensation Appeals Commission (AICAC), a tribunal which hears appeals of Internal Review Decisions concerning benefits under the Personal Injury Protection Plan (PIPP) of Manitoba Public Insurance (MPI), a no-fault insurance program.

Currently, under PIPP legislation, a claimant who has a bodily injury claim, files a claim with MPI and is assigned a case manager who issues a decision about the claim. If the claimant is not satisfied with that decision, s/he can file an Application for Review with the Internal Review Office. If the claimant is dissatisfied with the decision issued by the Internal Review Office, s/he has 90 days to file an Appeal with the Automobile Injury Compensation Appeal Commission.

Claimants have been frustrated with the length of time it takes for a matter to be resolved through the current dispute resolution processes. The purpose of providing mediation is to increase claimant satisfaction with the dispute resolution processes by reducing the time it takes for the resolution of an appeal, as well as reducing the number of cases that actually proceed to an appeal hearing.

In April 2011, a Project Manager was hired to develop and implement the Mediation Pilot Project, in consultation with a steering committee comprised of representatives of MPI, the Automobile Injury Compensation Appeal Commission, and the Claimants Advisor Office. The Claimant Advisor Office is an is an advocacy office that was created to help people who want to appeal their MPI Internal Review Decisions.

The mediation pilot project is being operated out of a new office called the ***Automobile Injury Mediation Office (AIM)*** located in Winnipeg. Notwithstanding the Winnipeg location, mediation is available to all residents of Manitoba. Where necessary, arrangements can be made for mediations to be held outside of Winnipeg. The AIM Office and the Project Manager operate independently from the steering committee to which it reports.

The AIM Office utilizes a roster of mediators, who have significant mediation training and experience. Currently there are 14 mediators on the roster, half of whom are lawyers. Mediators on the AIM roster are independent from MPI, AICAC and CAO. Mediators are assigned to cases based on their qualifications as well as the nature and complexity of the case. Upon joining the roster, the mediators receive training on the MPI claims processes and the MPI Act, including the PIPP legislation.

The pilot project is being rolled out in 2 phases. In the first phase, designed to address the backlog of cases at AICAC, mediation is being offered to those who have already filed a Notice of Appeal

To date, the AIM Office has received 91 Applications for Mediation. Approximately 75% of the cases have proceeded to mediation...

to AICAC. The second phase, designed to address newly filed appeals, will allow claimants to request mediation immediately upon filing a Notice of Appeal.

All claimants who indicate an interest in proceeding to mediation will be entitled to it with the following exceptions:

a) Where there is a late Notice of Appeal filed by the claimant. Under the legislation, a Notice of Appeal must be filed within 90 days of the internal review decision (IRD). For these cases, a determination will be made by AICAC whether to allow the late appeal. If AICAC makes the decision to accept the appeal, then the case can be considered for mediation.
b) Where the only issue requires a statutory/legal interpretation.
c) Where the maximum benefit under PIPP has already been awarded (or determined).
d) Where there is an appeal hearing or case conference already scheduled.

Just as they can at appeal, claimants can attend mediation alone, with a representative from the CAO, or with a lawyer. Attending mediation on behalf of MPI is an Injury Management Coordinator; this is not the same person who issued the original decision on behalf of MPI. In those cases where the claimant is represented by a lawyer, MPI will also attend with internal legal counsel. Mediation training has been provided to all those who attend mediations on behalf of MPI.

The AIM Office employs a two-step mediation process. The first step involves a Pre-Mediation Session where the Mediator meets with each party separately before the mediation session to discuss what to expect at the mediation, to clarify the issues, and to ensure that each side's view is understood. The second step, which is approximately one week later, is the actual Mediation Session where both parties are present at the meeting. Mediation sessions are scheduled for a 3 hour period; in some cases, additional mediation sessions may be required.

Where an agreement on some or all of the issues is reached, the Mediator prepares a Memorandum of Agreement which is signed by both the claimant and the MPI representative at the conclusion of the mediation session. The Appeals Commission does not receive a copy of the Agreement. In addition, if all of the issues are resolved, the Claimant will sign a Notice to Withdraw Appeal, which is submitted to the Appeals Commission. If some of the issues are resolved, but the claimant still wishes to appeal one (or more) issue(s), the claimant will sign a Notice of Partial Withdrawal of Appeal which is submitted to the Appeals Commission. If no agreement is reached or any issue(s) remains unresolved, the appeal proceeds in the usual course.

To date, the AIM Office has received 91Applications for Mediation. Approximately 75% of the cases which have proceeded to mediation have resolved in whole or in part.

An independent evaluator has been retained to conduct an evaluation of the pilot project and upon completion of the pilot program will submit a report to the Manitoba Government with recommendations as to whether the program should continue beyond the 2 year pilot period.

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