Vol. 32, No. 1
Spring 2023

Canadian Arbitration and Mediation Journal

A publication of the ADR Institute of Canada, Inc.

Learn about
ADRIC 2023
Annual National Conference
page 9

LEADING DISPUTE RESOLUTION IN CANADA
SINCE 1974

Vol. 32, No. 1 Spring 2023

CONTENTS

ADR Institute of Canada Inc.
LEADING DISPUTE RESOLUTION IN CANADA

234 Eglinton Avenue East, Suite 407
Toronto, ON (Canada) M4P 1K5

416-487-4733 | 1-877-475-4353
journal@adric.ca | www.adric.ca

Back Issues:
https://adric.ca/useful-links/journal-articles/

Également disponible en français :
adric.ca/fr

Message from the Editor

Welcome to the spring 2023 issue of the Canadian Arbitration and Mediation Journal. This issue continues our look at ADR research—who is doing it, with what resources, and to what end?

The journal talks to **Mary Lee**, a professor at Humber College in Toronto, Canada, who led a survey of Ontario's ADR practitioners aimed at identifying who comprises the field and what services they offer. **Joya Mukherjee** offers readers a primer that details the main steps required in a research undertaking, and **Methura Sinnadurai**, **Benjamin VanderWindt**, **Patricia McMahon**, and **Trevor Farrow** of the Winkler Institute at Osgoode Hall Law School make the case for research to support access-to-justice initiatives. **Mary T. Lee**, **Rameen Sabet**, **Joya Mukherjee**, **Oliver Mercer-Smail** and **R.M. Doyon Dolinar** provide a closer look at the ADR sector in Ontario in 2022 based on their recent survey. And I, **Genevieve Chornenki**, put forward an editorial about the past, present, and future role of research in the dispute resolution field.

But there's more! **Gary Furlong** explores a provocative topic, the use of the notwithstanding clause in labour relations. **Harvey Kirsh** challenges received wisdom about the best or only way to present evidence at arbitrations. **Natasha MacParland** and **Stephanie Ben-Ishai** paint an up-to-date picture of mediation and arbitration in insolvency proceedings. And, **Shaaron Jones-Crawford**, **Harold Tan**, and **David Stinson** explain a structured, time-bounded facilitation process intended to promote direct dialogue among disputing participants. And last but by no means least, as the table of contents indicates, the journal now offers links to **reviews of books** that will interest dispute resolution practitioners. **John D. Gregory** uses his expertise in international dispute resolution to review *The UNCITRAL Model Law on International Commercial Arbitration: A Commentary*, **Barry S. Corbin**, an estates law expert, reviews *Arbitration of Trust Disputes*, and I review *Inclusivity in Mediation and Peacebuilding*. Visit our book reviews webpage here.

We hope readers will enjoy and benefit from the material presented here, and we urge everyone to share this issue with colleagues, clients, and friends. Past issues of the journal can also be found on CanLII at https://www.canlii.org/en/commentary/journals/43/.

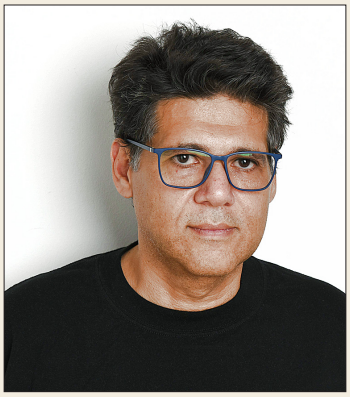
Thank you to all who made this issue possible: our contributors, the helpful staff at the ADRIC office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome.

Genevieve A. Chornenki
Editor-in-Chief

GENEVIEVE A. CHORNENKI, LL.M.(ADR), C.MED, C.ARB

Genevieve is the author of Don't Lose Sight (2021) and co-author of Bypass Court (2015). She holds a Certificate in Creative Writing from the University of Toronto and a Publishing Certificate from Ryerson University. She was inaugural chair of the Ontario Bar Association's ADR section and serves on ADRIO's C.Med accreditation committee.
www.genevievechornenki.com

President's Message



ELTON SIMOES, MBA, MDR, IDP-C, C.MED, Q.ARB

Elton Simoes is an accomplished Arbitrator, Mediator, Negotiator, Consultant, Board Director, and Business Executive. He practices arbitration, mediation, and Med-Arb in complex, confidential, time sensitive, commercial disputes. He has lived, worked, and studied in Canada, U.S., Latin America, and Europe. He possesses a strong academic background in Business, Law, Corporate Governance and Dispute Resolution.

Dear Members of the ADR Institute of Canada,

There is no greater honour than serving our fellow human beings. And no greater pleasure than doing it effectively. As the President of the ADR Institute of Canada, I am honoured to share this privilege with my colleagues on the ADRIC Board of Directors, our staff, affiliates, and the dedicated volunteers who contribute to making our Federation the most important and relevant ADR institution in Canada.

To be effective, however, we need shared intent, purpose, and values, all of which must be coordinated and supported by adequate infrastructure and human resources. As the leading ADR organization in Canada, ADRIC serves three main stakeholders: our members, our clients, and the public interest. Governing this complex organization demands that we never lose sight of those we serve.

ADRIC relentlessly pursues initiatives to provide professional opportunities for its members, improve the services provided to clients, and protect the public interest by improving its policies and processes to ensure that our members are practitioners of the highest quality.

Our intention, purpose, and values can be clearly seen in the many projects currently underway, which impact and improve, now and in the years to come, our members' access to professional opportunities, the quality of the ADR services provided by them, and the upholding of the highest professional standards to ensure ethics and competence in the provision of ADR services.

We are investing in understanding the needs of our membership and will soon conduct a census of our members to collect information that will help us focus our efforts with the necessary focus and intent. In the meantime, ADRIC and its affiliates are intensifying their ongoing efforts to create professional opportunities for members, with already visible results such as our leadership in the construction adjudication field, at both the provincial and national levels.

A group of dedicated volunteers, including some of the most prominent arbitrators in Canada, is working on a blueprint to improve ADRIC's operations and infrastructure to bring it to an even higher level of service as an appointing authority. We believe that by implementing this ambitious plan, ADRIC will improve its competitive position in the ADR market, becoming an important hub in the appointments of ADR professionals in Canada and abroad.

In the service of the public interest, ADRIC and its affiliates are working on a new and improved national complaint policy, which will give the public the necessary tools and guarantees that the ADR services provided are faithful to ADRIC's commitment to ethics and competence. Coupled with the new, updated, and improved versions of the National Introductory Mediation Course, already released and the National Introductory Arbitration Course, soon to be released, these initiatives guarantee ADRIC's position at the leading edge of ADR and best practices in Canada and the world.

All of these initiatives would be incomplete if they were not executed within the parameters of our shared values. In this regard, ADRIC invests in membership democracy, diversity, and inclusion. Our board of directors is gender-balanced and increasingly representative of Canadian diversity. We invite and support diversity and membership democracy by offering our members equal access to opportunities in the organization's leadership and governance positions. Mentoring and supporting new talent is one of the most important pillars to build resilience and strength in our organization.

We invite you to be involved and play an active part in our efforts to further build our great organization. Let's work together to serve our fellow men and women. And do it well.

Sincerely,

Elton Simoes

OSGOODE'S PART-TIME PROFESSIONAL MASTER OF LAWS (LLM) IN DISPUTE RESOLUTION

Marc Bhalla, LLM (DR), C.Med, Q.Arb, MCIArb
Mediator & Arbitrator, Elia Associates Professional Corporation, Barristers and Solicitors / Instructor, Osgoode Professional Development

MASTER NEW APPROACHES TO DISPUTE RESOLUTION

Courses Include:

- Dispute Resolution in the Digital Age
- Mediation Advocacy
- Creativity and Collaboration
- Culture, Diversity and Power in Dispute Resolution

Go beyond your day-to-day. Step outside the existing limitations of traditional conflict resolution processes and explore new ways of resolving disputes. Led by the top lawyers and experts in ADR, join this celebrated program that balances theory and practice to elevate your expertise.

Find out more about the program at:
osgoodepd.ca/adr

Program starts: Fall 2023
Apply by: May 1, 2023

Canada's leading Professional LLM degree program for lawyers, mediators, arbitrators and professionals involved in conflict resolution.

OSGOODE
OSGOODE HALL LAW SCHOOL
PROFESSIONAL DEVELOPMENT

YORK U

Listen In:

A conversation with Mary Lee and editor Genevieve Chornenki

MARY T. LEE, LL.M.

Mary Lee is a Program Coordinator and Professor in the Longo Faculty of Business at Humber College. In addition to her long and distinguished career in the administrative justice sector and the Ontario Public Service, Mary has spent more than 25 years teaching part-time in the continuing education program and the Alternative Dispute Resolution (ADR) Graduate Certificate program at Humber College. After spending 35 years in the provincial government ministries, boards and tribunals, Mary decided to dedicate herself to a full-time teaching career at Humber. With rich expertise in mediation, adjudication, operations, and business services. Mary also holds the position of Chair with the Toronto Licensing Tribunal. Mary has completed her Master of Laws (LL.M) degree, specializing in Alternative Dispute Resolution, at the Osgoode Hall Law School.

Mary, thank you making time to speak with me, I'm particularly interested to hear about the stakeholder survey that you're leading in Ontario because I understand it to be the first survey of its kind in Canada.

The survey is the first of its kind in Ontario, indeed the first of its kind in Canada. We talk about the Alternate Dispute Resolution (ADR) *industry* or *field* or *sector* or even *profession*, but whatever you call it, no one really knows who is out there doing what with ADR. So, in the first instance, the survey is intended to scope out the territory.

The primary purpose of the survey is to find out the needs and challenges experienced by Ontario's dispute resolution practitioners, both experienced and emerging. It is also intended to identify evolving practices, professional development and business opportunities in the sector, and to find out how ADR practitioners and users interact and engage; the survey is to identify the needs, challenges and evolving practice of ADR in Ontario.

At whose initiative did the survey come about?

Almost two years ago, the then executive director of the ADR Institute of Ontario (ADRIO) reached out to me in my role as professor and Program Coordinator of the ADR Graduate Certificate Program at Humber College in Toronto. ADRIO wanted to know whether I would be interested in partnering with them on a research project to learn more about the Ontario ADR sector. I had ongoing conversations with the executive director, and our two organizations had collaboration on various initiatives since the inception of Humber's program in 2012. Through a literature review and meetings with a joint Humber/ADRIO research committee, we identified that the best way to obtain information from ADR stakeholders was through a survey. The survey responses are intended to provide ADRIO with better understanding of the needs of the ADR sector, to develop and share best practices, and to develop targeted training and business development opportunities.

Who played what role in this initiative?

I would explain it this way: ADRIO is the client, and Humber College is the educational institution conducting research on ADRIO's behalf. It's a partnership with each organization making an appropriate contribution to the whole, and the relationship is formalized by means of a written partnership agreement.

Initially, there was a joint Humber/ADRIO committee that wrestled with the parameters of the project and brainstormed ideas. Early on, we conducted a literature and theory review on digital transformation and the Ontario ADR sector. We performed a needs assessment, formulated a research question, and proceeded to submit a research project proposal to Humber College's Office of Research and Innovation for funding.

Based on consultations with Humber College's Research and Innovation support office and ADR professionals, the research team began to design the survey, and fine-tuned the ADR stakeholder identification and engagement activities for survey distribution.

Where did the resources come from to support the research?

Humber College applied for and ultimately received an Engage grant from the Natural Sciences and Engineering Research Council of Canada (NSERC) for the project. Those grants are intended to foster collaboration between Canadian Colleges and universities with industry partners such as ADRIO. As a tenured Professor at Humber College, the college

freed me up from teaching one course so that I could devote myself to this project. I was also able to access other research expertise on campus, and the Engage grant provided the money for three research assistants. So, at the end of the day, ADRIO was not required to invest any of its organizational funds into the research costs.

To whom was the survey distributed and by what means?

Our distribution strategy was to target the ADR stakeholders for the purpose of obtaining as many ADR provider responses as possible. By way of survey invitation, we started with the ADRIO membership and then reached out to other Ontario dispute resolution organizations such as the Family Dispute Resolution Institute of Ontario, the Ontario Association of Family Mediators, the Law Society of Ontario, the Ontario Bar Association's ADR Section, the Society of Ontario Adjudicators, and community organizations such Toronto Neighbourhood Group and Peacebuilders Canada. Each organization agreed to support the research by sending out the survey invitation to their respective membership through communication vehicles such as monthly newsletters, communiques or email blasts.

What kind of information did the survey attempt to elicit?

Determining what questions were within our scope was a challenge. In the end, the questions were clustered together into groups with a view to eliciting information of commercial and professional value to dispute resolution practitioners. We sought to:

- Identify ADR Providers and Users in the Province of Ontario
- Identify needs and challenges experienced by ADR practitioners
- Identify new evolving ADR practices and processes
- Identify innovative and modern methods of virtual ADR services
- Identify new business development opportunities
- Identify targeted professional training opportunities
- Identify new ADR sector growth post-pandemic
- Identify digital solutions to improve how ADR practitioners interact with their clients (client-practitioner engagement)
- Identify a digital solution to capture and house the necessary data to inform and promote evidence-based policy, sector growth, the development and sharing of best practices and development of targeted training and business development opportunities.

The research project sounds like an enormous amount of work. What would you say was in it for you personally?

There was so much learning for me and the research team throughout the entire process. The task was somewhat daunting, but the team was very committed to see it through to the end. Even though I had designed and implemented an early resolution process at Ontario's Social Benefits Tribunal as part of a master's program, this research project was a big undertaking and commitment, much bigger than I anticipated or imagined. The learning curve was steep. I learned firsthand and in real time about the research process and its practicalities. For example, there are ethical considerations for data collection that required a submission to Humber's Research and Ethics Board before any research could proceed, and in order to get approval from that board, my research team had to complete a course on research ethics that is applicable to all research involving human participants (TCPS 2 Core Certificate). Then there was the process of applying for the Engage grant and learning how to write a proposal that would address all of the relevant criteria and make a compelling case for funding. Now that the survey has closed, I expect more learning, this time about data analysis, interpretation, and report-writing.

The biggest take away for me to date was the amount of time, hard work, patience, and resilience required from the research team to continue to advance the project. We ran into what seemed to me to be bottlenecks along the way, and it would have been easy to walk away at many junctures. However, my passion for learning and my commitment to ADR prevailed!

Before joining Humber College as a professor, you had an extensive background in administrative justice and the Ontario Public Service. Tell us about your background and your journey into and through dispute resolution.

I was first introduced to ADR back in 1996 in my role as Chief Administrator Officer with the Criminal Injuries Compensation Board, and I was a member of Society of Ontario Adjudicator and Regulator's (SOAR) training committee when I completed my first ADR training. In 1998, I was a vice chair at the Ontario Rental Housing Tribunal (now known as Landlord and Tenant Board). From there my passion for ADR and helping vulnerable people in difficult circumstances as an ADR provider began to grow. In addition, I'm a trained community mediator and on the roster of community mediators for St. Stephen's Community House. For over ten years I was also an investigator, mediator and conflict management trainer for the Ontario Women's Hockey Association. After spending 35 years in the provincial government ministries,

boards and tribunals, I decided to share my knowledge.

What it is about dispute resolution that motivates you?

I get very excited and eager when I have the opportunity to be a mediator or adjudicator so I can practise my skills and keep them current. There is something about helping people solve problems that invigorates me and that I find to be constructive and very satisfying, particularly when I am working with participants who are experiencing social vulnerability. At the Social Benefits Tribunal, for instance, individuals who had their benefits cut off had the option of filing an appeal, but the formality and requirements of that process were often intimidating or insurmountable for them. When I was able to design a less formal, conversational option for the tribunal, it was moving for me to see how appellants were able to understand and remedy their own situations and what that did for their self-respect. So, in general I would say that I am continually inspired by the potential that ADR has for positive human relations. As a result, I don't accept the proposition that conflict is inherently negative.

And, finally, please tell us about the ADR certificate program at Humber College?

The Humber ADR Graduate Certificate Program first began in September 2012. The program has grown and flourished over the past 10 years. The Ontario Colleges Graduate Certificate is a 1-year full-time program spread over three semesters (business.humber.ca/programs/alternative-dispute-resolution.html), and at the conclusion of the academic portion of the program, the students are required to complete a placement/internship during the third semester. Some students register for the program because they aspire to be full-time dispute resolution practitioners, but others sign up because they see that the concepts and skills are applicable to a wide range of callings in many sectors.

I have been the Program Coordinator since inception in 2012, and I play a key role for finding meaningful placement and mentoring opportunities for all the students. Over the past ten years of the program, I have been successful in building and establishing collaborative relationships with various professional ADR organizations and community organizations, and these relationships have not only yielded learning and career opportunities for the students but have been instrumental in advancing the recent survey of ADR stakeholders in Ontario.

Thank you for this great interview opportunity.

ADRIC 2023

49th ANNUAL AGM & NATIONAL CONFERENCE!

Halifax-Nova Scotia November 2-3, 2023

LEARN, NETWORK, AND INSPIRE!

MARK YOUR CALENDARS, AND PLAN TO ATTEND

We will be offering specialized content that develops your knowledge and skills.
As always, we will have CPD accreditation from law societies to support your continued learning objectives, plus important CEE credits from ADRIC.

VENUE:
Halifax Marriott Harbourfront Hotel
1919 Upper Water Street,
Halifax, Nova Scotia, Canada, B3J 3J5
Tel: +1 902-421-1700

SPONSORSHIP OPPORTUNITIES AVAILABLE

The ADRIC Conference is Canada's most important and largest in our industry, you do not want to miss this year's event! Our advertising and promotional campaigns reach, is over 10,000 individuals and businesses including; Adjudicators, Arbitrators, Mediators, Dispute Resolution Practitioners and much more....!

Join the ADR movement through sponsorship and enjoy the multiple benefits of our vast network.

ACT NOW – LIMITED OPPORTUNITIES:
Contact us: sponsorship@adric.ca

CONFERENCE WEBSITE:
https://adric.ca/2023-annual-national-conference

2,500+
ADRIC Members representing individual businesses and community organizations

2,300+
Twitter

10,000+
ADRIC's advertising and promotion campaign reach includes:

3,100+
LinkedIn

Dispute Resolution Research—Building a Community of Data-Driven Practitioners

JOYA MUKHERJEE

Joya Mukherjee is a Manager, Career Programs at Dress For Success Toronto working towards women's economic independence. Passionate about research, conflict resolution, and equity Joya is a certified community mediator and researcher of alternative dispute resolution in Ontario. Joya has worked with Indigenous communities impacted by the criminal justice system and provided alternative dispute resolution and community support. Joya has a BA in Political Science and International Development and a Master of Science in Violence, Conflict, Development.

Over the course of the pandemic terms like "pivot" and "data-driven" have become synonymous with modernization and the wave towards developing processes and services with humans at the center of their design. The Alternative Dispute Resolution (ADR) sector in Ontario and Canada finds itself at a unique moment where it too can pivot into a burgeoning community of data driven practitioners.

Some scholars and practitioners have remarked on the scarcity and infrequency of ADR research[1], and Rameen Sabet, a professor in the Faculty of Business at Humber College, observed that

> Over the past quarter century, ADR methods have become the primary mechanisms for resolving legal and regulatory disputes in Ontario. ADR professionals are represented in almost every industry in Ontario. Yet the data and research we have in Ontario to move this industry forward is limited.[2]

Other sectors like Science, Technology, Engineering, and Math (STEM) show us how strong and vibrant research communities can positively impact policy-making, businesses, access to justice, and techniques. Countries like Australia have started collecting empirical data and exploring what can be learned from survey data through their 2020 Australian Arbitration Report.[3] The aim of that inaugural survey was to gather data to spur more meaningful conversations with stakeholders, corporate users and government decision-makers. It was also intended to provide a framework for informing collective efforts to promote enhanced use of, and best practices in, arbitration in Australia. Importantly, the Australians also wanted to provide a baseline against which future developments and perceptions can be assessed.

The Canadian ADR sector has the opportunity to reap the benefits of an evidence-based approach, and initial efforts have been made to identify the nature of ADR service providers. In March 2022, the ADR Section of the Ontario Bar Association reviewed literature from other jurisdictions and issued report on the state of diversity among lawyers who serve as or who retain mediators and arbitrators.[4] The year 2022 has also welcomed new research aimed at changing the ADR sector landscape. As Mary Lee discusses in her interview in this issue of the journal, by means of a partnership between Humber College and the ADR Institute of Ontario (ADRIO), Ontario's ADR practitioners have begun developing robust baseline data by means of an online stakeholder survey that will allow all practitioners can benefit from a community with a thriving evidence-based approach to ADR techniques and ADR market dynamics.

Now is the time to increase the ADR sector's "research literacy" in order to build on the momentum of the Ontario stakeholder survey and other related research efforts. For those new to research and developing evidence-based approaches or for those in a need of a refresher, this article is intended as an entry point. Hence a research primer, ADR edition.

What does a research process involve?

The research process does not often come with a how-to-guide or offer transparency about its obstacles and timelines. Let's rip off the proverbial band aid and dive into the world of research. For those interested in evidence-based research into any aspect of ADR, what follows are the basic steps to be followed in carrying out credible research.

Develop an idea and formulate the research question

An initial research question is defined by gaps in the literature. The context surrounding the research question provides the tissue and flesh to validate a creditable issue or problem to address. Once the initial idea is identified, you can move into the feasibility phase of your research project. Before doing that, you need to consider whether the idea is feasible, interesting, novel, ethical, and relevant. Questioning your idea against these criteria will allow the researcher to adjust their idea and research question.

To further unpack the feasibility of the research question, you should enlist other researchers, subject matter experts, and practitioners to share, provide their expertise, and help determine if the concept is relevant, valuable to the field, and feasible. Gaining insights from statisticians, or data analysts and galvanizing inter-disciplinarily and cross industry support can assist with research design, methods, feasibility, and data interpretation. Inviting these professionals to share their expertise can ensure that research questions and objectives are answerable, standardized, and not leading. Collaborators are a game changer for developing novel ideas and creating sizable impact.

Secure an industry partner

A critical aspect of a research project is engaging with an industry partner and collaborator. Effective collaboration between practitioners, companies, and academics can inspire relevant topics and ideas, and encourage implementation of research findings. However, managing expectations and developing a cooperative relationship with an industry partner can be challenging. It requires additional time and skills that are not always readily available. This section could be its own primer as getting the industry partner to move through the stages of interest, excitement and execution of signed partnership agreements can take months. If you are attached to an educational institution such as a college or university, it is beneficial to reach out to the research and innovation department for expertise, support and guidance.

Review the literature

A literature review is invaluable to your research process. It can help you validate your research question and identify the gap that exists in the literature that your research will address. A literature review can also assist you with creating a framework for your proposed study. The literature review has multiple purposes as you will also share your literature review in your introduction or review of literature when you share your findings in a publication. Again, if you are fortunate to be connected to a college or university, connecting with a librarian is key. They can assist you with your literature review through the expanded access they have to reliable resources and journals. Librarians can also refer techniques to refine your search and share key words to allow you to deepen your search. There can at times be a lot of literature to comb through. Having the support and expertise from a librarian can allow you to refine the results to ensure the literature you've captured is aligned with your research question. On the flip side, there might be little to no literature about your research question. This might further validate your research question as an area that needs to be addressed but you will still need to place your research within the literature landscape.

Construct a methodology

A methodology while at times may feel tedious, will become a good friend of yours on your research journey. You can think of your methodology as a road map to how your research will be designed, conducted and implemented. It should be detailed enough that another researcher could replicate it. For example your methodology could include: population description, sample size, research design, variables, data collection procedure, statistical tests, and statistical analysis.

Create a proposal

Your proposal is a larger road map of your research and can form the basis of funding applications. Generally, a proposal contains an introduction (literature review, justification, research question, and objectives), methodology and references. If you are aiming for publication or seeking funding there might be multiple iterations of your proposal for each audience. Creating a space for your collaborators to share their feedback and expertise is valuable here to ensure that all aspects of your research project are thoughtful and demonstrate that you have the pulse on your subject matter.

Secure funding

Securing funding is not always easy and could require its own primer. Humber College, like other colleges and universities, has a Research and Innovation department that can support researchers through explaining how applications work to the Social Sciences and Humanities Research Council (SSHRC)[5] and the Canadian Institutes of Health Research and the Natural Sciences and Engineering Research Council (NSERC)[6]. For instance, with NSERC there are applied research grants and other collaborative research and development grants. Information such as eligibility and requirements for funding and whom the primary investigator

needs to be can be found on the NSERC website. Applying for an Engage Grant[7] is another option. The Engage Grants are designed to connect innovative Canadian companies to knowledge and expertise at Canadian universities and colleges. These grants are designed to foster development of new research and aimed to address a company-specific problem.

Seek approval from the institutional and/or funder

There may be research training that your team will need to complete such as from a Research Ethics Board (REB) to qualify for approval. There may also be a schedule to accept applications and a timeline to make edits to requalify as well. It's important if possible to connect your educational institution to see they have a department that can support you through the process. You may need to communicate delays and the timeline to be approved with your industry partner and translate how the process of the research needs to be ethical.

Collect the data

It is important that when working with your industry partner, they are aware of the parameters for how to conduct the research collection to ensure that the data collection remains unbiased, consensual, and ethical at all times. It's also important to define everything, all concepts and industry jargon. Your research participants need to understand the questions that are being asked to ensure that their answers are reliable. Equally as challenging as reliable data collection is the recruitment of participants. There needs to be a plan for how to ethically engage research participants that is aligned with your funding and institutional guidelines. Investigating your target population is valuable and also will indicate what a realistic sample size could be. Informed consent will also be required by your funder as well as the risks and possible benefits

Analyze the data

The collection and protection of personal information and sensitive information is hugely important and will be evaluated by your funder. When you have collected your data, it is important to ensure that you can store your data in a secure place that only your team can access. Confidentiality and privacy especially of sensitive data is paramount. Your collaborators and literature review can assist you with your data analysis and help you determine what is informative and valuable to highlight. Many data collection platforms can be exported to Microsoft Excel or Tableau or other spreadsheet and data visualization programs.

Prepare data for the publication

Publication is a detailed process. It's important to consider what academic journals you are interested in and what kind of publication they are. For example, there are peer-reviewed journals and international publications. Peer reviewed journals are wonderful to apply to as they have external reviewers examine your data and work. With that in mind, even if the publication does not accept your article, you will have valuable comments and feedback on your work. You may even consider presenting at conferences and other venues to discuss your research in addition to publishing. You can also collaborate with your industry partner about others means to showcase and publish your research findings.

Benefits of an evidence-based approach

The development of evidence-based research into the Canadian ADR sector will assist both practitioners and users. Research that further promotes the ADR market and best practices will result in more evidence-based policy-making, informed resource allocation, and new ADR users. More robust data can lead to better understanding of the ADR sector for employment and professional development opportunities for ADR practitioners, improve public awareness and understanding of dispute resolution processes outside of traditional courts and tribunals, and relieve the Canadian court system.

Thinking globally, Canada can pioneer access-to-justice innovation and collaborate with countries like Australia and others to usher in ADR evidence-based policy-making on a world stage. Step by step, an informed and dedicated ADR sector can build a community of data-driven practitioners.

1. See, for instance, https://www.lawtimesnews.com/news/features/focus-time-to-re-evaluate-the-mandatory-mediation-program/262093 and https://www.justice.govt.nz/assets/Documents/Publications/alternative-dispute-resolution-general-civil-cases.pdf
2. Saran Davaajargal (2022, June 2). Humber College. Digital Transformation of Ontario's Alternative Dispute Resolution (ADR) Sector, https://humber.ca/research/news/digital-transformation-ontarios-alternative-dispute-resolution-adr-sector
3. The Australian Centre for International Commercial Arbitration. (2020). *2020 Australian Arbitration Report*. https://acica.org.au/wp-content/uploads/2021/03/ACICA-FTI-Consulting-2020-Australian-Arbitration-Report-9-March-2021.pdf
4. Ontario Bar Association (OBA) (2022, March). OBA Working Group on Neutral Diversity. *Neutral Diversity in Ontario*. https://www.oba.org/CBAMediaLibrary/cba_on/pdf/ADR/OBA-Report-on-Neutral-Diversity-Final-March-2022.pdf
5. https://www.nserc-crsng.gc.ca/index_eng.asp
6. https://www.canada.ca/en/health-canada/services/science-research/science-advice-decision-making/research-ethics-board/apply-ethics-review.html
7. https://www.nserc-crsng.gc.ca/professors-professeurs/rpp-pp/engage-engagement_eng.asp

A Call for Evidence-Based Research in ADR

In any three-year period, almost half the adult population in Canada will experience at least one justiciable civil or family problem.[1] Few, however, will have the resources to resolve their legal problems, thus highlighting longstanding barriers that make access to justice such a pressing issue in Canada.[2] Among many global justice initiatives, a prominent call to action is Goal 16 of the 2030 United Nations Sustainable Development Goals, which commits nations to work towards ensuring equal access to justice for all by 2030.[3] Although there is no single strategy to achieve this, evidence-based practices in all areas of civil and family justice can help close the access-to-justice gap by shining a light on where gaps exist and suggesting how they may be closed.

In addressing the crisis of access to justice, this article explores the need to include research relating to alternative dispute resolution (ADR) within the broader call for data-based justice initiatives.

The Need for Evidence-based Research within the Broader Legal Field

Professions are increasingly being called upon to revise their methods to incorporate evidence- based research. Medical schools, for instance, include evidence- based practices as important aspects of good medicine, and several studies have examined the impact of integrating such practices and an awareness of research into the curriculum.[4]

The legal community is receiving calls for evidence-based research[5] in the hope that data-based initiatives will help legal systems more efficiently and effectively address impediments to accessing the legal system for those in need. The Chief Justice of Canada has described the inability to access justice as not only a democratic issue but also a human rights and economic issue.[6]

Many factors hinder access to justice, including the cost of proceedings, complexity of disputes, systemic barriers, a lack of

METHURA SINNADURAI

JD, Osgoode Hall Law School; Research Assistant, Winkler Institute for Dispute Resolution

PATRICIA I. MCMAHON, PHD.

J.S.D., Assistant Professor, Osgoode Hall Law School; Co-Academic Director, Winkler Institute for Dispute Resolution; Director, Oral History Program, Osgoode Society for Canadian Legal History, https://www.osgoode.yorku.ca/faculty-and-staff/patricia-mcmahon/

BENJAMIN VANDERWINDT

JD Candidate 2023, Osgoode Hall Law School; Research Assistant, Winkler Institute for Dispute Resolution.

TREVOR CW FARROW, PHD.

Professor & Associate Dean (Research & Institutional Relations), Osgoode Hall Law School; Co-Academic Director, Winkler Institute for Dispute Resolution; Chair, Canadian Forum on Civil Justice, https://www.osgoode.yorku.ca/faculty-and-staff/farrow-trevor-c-w/

resources, and even a basic lack of awareness about available services.[7] Although there have been many reform efforts to date, the gaps in access continue to grow.[8] Unfortunately, the lack of empirical data about access to the Canadian justice system and experiences relating to the resolution of legal disputes hinders the potential to engage in effective justice reform.[9] As Lisa Moore, the Director of the Canadian Forum on Civil Justice, explains,

> rigorous fact-seeking is the standard that gives credibility to the law's oft-cited assurances of impartiality and due process. Yet, the very legal mechanisms for which this standard informs and justifies decisions are often themselves without the data necessary to evaluate the frameworks within which they operate.[10]

Data and evidence provide insight into the scale of a problem and the cost-effectiveness of potential solutions.[11] The Edmonton Social Planning Council found that "one of the key barriers to progress in improving access to justice is the lack of information on the effectiveness of legal services, and an absence of tools to measure and define progress towards equal justice."[12]

If it is to advance investment strategies aimed at effectively responding to people's needs within the justice system, the legal community must collect more data to identify who experiences legal problems, how relevant information and services may be accessed, and what processes might work to address these problems efficiently and effectively.[13] To make meaningful progress towards ensuring equal access to justice for all, we require a better understanding of the current justice framework and the effectiveness of dispute resolution mechanisms across various legal matters. Evidence-based research is necessary to make real improvements to the justice system. Proper reform cannot be built on anecdotes and philosophical considerations alone.

Relevance of Data-Based Justice Initiatives to ADR Research

Within the broad call for evidence-based legal research, there is a need for ADR-specific research. For our purposes, we define alternative dispute resolution broadly and include all methods of dispute resolution outside the established adjudicative function of courts and tribunals.[14] ADR comprises many, sometimes complex, methods that require highly trained and diligent practitioners. Increasingly common and described as "successful," ADR has acquired an integral role within the justice system.

During the 1990s and 2000s, ADR enjoyed a surge in popularity within the Canadian legal community. Twenty years ago, there was a widespread—though lightly documented—acknowledgment of its benefits. In 1999, the Ontario legal system incorporated Rule 24.1 into the Rules of Civil Procedure. Rule 24.1 established mandatory mediation, in specific contexts, because of its ability to "reduce cost and delay in litigation and facilitate the early and fair resolution of disputes."[15]

In those early days, there was excitement to research and write about ADR and its potential uses as an up-and-coming legal area.[16] As Trevor Farrow wrote in 2003, "there has been an ever-expanding body of ADR literature and online materials."[17] More recently, in the 2018 case of *Canfield v. Brockville Ontario Speedway*, the Ontario Superior Court of Justice endorsed the benefits of mediation before litigation.[18]

A resolution found through ADR can often respond to issues of more complexity in a timely and mutually beneficial way. Although some concerns have been raised,[19] ADR has led to breakthroughs in certain social justice issues. For example, in the urgent and relevant issue of climate change, ADR is said to be uniquely suitable to deal with climate change conflicts. As Kariuki and Sebayiga explained, "ADR mechanisms are better suited to manage climate change conflicts because of their ability to address the root causes of the conflicts while preserving relationships."[20]

Implementation of ADR has been widespread across Canada and other countries, yet there remain significant research gaps to prove when and where it is most beneficial. ADR offers legal practitioners another set of tools, but they must push their understanding further and define how to best maximize those tools as a profession.

A lack of robust evidence-based research risks undermining the evolution and even the credibility of ADR. While reiterating the call for more evidence-based research within ADR by academics and practitioners, the purpose of this article is not to examine the history of ADR research. Nevertheless, some recent completed examples may be instructive.

In 2021, The Legal Education Foundation (TLEF) published a report that analysed and combined studies about ADR, specifically mediation and court outcomes, in Australia, Canada and the United States. Some of the research that was reviewed found that mediation had an overall positive impact on the resolution of small claims matters, in both the long-term and short-term, in comparison to "court-based processes for similar matters."[21] The report observed that "there is an obvious

lack of robust empirical research comparing court-based and mediated processes across the board.…It may not be possible to identify certain benefits or risks without well-funded pilot projects and follow-up research."[22] The findings of mediation having a positive impact compared to court outcomes may not be surprising to many practitioners of ADR in Canada. Similarly, the findings of a shortage of empirical research on mediation could be expected.

In a California-based study, Tucker et al. addressed the shortcomings in existing literature examining the outcome of parent-child mediation on family functioning and child problem behaviors.[23] Research in this area is important to determine the efficacy and scope of existing youth-oriented mediation programs among public and private juvenile justice and social service agencies and, as such, is also applicable in the Canadian context.[24] In this study, families with a middle school or high school-aged child referred to a community-based agency in California for family mediation due to poor grades, truancy, defiant behavior, delinquency, and substance abuse were assigned to either an intervention group or a wait-list control group.[25] Families in the intervention group participated in at least one family mediation, and all families completed three surveys (baseline, six weeks later, and 12 weeks later) assessing family communication, conflict, cohesion, child substance abuse intentions, grades, and reported delinquency.[26] The results indicated that families participating in the parent-child mediation displayed modest improvements in family functioning and child problem behaviors over six weeks; however, the positive gains appeared to be somewhat short-lived as they diminished by the 12-week follow-up.[27]

Studies like the one by Tucker et al. provide a good example of the kind of research that can and should be done to explore the perceived and actual benefits of ADR processes, and how those processes can be improved. In other words, to what extent does mediation accomplish what its proponents claim it accomplishes? It would be useful to assess the relationship between the type of child behavioral problems and the effectiveness of parent-child mediation.

Furthermore, as we noted above, with respect to the need for evidence-based research, future studies should also examine the mediation process itself,[28] meaning how does what happens during mediation impact the participants and their outcome?

A relatively recent Canadian example of evidence-based ADR research involves a study by the former Canadian Research Institute for Law and the Family. The study looked at the cost implications of using different ADR processes in four different Canadian provinces. Using interviews and a social return on investment-based methodology, this study provides insights into the merits of using various ADR processes in the context of high and low conflict cases.[29]

A Call to Action

Empirical research and experimentation in science and medicine fosters change and innovation. The legal field, however, lacks the same urgency towards and acceptance of evidence-based research. This gap has been recognized by various organizations, including the Canadian Forum on Civil Justice (CFCJ), for more than twenty years.[30] The call for evidence-based data in the legal community is critical concerning the ADR field. As Genevieve Chornenki discussed in the Fall 2022 issue of the Canadian Arbitration and Mediation Journal, the field of dispute resolution needs to develop a culture of research.[31] Research-backed methods work towards honing and crafting the profession to maximize resources and increase access to justice.

Although they are more costly and require increased collaboration, longitudinal studies with larger sample sizes are needed to examine the effectiveness of ADR interventions on outcomes, the costs and benefits over time, and their ability to promote access to justice.[32] There is literature on mediation outcomes, but very little that assesses the mediation process itself. Research is needed the examine the extent to which elements of ADR have an impact on the outcome of a dispute, like the number of completed mediation sessions, the mediator-client dynamics, caucusing techniques, and how similar procedural factors impact the outcomes, efficacy and fairness of the process.[33] Other areas of research include the role that mandatory ADR plays in the traditional court system and online dispute resolution, along with systemic, subjective and contextual factors, including power, gender, race, culture, human rights and ethics.[34]

The limited availability of empirical data relating to ADR processes may be due to the anecdotal and flexible nature of ADR. However, as Trevor Farrow reiterated in his article examining dispute resolution teaching and research programs, the current scarcity "provides significant opportunities for future research initiatives—including those of a collaborative and/or interdisciplinary nature—undertaken by full-time academics, LL.B. students, and graduate students."[35] His statement is as true today as it was when he made it in 2005. Coordinating justice data across institutions and actors within the ADR

community will thus play a vital role in addressing the justice data gaps and enhancing our understanding of the current justice framework.[36]

Increased research will benefit both ADR practitioners, academics, and clients. Without research, there is a risk that negotiation and mediation processes and practice will lack meaningful empirical rigour. We contend that, without empirical research, ADR cannot continue to develop and thrive to its full potential.

ADR continues to enjoy wide popularity and use in the legal community. There is excitement, credibility, and potential for further growth for ADR, and with good reason. ADR offers Canadians an important way to improve access to justice. Good evidence-based ADR research is happening, and that research is driving the future of legal practice. The next generation of legal professionals is especially keen on ADR as evidenced by its popularity among law students, given their participation in moots and enrolment in course offerings on the subject. But, as a component of legal scholarship, we are behind the evidence-based practices of other professions. We encourage all ADR practitioners and researchers to keep up and increase data-based initiatives. To further the field of ADR, inspire junior legal scholars, and pursue access to justice, there must be a focus on producing more evidence-based ADR research.

---

1. Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 10; Trevor CW Farrow et al., *Everyday Legal Problems and the Cost of Justice in Canada, Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016). Compare recent Statistics Canada, "Canadian Legal Problems Survey (CLPS)" (2022), online: *Government of Canada* ←www.statcan.gc.ca/en/survey/household/5337→. The term "justiciable problem" includes issues that engage legal principles, regardless of whether any action taken to deal with the event involves the use of any part of the civil justice system. See e.g. Hazel Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford: Hart, 1999) at 12.
2. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) at 6, online: *CFCJ* ←https://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf→ ["A Roadmap for Change"].
3. *Ibid* at 29.
4. JL Dorsch et al., "Impact of an evidence-based medicine curriculum on medical students' attitudes and skills" (2004) 92:4 J Med Libr Assoc 397 at 406.
5. Marin dos Santos & Douglas Henrique, "Evidence-Based Law: A New Approach to Legal Practice Under the Scope of the Pragmatic Methodologies of Evidence-Based Medicine" (17 June, 2021) at 4, online: ←pubmed.ncbi.nlm.nih.gov/154494754/→.
6. The Right Honourable Richard Wagner, PC, "Access to Justice: A Social Imperative" (4 October, 2018), online: Supreme Court of Canada ←https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx?pedisable=true→.
7. "A Roadmap for Change", *supra* note 2.
8. Task Force on Justice, *Justice for All – Final Report* (New York: Center on International Cooperation, 2019) at 18, online: ←www.justice.sdg16.plus/_files/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf→ ["Justice For All – Final Report"].
9. *Ibid*.
10. Lisa Moore, "Understanding the Need for More Evidence-Based Decision-Making in Legal Sector and How We Get There" (4 February 2021), online: *Slaw* ←www.slaw.ca/2021/02/04/understanding-the-need-for-more-evidence-based-decision-making-in-the-legal-sector-and-how-we-get-there/#_ftn3→.
11. "Justice for All – Final Report," *supra* note 8 at 103.
12. Maxwell Jenkins, "Access to Justice: The Great Gap in Canada's Justice System" (Oct 2017) at 14, online: *Edmonton Social Planning Council* ←edmontonsocialplanning.ca/wp-content/uploads/2017/10/edmontonsocialplanning.ca_joomlatools-files_docman-files_ESPC-Documents_PUBLICATIONS_A.06.G-REPORTS_ESPC-REPORT_ACCESS-TO-JUSTICE_20170930.pdf↑.
13. Peter Chapman et al., *Grasping the Justice Gap: Opportunities and Challenges for People-Centered Justice Data* (Washington, D.C.: World Justice Project; New York: Pathfinders for Peaceful, Just and Inclusive Societies; Paris: OECD, 2021) at 5, online: *World Justice Project* ←https://worldjusticeproject.org/sites/default/files/documents/Grasping-the-Justice-Gap_Challenge-Paper_final.pdf→.
14. Jerameel Kevins, "Towards Enhancing Access to Justice through Embracing Alternative Dispute Resolution Mechanisms in Kenya" (7 November 2022) at 6, online: SSRN ←papers.ssrn.com/sol3/papers.cfm?abstract_id=4270724→.
15. RRO 1990, Reg 194, r 24.1.01.
16. Trevor CW Farrow, "Thinking About Dispute Resolution" (2003) 41:2 Alta Law Rev 559 at 560.
17. Ibid.
18. ONSC 328 at para 41.
19. Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: UofT Press, 2014).
20. Francis Kariuki & Vianney Sebayiga, "Evaluating the Role of ADR Mechanisms in Resolving Climate Change Disputes" (2022) 10:3 Alternative Dispute Resolution 1 at 13.
21. Daisy Ogembo, "Rapid evidence review: The impact of mediation on outcomes, experience and bias" (Surrey: The Legal Education Foundation, October 2021) at 24, online: ←research.thelegaleducationfoundation.org/wp-content/uploads/2021/10/FINAL-Rapid-Review-Mediation-4-SINGLE-PAGES.pdf→.
22. *Ibid.*
23. Joan S Tucker et al., "Effectiveness of Parent-Child Mediation in Improving Family Functioning and Reducing Adolescent Problem Behavior: Results from a Pilot Randomized Controlled Trial" (2017) 46:3 J Youth Adolesc 505 at 506 ["Effectiveness of Parent-Child Mediation"].
24. *Ibid*.
25. *Ibid* at 507.
26. *Ibid*.
27. *Ibid* at 512.
28. *Ibid.*
29. Joanne Paetsch et al., *An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implications of Various Dispute Resolution Methods* (Toronto: Canadian Forum on Civil Justice, December 2017).
30. Lisa Moore, "Fixing a Problem That We Don't Fully Understand" (15 August 2019), online: *Canadian Forum on Civil Justice* ↓https://cfcj-fcjc.org/a2jblog/fixing-a-problem-that-we-dont-fully-understand/#_ftn4↑.
31. Genevieve A Chornenki, "Editorial—Towards a Culture of Research in Dispute Resolution" (2022) 31:2 Can Arb & Med J at 19.
32. For some current longitudinal access to justice research efforts, see e.g. Trevor CW Farrow, Lisa Moore & Ab Currie, "Measuring Impacts of Legal Services: Bibliography, Network and Methodology" (Toronto: Canadian Forum on Civil Justice, June 2020), online: CFCJ ↓cfcj-fcjc.org/wp-content/uploads/Measuring-Impacts-of-Legal-Services-Bibliography-Network-and-Methodology-%E2%80%93-Trevor-Farrow-Lisa-Moore-and-Ab-Currie.pdf→.
33. "Effectiveness of Parent-Child Mediation," supra note 23 at 512.
34. See e.g. Trevor CW Farrow, "Dispute Resolution, Access to Civil Justice and Legal Education" (2005) 42:3 Alta L Rev 741 at 785.
35. *Ibid*.
36. "Justice for All – Final Report," supra note 8.

Digital Transformation of Ontario's Alternative Dispute Resolution Sector:

A Closer Look at ADR Stakeholders in Ontario

In early 2020, the Alternative Dispute Resolution (ADR) field experienced a major shift from in-person to online delivery of ADR due to the COVID-19 pandemic. ADR service providers had to reshape their practices to quickly adapt. Prior to the pandemic, some online ADR had been happening. Since 2012, guidelines for online dispute resolution (ODR) have been available from Justice Canada. The use of technology for ODR between 2012 and 2019 shows that it was mainly used to address the need for access for participants in remote communities, and ODR was not widely adopted by family and civil justice systems until the COVID-19 pandemic in 2020 (Justice Canada, 2022). With the major shift to online delivery, practitioners and users of ADR have gained a wealth of knowledge from their experiences using online dispute resolution (ODR), which has yet to be fully harnessed for informing future guidance and standards.

MARY T. LEE, LL.M.

Mary Lee is a Program Coordinator and Professor in the Longo Faculty of Business at Humber College. In addition to her long and distinguished career in the administrative justice sector and the Ontario Public Service, Mary has spent more than 25 years teaching part-time in the continuing education program and the Alternative Dispute Resolution (ADR) Graduate Certificate program at Humber College. After spending 35 years in the provincial government ministries, boards and tribunals, Mary decided to dedicate herself to a full-time teaching career at Humber. With rich expertise in mediation, adjudication, operations, and business services. Mary also holds the position of Chair with the Toronto Licensing Tribunal. Mary has completed her Master of Laws (LL.M) degree, specializing in Alternative Dispute Resolution, at the Osgoode Hall Law School.

JOYA MUKHERJEE

Joya Mukherjee is a Manager, Career Programs at Dress For Success Toronto working towards women's economic independence. Passionate about research, conflict resolution, and equity Joya is a certified community mediator and researcher of alternative dispute resolution in Ontario. Joya has worked with Indigenous communities impacted by the criminal justice system and provided alternative dispute resolution and community support. Joya has a BA in Political Science and International Development and a Master of Science in Violence, Conflict, Development.

RAMEEN SABET

Rameen Sabet is a Professor in the Longo Faculty of Business at Humber College, teaching in both the ADR Graduate Certificate Program and Paralegal Diploma Program. Rameen spent nearly ten years working in Tribunals Ontario, as a Mediator and Program Advisor. He holds a Master of Public Policy, Administration and Law from York University, where he focused his major research on evaluating the effectiveness of Ontario adjudicative tribunals.

OLIVER MERCER-SMAIL

Oliver Mercer-Smail is a web developer with a background in the non-profit sector and conflict resolution.

In addition to the transition to online ADR services, new ADR practices have been emerging. In an effort to understand these trends, it became apparent that there is little known about who exactly comprises the ADR sector group, the breadth of available ADR services, and what is needed to support ADR service providers and users in the future. A clear need was identified to get to know ADR stakeholders in Ontario and how to approach this discovery.

Humber College Institute of Technology & Advanced Learning in Toronto, Ontario and the ADR Institute of Ontario (ADRIO) have a longstanding relationship, working together to support the training and certification of ADR practitioners. Humber College has been delivering an ADR Graduate Certificate Program since 2012. ADRIO is a non-profit industry association for practicing and aspiring practitioners of Alternative Dispute Resolution (ADR).

With over 1,000 members across Ontario, ADRIO strives to enhance the quality and standards of practice in the provincial ADR sector through accreditation, certification, and professional development.

Together, Humber College and ADRIO embarked on an effort to address this knowledge gap. Humber College's Office of Research & Innovation supported a proposal for research and then successfully applied for an Engage grant from the Natural Sciences and Engineering Research Council of Canada (NSERC).

The desired outcome of the research study was to understand the needs and challenges of Ontario's ADR practitioners, both experienced and emerging, and to identify evolving practices, professional development and business opportunities in the ADR sector. This article highlights some of the key findings from this research.

Research Method

After a thorough literature search, it was noted that a comprehensive ADR framework did not exist in Ontario. To meet the desired outcome of the research, an overview of what constitutes ADR services was first needed. To fill this gap, an ADR Processes Framework was created, to encompass all the existing and current ADR processes active in Ontario.

Once the ADR Processes Framework was developed, a survey was developed to reach out to the full array of ADR service providers and users across Ontario, with the goal to answer the following key questions:

- Who are the ADR stakeholders?
- What are the needs and challenges experienced by ADR practitioners?
- Can we determine any evolving ADR practices and processes?
- Can we identify professional training opportunities?
- Can we identify new business development opportunities?
- Can we recommend innovative and modern methods of virtual ADR services?

A survey questionnaire, including consent requirements and background information documents consisted of 51 pre-populated as well as open-ended questions, aimed at addressing the key research questions noted above. The survey was designed and hosted within the secure Humber College Qualtrics platform. The survey was distributed to identified ADR stakeholders across Ontario through various communication channels such as ADRIO membership, ADR provider newsletters and organizations. A poster was created including a direct anonymous link and a QR code option to start the survey.

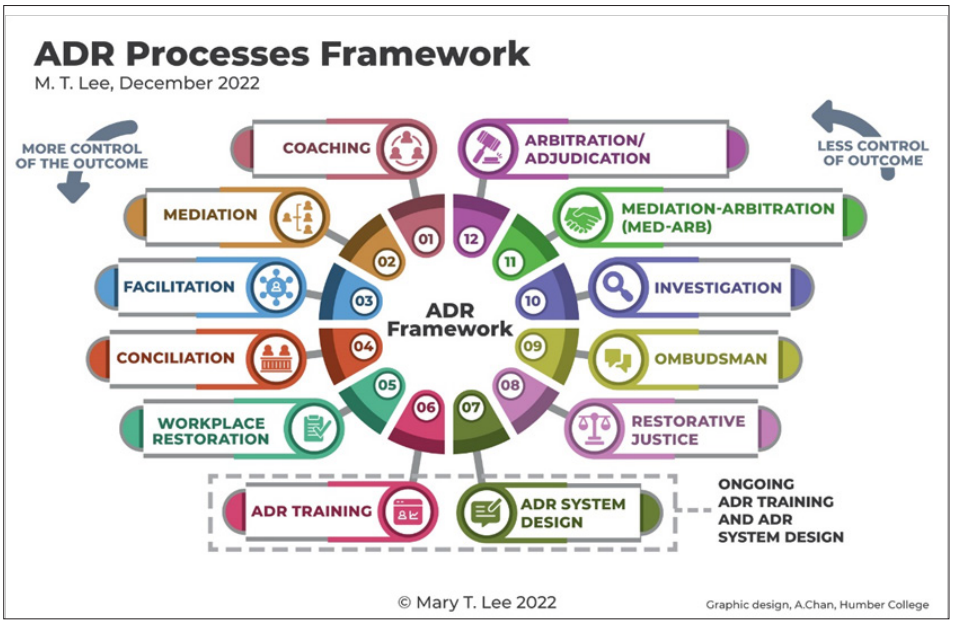


Figure 1: ADR Processes Framework, M.T. Lee (2023)

Results

The ADR survey ran for 4 weeks from October 28, 2022, to November 28, 2022, with a total of 213 surveys received. Of the 213, 100% consented to the survey. With the attrition of incomplete surveys (less than 20% of the survey completed) and responses from those who reported they were not ADR providers or users, the total number of completed survey responses was 189 respondents.

Of the potential 1,000 members of ADRIO members, the survey generated an 18.9% representative sample, with less than 7% margin of error within a 95% confidence interval (Qualtrics, 2023) demonstrating an acceptable sample for addressing the following research questions. Survey respondents reported the following membership affiliations, with ADRIO (110 members) and ADRIC (88 members).

The research findings target participants across the sector and map the landscape of ADR stakeholders across Ontario. They indicate some of the unique challenges facing ADR practitioners and identify emerging practice areas and opportunities for professional development and business expansion.

Research Question 1: Who are the ADR Providers in the Province of Ontario?

The data that emerged from the survey provides a snapshot of a) the demographics of ADR providers, including age, gender, education background, and employment status; and b) the services delivered by ADR providers. ADR service providers comprised 75% of the respondents, 3.8% were ADR service users, and 21.2% were both service providers and users.

Age and Gender

Nearly half (47%) of the respondents were between the ages of 31 and 56 years of age. Five percent (5%) were between 18 and 30 years of age. A third of respondents were between 57 and 69 years of age, and 12% were 70 years of age and older. From the 189 respondents, 59% identify as female, 39% identify as male, and 2% identify as transgender, non-binary or preferred not to answer.

Education of the ADR Providers

It is interesting to note that most practitioners possess high levels of education. In fact, 81% of respondents answered that they have either a post-graduate certificate, a master's degree, a doctorate degree, or professional degree. These results indicate that the ADR sector is rich with high academic standards and reaffirms that the nature of the work is complex and theoretical. In addition, the results raise questions about the future of training, education, and certification requirements in the ADR field. The table below provides a full breakdown of the different levels of education.

Table 1: Highest level of education achieved of ADR Stakeholders (n =189)

Highest level of education achieved of ADR Stakeholders	Percentage of respondents
Undergraduate degree includes certificates	14.81%
Post-graduate educational certificate	13.76%
Master's degree (MA, MBA, LL.M)	39.68%
Doctorate degree (PhD)	2.65%
Professional degree (JD, LLB)	25.40%
Ontario College/Diploma	3.70%
Total	100%

Employment Status

Another informative piece of data is knowing how Ontario's ADR practitioners are employed and how that employment landscape is shaped. The most significant piece of data is that over 40% of the respondents identified themselves as sole practitioners or self-employed. Full-time/part-time employees make up 26% of respondents and contractor or casual providers make up about 7% of respondents.

Table 2: Employment status of ADR Stakeholders (n = 189)

Employment status of ADR Stakeholders	Percentage of respondents
Employee (full-time)	18.44%
Employee (part-time)	7.79%
Sole Practitioner / self-employed	40.16%
Group Practice	3.69%
Contractor / casual	6.56%
Volunteer	6.15%
Student	1.64%
Retired	5.74%
Unemployed	0.00%
Looking for work	4.51%
Other	5.33%
Total	100%

ADR Services Providers

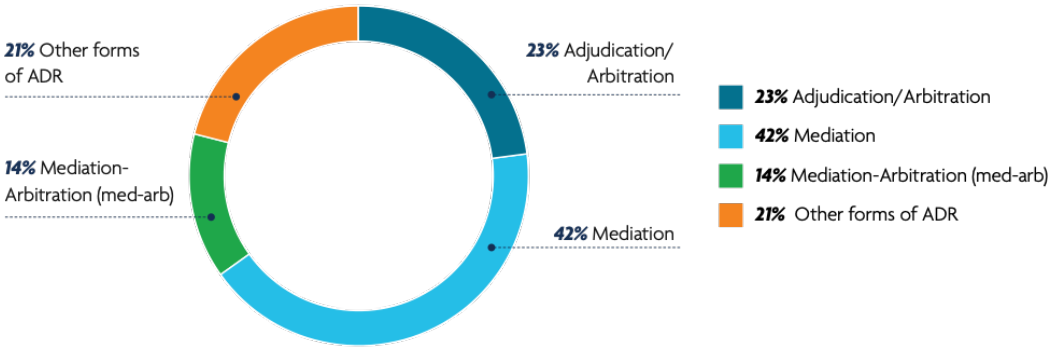


Figure 2: ADR Services delivered by ADR Providers (n = 189)

Table 3: Other Services delivered by ADR Providers (n =189, responses 256)

Other Services delivered by ADR Providers	Percentage of respondents
Facilitation	17.97%
Conciliation	7.42%
Investigation	11.33%
Ombudsman	5.47%
Workplace restoration	10.55%
Restorative processes practices	8.20%
Coaching	15.23%
ADR Training	16.02%
ADR Systems Design	7.81%
Total	100%

Services Provided

Fifty six percent (56%) of ADR practitioners provide Mediation and Mediation-Arbitration (Med-Arb). Twenty three percent (23%) provide Adjudication/Arbitration (Figure 2 below).

Of the remaining 21% who stated they provide other services (Table 3 below), 18% deliver facilitation, 31% deliver ADR training and coaching, and 11% provide workplace restoration and investigation services respectively.

In the last 2 years (Jan 2020 – Dec 2021), over fifty-eight percent (58.7%) of respondents stated that at least half of their work was dedicated to ADR services, while over thirty percent (30.5 %) stated that the entirety of their work was dedicated to ADR services.

Research Question 2: What are the needs and challenges experienced by ADR practitioners?

While 73% of respondents indicated that they do not face any one specific challenge in delivering ADR services, the remaining 27% provided insights into their needs and the challenges they are facing with ADR in the most recent years: over forty percent (42.6%), stated none of their services were provided online before March 2020. With the transition to online ADR service delivery, a level of frustration was expressed by a number of respondents with respect to technological challenges. While it appears most have now adjusted to online ADR, the initial transition was flagged as a big hurdle. Still, it was identified that some users, particularly vulnerable populations, have poor access to technology or limited technical capabilities. Both providers and users experience the difficulties of weak or broken connections that interrupt proceedings. Some report the lack of appropriate space for users to participate in confidential matters. It was also noted by respondents that they find participants can be more adversarial online. Other practitioners have also perceived a decline in the likelihood of successful settlements. With the shift online, some practitioners are lamenting the loss of valuable interaction with colleagues.

On the business side, survey respondents have expressed struggles in their attempts to successfully launch ADR practices. Obstacles cited include the difficulty of establishing sustainable client bases due to a lack an open referral process, as well as a combination of existing and increasing competition; the number of organizations that rely on legal counsel; legal professionals inclined towards judgements; and a lack of expansion of the Ontario Mandatory Mediation Program (OMMP). Respondents also noted that ADR can be perceived as a complex and confusing business sector, which makes access for potential users difficult. Difficulty in entering the ADR field was also raised by respondents. They state that despite having the required designation, it is difficult to obtain the necessary experiences required for further employment and business opportunities.

Survey respondents also identified that current social issues around anti-racism and anti-sexism need to be top-of-mind in the growth and development of the ADR sector in Ontario. Other needs and challenges identified by survey respondents include expanding and improving access to conflict resolution, further legislative changes around de-criminalization, and providing new practitioners with ongoing and relevant training and practical development.

Research Question 3: Can we determine any evolving ADR practices and processes?

The survey results revealed several evolving ADR practices and processes over the past two years. Mediation and Arbitration-Adjudication are identified as the leading dispute resolution processes practiced by ADR service providers. However, it is apparent that Mediation-Arbitration (Med-Arb) is being considered as a popular dispute resolution process. Med-Arb practitioners represented fourteen percent (14%) of the survey respondents. The popularity in the use of this process could be attributed to the recent procedural recognition of Med-Arb by the ADR Institute of Canada (ADRIC) in 2019 when they launched a new designation for Mediator-Arbitrators and a specific framework.

While the respondents still work primarily in the traditional areas of ADR, the 21% who provide "Other ADR Services," as evidenced in Figure 2, highlight the breadth of existing ADR services. Because this study is the first of its kind, a baseline does not exist. However, the survey responses and literature searches demonstrate other areas, particularly restorative processes (8%) and workplace restoration (11%), are notably active and federally supported. In Canada, workplace restoration has been a popular method of dispute resolution within workplaces. In fact, the Government of Canada has an established managerial procedure for facilitating workplace restoration in public service workplaces since 2013 (Government of Canada, 2013). In addition, the Canadian restorative justice system is supported by federal legislation and policy responses. The Criminal Code of Canada references the use of restorative justice measures in criminal matters (Justice Canada, 2023).

The survey respondents confirm that these other areas make up a significant portion of all ADR services and as such, are evidently a solid alternative to traditional ADR. Growth in these areas is also indicated by the finding that 49% of respondents providing "Other ADR Services" are working in education, facilitation, training, and coaching. This substantial focus on education and training indicates that there is significant appetite for learning and growth in these alternate areas of ADR.

Research Question 4: Can we identify professional training opportunities?

Eighty-four percent (84%) of ADR service providers dedicate at least 10 hours a year to professional development skills training, this demonstrates the commitment to continuing education and development amongst industry professionals. Webinars were the most popular delivery method of skills training (32%).

As noted above, the survey also found that the use of workplace restoration (11%) and restorative justice processes (8%) is a popular alternative among ADR service providers. This trend towards best ADR practices is both encouraging and opportunistic for advancing targeted professional development and training.

Training institutions and ADR curriculums should continue to emphasize ODR training and skills development. Survey respondents emphasized they have been providing at least half of their professional services virtually since January 2020 and expect that trend to continue. Further, seventy-seven percent (77%) of respondents agreed that ODR will be the preferred medium of service going forward, as opposed to in-person services. Given this, modifications should be considered to ADR curriculum and training programs to incorporate the solidification of ODR in the dispute resolution landscape.

Association and connectivity are paramount for ADR professionals. Ninety-six percent (96.3%) of respondents belong to an ADR professional organization in Ontario. Ten percent (10%) claimed they obtain work through their ADR professional organizations and forty-four percent (44%) of respondents stated they find their ADR work from colleagues. This demonstrates the significance of the role and function of ADR professional organizations within the industry, not only as a means of professional development, education, mentoring and accreditation, but as a business strategy for professionals.

Research Question 5: Can we identify new business development opportunities?

The survey provided a chance to analyze the supply and demand amongst various practice areas for ADR professionals. The highest participation practice areas noted by respondents correspond with the highest areas of service demand: civil/small claims (15%), employment/labour (14%), family and child protection (14%), human rights/social justice/disability (14%), and insurance/personal injury (7%).

A deficiency in ADR referral services was identified by survey respondents. From 122 responses, seventy nine percent (79.51%) of survey respondents reported that they were not receiving any referrals for their services from the Ontario Mandatory Mediation Program (OMMP), and only twenty percent (20.49%) reported receiving referrals from the OMMP.

In their 2020 submission to Ontario's Ministry of the Attorney General, the Ontario Bar Association advocated for the geographic expansion and virtual delivery of Rule 24.1 Mandatory Mediation (OBA, 2020). If accepted, with the implementation of ODR processes and the availability of mediators, the Ministry of the Attorney General can bring the OMMP to more municipalities in the province, thus providing new business opportunities to Ontario mediators (Egsgard, 2020).

Research Question 6: Can we recommend innovative and modern methods of virtual ADR services?

With the knowledge that most ADR providers will continue to deliver most of their services online, investment is necessary to harness the creative practices that have emerged in recent years and scale them up to create a digital transformation of the ADR field. Survey respondents, including those working in the Ontario Condominium Authority Tribunal's fully online dispute resolution system for example, provided insight into the innovative ways they and their organizations have responded to the shift to online ADR.

As noted earlier, this study confirms the centrality of ADR professional associations in all facets of the ADR processes framework. There is a central role to be played by these professional associations, like ADRIO, to further delve into the specifics of these innovative practices. There is an opportunity for these associations to be a platform to share creative practices in the new digital ADR world, to be connectors for members, organizations, users, students, and experts, and to lead the digital transformation of the ADR field.

Limitations of the Study

- The vast majority of respondents were service providers and so it hinders our ability to analyse the needs and challenges of ADR users and the recommendations we can make in this area.
- The survey did not include new ADR graduates who are not currently working in ADR.
- The survey question on ethnicity did not reflect the 2016 Statistics Canada census choices and has limited our ability to report on this data.

Areas of Future Research

The following questions arose from this research: Has ODR made an impact on the backlog in courts and tribunals in Ontario? Would a Canada-wide ADR survey provide a better view on the time to disposition of court or tribunal disputes that used ADR processes? Should this include further analysis into mediation statistics to identify emerging training for this practice area? Does there exist a disparity in the ADR processes that are available in large and small communities?

Future research is needed to address the accessibiliy of ADR services to those most in need, the vulnerable sectors of the population. Further study is needed to look at ways to reach those who are in crisis, and may not have access to technology, do not have adequate housing, and have little to no means to navigate the legal system.

The ADR Processes Framework (Figure 1) could be used to design and test a fair and accessible referral process This could ensure a targeted approach to identifying the best fit for ADR services.

Further research is also needed to explore the impacts on ADR professionals' career trajectory and business prospects by expanding existing mentorship programs for new graduates to work alongside experienced ADR practitioners.

Conclusion

This research study set out to map the landscape of ADR stakeholders across Ontario. With the creation of an ADR Processes Framework, the researchers were able to target participants across the sector. The research survey sought to understand the unique challenges facing ADR practitioners within each segment of the Processes Framework. This research has identified emerging practice areas and subsequently highlighted opportunities for professional development and business expansion.

The findings within this article are a basis for future research The researchers are optimistic that with further analysis and collaboration between Humber College and ADRIO, that the knowledge gathered will be harnessed to contribute to the digital transformation of the ADR sector.

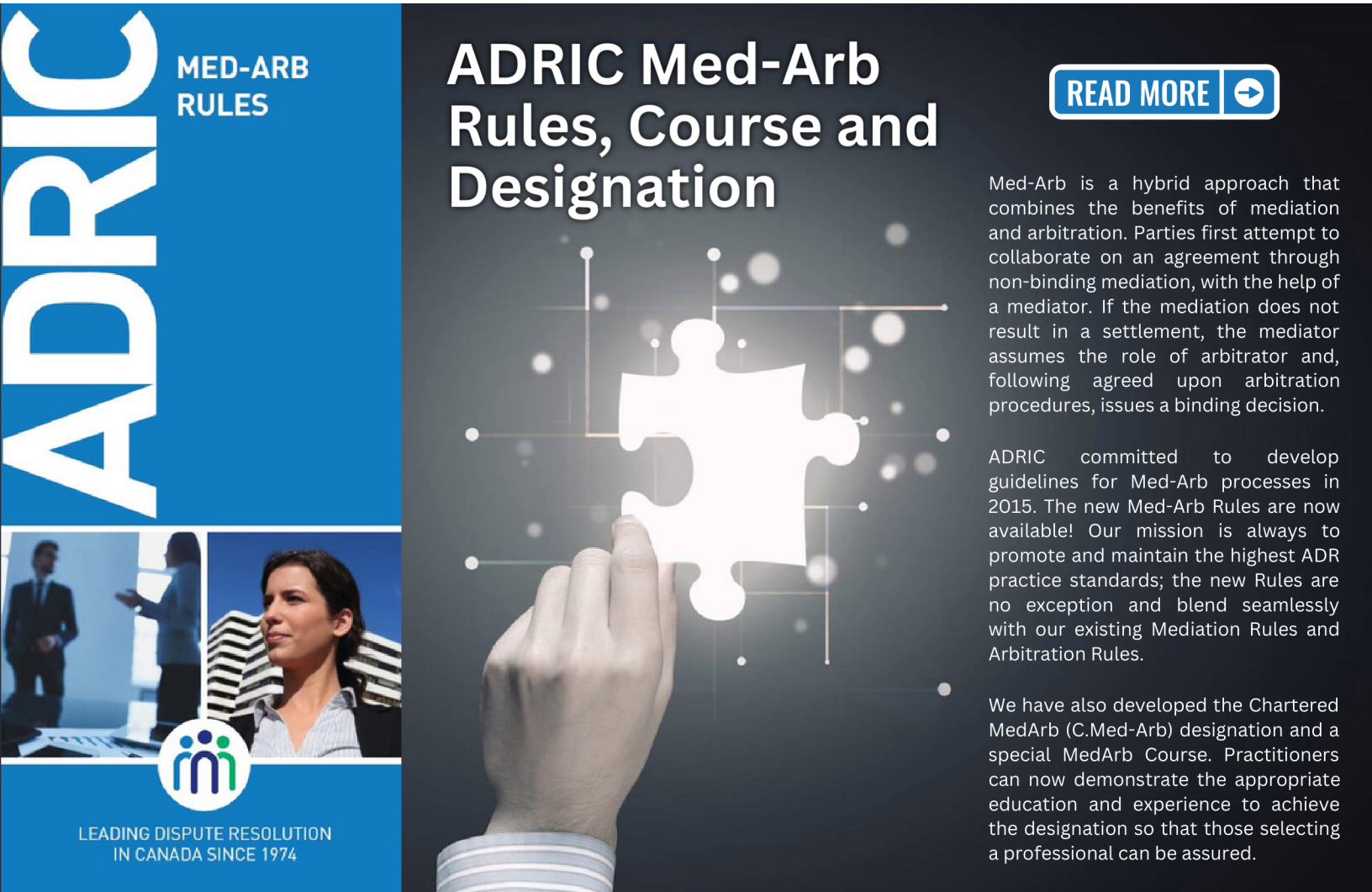
Acknowledgements

We acknowledge the support of the Natural Sciences and Engineering Research Council of Canada (NSERC) and Humber College Office of Research and Innovation.

We also want to acknowledge Pramila Javaheri, Executive Director, ADRIO and Bruce Ally, ADRIO Board Member for their ongoing guidance and support throughout this research project.

References

- Justice Canada (2023). The Use of Restorative Justice to Address Criminal Offending in Canada. Government of Canada. Updated Jan 16, 2023. https://www.justice.gc.ca/eng/rp-pr/jr/urjacoc-rjrplccc/index.htm
- Attorney General (2015). Alternative dispute resolution and mediation in Family Court. Government of Ontario. https://www.attorneygeneral.jus.gov.on.ca/english/family/policies.php
- Egsgard, J. (2020) Mandatory Mediation in Ontario: Taking Stock After 20 Years. Ontario Bar Association. https://www.oba.org/Sections/Alternative-Dispute-Resolution/Articles/Articles-2020/July-2020/Mandatory-Mediation-in-Ontario-Taking-Stock-After
- Government of Canada (2013) Restoring The Workplace Following A Harassment Complaint: A Manager's Guide. https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/harassment-violence/restoring-workplace-following-harassment-complaint-managers-guide.html
- Justice Canada (2022). Use of Technology in the Family Justice System. Department of Justice, Canada. Research & Statistics Division: Annotated Bibliography. https://www.justice.gc.ca/eng/rp-pr/jr/utfjsab-utsjfba/p4.html
- Justice Canada (2012). Dispute Resolution Reference Guide. Department of Justice, Canada, Government of Canada, Dispute Prevention and Resolution Division. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html (modification in 2022).
- Ontario Bar Association (2020). Expanding Mandatory Mediation in Ontario: A submission to the Attorney General of Ontario. https://www.oba.org/CMSPages/GetFile.aspx?guid=4f756ca7-2962-417b-aec6-18e1ae760d12
- Qualtrics (2022). Qualtrics sample size calculator. https://www.qualtrics.com/blog/calculating-sample-size/
- Qualtrics (2023). Qualtrics margin of error calculator. https://www.qualtrics.com/experience-management/research/margin-of-error/
- Statistics Canada (2016). Ethnic and cultural origins of Canadians: Portrait of a rich heritage. Government of Canada. https://www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016016/98-200-x2016016-eng.cfm
- Stomper, R. (2020). Efficient Contracting and Alternate Dispute Resolution: Ethical Considerations. SSRN Electronic Journal. https://doi.org/10.2139/ssrn.3401563



Beyond Received Wisdom

How do we know what we know about alternative dispute resolution in Canada? On what do we base our confidence that mediation, arbitration, and other interventions actually benefit participants, not service providers or professional advisors? By what means do we evolve new ways of serving people and organizations in conflict? How do we know these innovations are useful and welcome?

GENEVIEVE A. CHORNENKI, LL.M.(ADR), C.MED, C.ARB

Genevieve is the author of Don't Lose Sight (2021) and co-author of Bypass Court (2015). She holds a Certificate in Creative Writing from the University of Toronto and a Publishing Certificate from Ryerson University. She was inaugural chair of the Ontario Bar Association's ADR section and serves on ADRIO's C.Med accreditation committee.
www.genevievechornenki.com

In the past, dispute resolution practitioners—and that includes me—have confused research with information gathering from books and online sources. We have relied on received wisdom, personal preference, and isolated observation to legitimize our interventions. And we have looked to dated studies not knowing whether they have been replicated or updated.

Now things are changing, albeit slowly and incrementally. A review of the journal's contents over the last five years shows that practitioners are beginning to value empirical research as a source of knowledge and to understand that it may be a more reliable way of knowing than reading, assumptions, or personal experience.

The table below summarizes a dozen published journal articles in which contributors conducted or relied on empirical research to advance thinking and practice in the field. Of particular note are the instances where private practitioners such as Cinnie Noble and Loïc Berthout used their own resources to research and develop tools to assist the people they serve. Although modest in scope, theirs is truly client-centered work. Imagine how much more could be accomplished if initiatives like the Noble and Berthout ones were generously funded and supported by academic or professional organizations with access to further expertise and broader reach.

Of course, the list of journal articles is not exhaustive of such activity in the field. How could it be, given that dispute resolution research is not widely disseminated, discussed, or accessible to the average, non-academic practitioner? Still, these articles are encouraging, and readers are invited to revisit them.

ISSUE	PAGE	JOURNAL ARTICLE
Vol. 28, No.1, Fall 2019	9	Mediation Psychology: Seven Science-based Insights by Ruth M. Corbin An evidence-based approach to mediation and directs readers to current research
Vol. 29, No. 1, Spring 2020	8	Reading Research—Bamboozled No More by Ruth M. Corbin Tools to properly evaluate social science research rather than extracting isolated nuggets.
Vol. 29, No. 1, Spring 2020	20	Arbitration Decision Making—By the Numbers by William Horton An analysis of the decision-making process of emerging arbitrators.
Vol 29, No. 2, Fall 2020	19	Reading Research on Micro-Facial Expression and Sequel to "Bamboozled No More" by Ruth M. Corbin An analysis of a meta-study about whether emotions can really be read from a person's face.
Vol 29, No. 2, Fall 2020	23	Domestic Violence Theories and Family Mediation: The Mediator's Dilemma by Georg Stratemeyer An enquiry into the suitability of mediation in the context of domestic violence based on a literature review and an analysis of data from over 800 mediation records.

ISSUE	PAGE	JOURNAL ARTICLE
Vol 29, No. 2, Fall 2020	28	An evaluation of the cost of family law disputes: Measuring the cost implication of various dispute resolution methods—research reviewed by Paul Godin A breakdown and analysis of a 2017 study seeking to determine what dispute resolution process provides the best value in family law conflicts.
Vol. 30, No. 2, Fall 2021	7	Conflict Management Coaching: The Back Story Cinnie Noble in conversation with Genevieve Chornenki How a private dispute resolution practitioner assembled a study group of 50 candidates to research and develop a specialized form of coaching now taught and used throughout the world.
Vol. 30, No. 2, Fall 2021	28	The Effectiveness of Community Mediation— Narrowing the Literature Gap with Research by Rachelle Paquet and Antonnia Kiana Blake A report on research conducted in 2019 & 2020 to assess the effectiveness of community mediation in improving the future capacity for communications and conflict resolution between and among users.
Vol. 31, No. 1, Spring 2022	15	Increasing Police Trust and Effectiveness through Conflict Management Training by Richard Moore How a private dispute resolution practitioner researched and developed conflict management training to increase trust and confidence in police.
Vol. 31, No. 2, Fall 2022	6	Listen In: A conversation with Julie Macfarlane and editor Rick Russell Insights from one of the most accomplished researchers in Canada who has looked into issues of access to justice and, most recently, non-disclosure clauses.
Vol. 31, No. 2, Fall 2022	10	Preparing Parties to Participate in Mediation— The Evolution of a Coaching Model by Cinnie Noble How a private dispute resolution practitioner independently researched and designed a process for pre-mediation coaching that supports participants without compromising a mediator's neutrality.
Vol. 31, No. 2, Fall 2022	14	Measuring Trust Between Business Partners: A Practical Tool by Loïc Berthout How a private dispute resolution practitioner researched, developed, and beta-tested a process to generate trust among disputing business partners.

Circles or pods of dispute resolution practitioners are beginning to focus on quality improvement initiatives in the field. See, for instance, the intentions of the Winkler Institute expressed in this issue. See also the U.S. empirical research by Roselle Wissler and Art Hinshaw on pre-mediation preparation which found that 66% of the 1,000 civil mediators surveyed held pre-session discussions about non-administrative matters with the parties and/or their lawyers in their most recent case https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4061179. John M. Lande, Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri School of Law is also compiling literature about pre-mediation preparation and recently circulated this preliminary list of publications which, ideally, will grow to be international in scope:

1. Judy Cohen, How Preliminary Conferences Lay the Groundwork for a Productive Process, 30 Alternatives to the High Cost of Litigation 169 (2012).

2. Timothy Hedeen, Vittorio Indovina, JoAnne Donner, & Claudia Stura, Setting the Table for Mediation Success: Supporting Disputants to Arrive Prepared, 2021 Journal of Dispute Resolution 65.

3. Maryland Courts, four-part video series for parties, including Part 3: How to Participate in Mediation.

4. Michele Kern-Rappy, Esq., Senior Mediator and Settlement Coordinator, R.A.I.S.E - To Get to a Higher RoadTM - MED-NJ Mediation Process.

5. John M. Lande, The Critical Importance of Pre-Session Preparation in Mediation

Welcome steps. Positive signs pointing beyond received wisdom to Joya Mukherjee's "community of data-driven practitioners." I envision that such a community will endorse research as a standard part of dispute resolution training, routinely share and discuss past, present, and future research initiatives, and insist on research literacy as a necessary ingredient of dispute resolution competency.

In the meantime, here is what continues to trouble me. The dispute resolution field, albeit well-intentioned, tends to be self-focused and commercially motivated. These attributes that are not necessarily bad or worthy of condemnation. They are simply incomplete. Where, we should be asking, do participants fit into research? How can we include them in quality control initiatives and other empirical enquiries? With few exceptions, practitioners, academics, and professional advisors continue to stand in as proxies for ADR participants and to prescribe what is good for them.

So, yes, the field needs more research, but research that asks the participants to speak for themselves and that compares one model to another through the eyes of participants, not through the eyes of mediators, arbitrators or participants' lawyers.

As the editorial in Vol. 31, No. 2 maintained, empirical research in dispute resolution has the potential to provide practitioners with direct information about the people they serve. It can validate (or not) the presumptions that practitioners make on behalf of their clients and the models that practitioners champion. But credible, accessible research may offer more than increased knowledge. It might—just might—give dispute resolution the gravitas and credibility that the field craves. And empirical research might—just might—elevate the practice of dispute resolution more effectively than any amount of credentialing, regulation, or promotion.

Use of the Notwithstanding Clause in Labour Relations

GARY T. FURLONG
C.MED, LL.M (ADR)

Gary Furlong, C.Med, LL.M (ADR) is a mediator, arbitrator, and labour relations and workplace specialist, and is the author of The Conflict Resolution Toolbox, Wiley 2020. Gary works with unions and management teams across Canada in a wide range of industries. He is a partner at Agree Inc., https://agreeinc.com/our-team/gary-furlong/.

Introduction

Collective bargaining—the process by which management and organized labour work out the terms and conditions for unionized employees—has existed in Canada for at least seventy-five years. Long before ADR classics like *Getting to Yes* and *Designing Conflict Management Systems*, collective bargaining had developed a structured negotiation process with access to third-party neutrals such as conciliators, mediators, and arbitrators.

As dispute resolution practitioners know, negotiation can be messy and protracted. Labour-management negotiation is no exception, but for all its faults, that process has become part of civil society. In 1995, the Supreme Court of Canada expressly stated that the right to freedom of association (section 2(d) of the *Charter of Rights and Freedoms*) includes the right to meaningful collective bargaining.

What then does it mean for an established and court-sanctioned negotiation process when legislation is passed that eliminates the right to collective bargaining and imposes fines on workers and unions who defy the law? Are there lessons for dispute resolution practitioners who do not work in this specialized field. Should they care? This article chronicles recent legislative attempts to restrict and control collective bargaining in Canada and discusses the consequences, especially the implications of using the notwithstanding clause in Canada's constitution.

Labour Relations—Evolution not Revolution

Labour relations in Canada, at both the provincial and federal level, tend to move and change at a slow, almost glacial, pace. Change is incremental in most collective agreements; the addition or removal of rights is typically a matter of evolution, not revolution. When change moves too slowly strikes happen, but governments seem to have a low tolerance for protracted strikes when it comes to public sector workers, and they have a track record of ordering public sector workers back to work and letting an arbitrator set the terms of any new contract. Arbitrators, for their part, tend to be conservative in their approach, rarely awarding significant changes to the agreement in their decisions—again, evolution, not revolution.

The pandemic, however, has upended labour relations on a grand scale, with vaccine mandates and human rights issues leading to a flurry of grievances and arbitrations. Labour shortages that flew beneath the radar before the pandemic have become extreme in many critical areas (especially in health care), waking up and invigorating the labour movement across Canada. Rampant inflation not seen in many years has spiked, and wage demands at the bargaining table have reached heights also not seen in many years.

Governments across the country have at times tried to constrain public sector labour costs by legislating wage caps or freezing wages entirely. These attempts have had mixed results— when unions believe governments have materially interfered with bargaining, then court and constitutional challenges follow quickly.

In 2002, for example, the British Columbia government revoked existing collective agreements in the health care sector and unilaterally imposed new contracts with dramatically different terms and conditions. The unions went to court, and in 2007 the Supreme Court of Canada ruled in favour of the unions' constitutional right to have negotiated agreements honoured. This resulted in significant damages and orders for replacing many positions lost due to the actions of the BC government.

Under the Ontario government of Premier Dalton McGuinty in 2012, new contracts were imposed on teachers. In order to avoid an outcome like British Columbia, however, terms were imposed *after* the expiry of the agreements. Again, the unions resorted to the courts and again the unions won the day, resulting in significant damages in the hundreds of millions of dollars ordered to be paid to the unions. More importantly, both the Ontario and the British Columbia cases upheld the Charter rights of unions to freely negotiate agreements and take collective job action if no agreement is reached.

The Ontario government under Premier Doug Ford has taken government control of the collective bargaining process

to a whole new level. First, in 2019, it passed Bill 124 limiting many parts of the Ontario public service to increases of 1% per year, legislation that is currently under a charter challenge by the unions. Then, in fall of 2022, realizing that the unilateral imposition of new agreements might again be considered a violation of the union's Charter rights, and unwilling to submit a negotiating impasse to an impartial arbitrator, the Ontario government attempted to simply extinguish those rights by passing Bill 28. That bill imposed a contract on education workers represented by the Canadian Union of Public Employees (CUPE) and invoked Section 33 of the Constitution (the so-called "notwithstanding clause"), effectively removing all legal recourse for unions to protest or challenge his legislation. In addition, the legislation imposed onerous penalties for strike action on both individual workers and on the union.

For CUPE, and indeed all unions in Canada, this was seen as an existential threat to constitutional rights for all workers. If any premier in Canada, or the prime minister, could simply invoke the notwithstanding clause and dictate any contract they desired at any time without anything more than political consequences, unions would cease to have any leverage or any rights in the bargaining process at all.

In short order, CUPE went on strike, ignoring the punitive fines in the legislation. Almost immediately, the entire union movement across Canada, public and private sector, united in opposition to this legislation. Within hours, there was talk of a general strike by all unions to bring Ontario's economy to a standstill until the legislation was repealed. Premier Ford, seemingly shocked by the speed and strength of the reaction, rescinded the legislation in a matter of days and returned to the bargaining table with a better offer.

While bargaining is now seemingly back to "normal," the genie will not go back into the bottle easily. The very fact that a government took action to strip workers of their rights without recourse will have lasting effects on labour relations across Canada. What are the likely impacts?

The Impact of the Notwithstanding Clause in Labour Relations

The use of the notwithstanding clause in labour relations, regardless of the final contract between the Ontario government and CUPE, will reverberate in Canada for many years. First, the strength and unity of the labour movement's response will send government strategists back to the proverbial drawing board. Secondly, this event has the potential to energize the labour movement, to embolden them to make larger demands and not back down in the face of government pressure or legislative action. The Ontario government poked the bear, and the bear is now awake and none too happy.

What Has Changed for Governments Across Canada

Fundamentally, what has changed for all provincial governments is the inability to use the notwithstanding clause in labour relations—perhaps forever. In the last five years, provincial government use of the notwithstanding clause has grown dramatically. The Quebec government has used it twice since 2019 to shield legislation from the courts, and since 2018, the Ontario government has used it twice (and threatened its use a third time). While there was some public reaction, it was muted. Given the perceived success of these provinces in their use of the clause, it was only a matter of time before a province tried to apply it to collective bargaining and to unilaterally take control of union contracts.

The reaction was swift and unequivocal. Whereas the Freedom Convoy of only a few hundred dedicated individuals paralyzed trade and Ottawa's downtown core, suddenly tens of thousands of unionized workers were prepared to protest illegally and shut down an entire province, if not the country. The Ontario government quickly saw that there was no political win in this for them, and it is unlikely any government will see the notwithstanding clause as a viable option in labour relations any time soon.

In addition, Ontario's attempt to extinguish collective bargaining rights managed to do the improbable—unite a fractious union movement that is characterized by ideological rifts and divisions. Every union in Canada, however, saw this as an existential threat—one that had to be stopped immediately—and came together to do just that. Premier Ford blinked and blinked quickly.

The net result is that no premier or prime minister in this country will risk using the notwithstanding clause to strip Charter rights from unions for a very long time. That means governments, like all employers, must come to the table in good faith and reach a deal by means of collective bargaining, or live with an arbitrated decision decided by a neutral third party.

Governments can still order striking unions back to work; this has happened frequently and will likely continue to happen when important services, such as education and transit, are impacted. But unions will still have a remedy through the courts or through binding arbitration to ensure at least a semblance of fairness in the negotiation process. Canadians will not be seeing Section 33 in relation to labour relations again, for a very long time.

What has Changed for Unions

On the union side it is less clear how the Ontario government's aborted use of the notwithstanding clause will impact them. In the short term, the union movement has flexed its collective muscle and won

a clear victory. Unions feel stronger than they have in many years, and in the short term this will mean larger and stronger demands at the bargaining table.

In addition, union-government relations have been eroded, even damaged, by this episode. The fact that the Ontario government disregarded the union's concerns around pay and inflation and slammed the door on them has erased any goodwill that government had built up with parts of the labour movement over their first few years in office. Even the private sector unions that endorsed the Ontario's premier in the last election publicly criticized his government's attack on collective bargaining and participated in planning a general strike. Poor relations between parties encourage union leaders to focus on building support for a strike and prompt governments to court public opinion, rather than the two of them finding an acceptable compromise at the table.

All that said, there is a risk the union movement may overplay their hand. CUPE's education workers will now need to channel their success at getting Bill 28 repealed into finding a contract that can be ratified, not demanding increases that force the government back to using legislation, however less draconian that may be this time. As of this writing, CUPE's education workers have issued a second five-day strike notice, even after reports that a wage agreement had been reached. Should CUPE strike again, after what appeared to be the primary issue of wages was settled, they will risk losing public support and once again shifting the balance of power back to the provincial government. We shall see.

Regardless of the CUPE outcome, all other unions in Ontario are watching carefully as many of them are next up to negotiate contracts. The outcome of CUPE's negotiations will determine where and how far some of the larger education, health care, and public service unions go as a next step.

What Won't Change

Regardless of the outcome of the Bill 28 adventure and the outcome of CUPE's current negotiations in Ontario, factors inherent in the collective bargaining process will temper the effects of this episode, at least to some degree. These are factors that come into play long before any negotiation reaches the level of conflict that might trigger a strike or prompt the thought of legislation, let alone the use of the notwithstanding clause:

- Firstly, unions operate as one of the purest forms of democracy, and democracy is messy. It is a constant challenge for unions to focus and unify their membership to the point where they can sustain and win concessions through a strike. Not many unions can sustain a strike over small gaps in wage offers or smaller changes to working conditions. Strikes are successful when the issues are highly motivating to almost all members, and few issues rise to that level. The scarceness of highly motivating issues means that many agreements are reached and ratified, even when the union executive and some of the members wanted to hold out for more.
- Secondly, governments and private sector managers serve very fickle groups—voters and customers, respectively. Neither constituency is very tolerant of having their services suspended by a strike and often blame leadership, rather than unions, for the inconvenience. This is why governments reach for back-to-work legislation quickly, even though arbitration tends to cost them more in the end.
- Finally, as mentioned before, unions are not, historically, unified as a broader labour movement. Ontario's current premier, for example, was elected with the support of large private sector unions who sided with the agenda of a particular political party rather than their public sector union colleagues. Historic divisions within the labour movement will not be overcome by means of local issues that do not affect workers outside one given union or sector. The use of the notwithstanding clause in Ontario labour relations threatened all unions and all members' fundamental rights, but most issues do not. If any union strikes over normal issues of pay or benefits, they will not be supported by the threat of a general strike.

While the swift, collective reaction to Ontario's use of the notwithstanding clause may open some doors and create some additional collaboration between unions across public and private sectors, it is unlikely to have changed the basic priority for each union—focusing their attention and resources on the issues that affect their own members every day, not the union movement at large.

Going forward, watch for unions to try and capitalize on the energy and focus from their membership that Ontario's government created with its heavy-handed approach. But labour relations were in a changed era even before this use of the notwithstanding clause. The pandemic, along with rampant inflation and severe labour shortages had already shifted the playing field in favour of workers in general, and unions in particular. Union focus and energy had already increased substantially and will continue as our economy and society grapples with these issues. Collective bargaining will be more difficult for the foreseeable future, but it would have been so in any event. As labour and management, both public and private sector, wrestle with finding a way through this, the notwithstanding clause incident will have less and less impact on the future, provided government has learned the right lesson from this experience.

Tendering Evidence in Construction Cases:

By Affidavit or Viva Voce (Oral) Testimony?

He flung himself upon his horse and rode madly off in all directions.

~ Stephen Leacock

HARVEY J. KIRSH

Harvey J. Kirsh, C.Arb is a recognized authority in construction law. He has many years of experience in the arbitration, mediation and litigation of complex construction claims and disputes arising out of infrastructure, transportation, energy, resource, residential, industrial, commercial and institutional projects. His professional bio, and his awards, recognitions and testimonials, may be accessed at http://kirshadr.com.

Introduction

How evidence is put forward in an arbitration can matter. Should a witness testify in person or can a sworn written statement stand in for live testimony? There are many factors for participants and their lawyers to take into account when deciding how to present their case to an arbitrator. My experience is in construction arbitration, but the considerations are equally relevant in other kinds of arbitration cases.

Tendering Affidavit Evidence

I was counsel in a complex construction case. In play were millions of dollars in claims and counterclaims arising out of the design and construction of a large infrastructure project. The pleadings disclosed legal issues relating to construction deficiencies, design defects, causation, compensable and non-compensable delays, unforeseen subsurface conditions, and scope-of-work issues. Thousands of project documents were catalogued, scanned, and exchanged.

Significantly, many of the project documents and correspondence revealed factual discrepancies and disagreements between the parties, and there was an abundance of credibility issues. The testimony of fact witnesses, therefore, was expected to be critical in order to provide a foundation for the anticipated opinions of expert witnesses.

The arbitrator had ordered that the evidence-in-chief should be tendered by way of sworn affidavits from each fact witness, rather than by the usual and ordinary procedure of *viva voce* (oral) testimony. The thinking was that this protocol would be more expeditious and cost effective. Indeed, many counsel prefer this method of introducing evidence, expressing the view that it speeds the process along, saves hearing time, does not increase costs, and leads to better and clearer results.

When I initially received the opponent's affidavits well in advance of the arbitration hearing, I combed through them to attempt to ascertain whether they contained any allegations which could test and challenge the credibility of the witnesses. It was immediately clear that the affidavits were drafted by lawyers. The words, the turns of phrases, the phraseology, and the references to legal issues were not of the sort typically used by witnesses in construction cases. So, on a macro level, the affidavits could be challenged on that basis. But the affidavits were also riddled with allegations, claims, and arguments which offended the rules of evidence, and all or parts of them raised issues of admissibility.

When the arbitrator asked counsel their views on whether he should apply the common law rules of evidence at the hearing, I readily consented to that approach, and was pleased that my colleague, the opposing counsel whom I will call Mr. Smith, did not object.

The way it worked at the hearing was that, after the witness was sworn, Mr. Smith would introduce the affidavit of his witness and would have it marked as an exhibit for identification purposes. He then asked the witness to identify the affidavit and his signature on it; to confirm that the facts contained in it were true and correct when he signed it and that they continued to be so; and to identify himself and his role in the project. He then invited me to cross-examine and sat down, feeling that the entirety of the affidavit testimony had been successfully submitted into evidence. Cross-examination and any re-examination were then to be conducted orally and transcribed.

Even before addressing the first witness, I stood to register my objections to the affidavit and then embarked on a bold strategy of challenging the affidavit on a number of fronts, pointing out evidentiary shortcomings in the affidavit—irrelevancies, numerous opinions, hearsay, double-hearsay, disclosure of privileged information, and so on. I then asked the arbitrator to strike out whole paragraphs and large swaths of other paragraphs, which he was apparently prepared to do. In the end, I was successful in striking out about thirty percent of the affidavits of all of the witnesses; and this was before I asked a single substantive question of any of them.

My attack on the affidavits also served to discredit some of the damages which were being claimed by the opposing party, and before I began my cross-examination, Mr. Smith conceded that some of his client's claims for damages, totaling in the tens-of-thousands of dollars, had been reconsidered and were withdrawn.

Following from that, my cross-examination then challenged the "spin" of the drafting which was obviously undertaken by Mr. Smith or one of his associates. Was the actual testimony that of the witness or the lawyer? I asked the witness whether he had drafted the affidavit (answer: no), whether he dictated parts of it (answer: no), whether the actual words in the affidavit were his (answer: no), whether he understood the words which were used (answer: some no), and whether he used those words in his daily conversations (answer: no).

During a break in the proceeding, I went into the hallway outside the hearing room and was surprised to encounter a colleague who was a retired judge from England. He was now a full-time arbitrator and, coincidentally, had come to Canada for an arbitration where the hearing was taking place in the very next room to where my hearing was proceeding. I told him about my success as counsel in excising large portions of the opponent's affidavit evidence, and he simply smiled and said that they did not do it that way in England—"Life's too short." Distinguishing between admissibility and weight, he stated that in his world, most evidence is admitted, and the arbitrator would then decide what weight it is to be given.

Tendering *Viva Voce* (Oral) Evidence

I was also counsel in another major construction case. There, a critical witness I was calling to testify *viva voce* had just arrived from Europe the day before the hearing began. I had never met him, and our communication up until that point in time was entirely through telephone calls and correspondence. He showed up at the hearing obviously still tired from his long trip and wearing tattered blue jeans, scuffed shoes and an ill-fitting jacket. Sitting in the witness box, he leaned so far back in his chair that everyone in the room was taking bets as to whether and when the unbalanced chair would collapse under his weight. When I asked him questions, he would take an inordinate amount of time to answer, giving the impression that he was not particularly informed or prepared. Despite some damaging cross-examination by opposing counsel, I managed to shuffle him off the stand and out of the room quickly. I had hoped that his testimony, critical as it was, did not unduly prejudice my client's case.

It was clear that this particular witness's testimony would have benefitted had it instead been submitted in the form of an affidavit. An affidavit does not describe body language, does not indicate whether the witness is articulate or logical, does not disclose the state of the witness's attire or demeanour, and secures the benefit of the "spin" imposed on the testimony by counsel. To the extent that any of those factors were to assist in the evaluation of credibility, the decision writes itself.

What if his evidence were tendered in the form of an affidavit? My own view is that, even though he would nevertheless be exposed to cross-examination, at least his written evidence would have been more smooth, articulate, and credible. Let the opposing counsel worry about how compelling the witness's answers were on cross-examination.

These anecdotes squarely raise the issue of whether the evidence should be tendered by way of affidavit or by *viva voce* testimony. How does one decide which is the better approach? That question has generated a high-level debate amongst legal scholars.

The Boundaries of the Academic Debate

Credibility

A fundamental issue is whether an arbitrator is able assess the credibility of a witness when direct testimony is presented in writing or orally.

When a fact witness's evidence is submitted in affidavit form detailing the witness's recollection of events, an experienced arbitrator, during cross-examination, will not likely have a problem evaluating the credibility of the witness. If the arbitrator ensures that documentary discovery is thorough and complete, then the tools for an effective cross-examination have been provided to counsel and there is little to be lost by having direct testimony submitted

in writing. However, if documentary discovery is not thorough and incomplete, then the cross examiner will have significantly less at his disposal to undermine the witness's story, and the arbitrator might very well find himself wondering whether the story presented in the affidavit was that of the witness or that of his lawyer.

On the other hand, where the testimony is *viva voce*, the arbitrator has the opportunity and ability to assess witnesses by observing their behaviour, demeanour, frankness, readiness to answer, coherence and consistency, and to evaluate their credibility. Furthermore, the drama of *viva voce* testimony, including the witness' body language and ability to recall events accurately; as well as the possibility of unexpected admissions or statements, serves to put a thumb on the scale in evaluating the alternative approaches.

Additionally, an arbitrator will often exclude witnesses from the hearing room before they testify so that their testimony will not be tainted or influenced by hearing the evidence of other witnesses. If a witness were not excluded from the hearing room, the fact that they had heard the testimony of other witnesses may affect their credibility and, therefore, the weight of their testimony.

Advance review

Written statements provide the arbitrator and opposing counsel with the opportunity to gain an understanding of and to evaluate the direct testimony evidence well in advance of the in-person hearing and any cross-examination. The witness' testimony would therefore be more predictable than if it were submitted orally.

Memory Distortion

Studies exploring the science of human memory have revealed that, particularly in complex engineering construction projects, human memory is fragile and malleable and that memories could become unwittingly corrupted and distorted. If a project participant were to keep detailed and complete records of the project, however, then it may not matter whether his evidence is submitted to the arbitrator in written or oral form. But if he were to rely strictly on his memory, then *viva voce* testimony would probably be less reliable than affidavit evidence since the events may have taken place years earlier, and the witness may have moved on to other roles, other projects, or other employment. Memory distortion can be remediated if the witness were given an opportunity, in advance, to investigate the facts for inclusion in an affidavit rather than simply struggling to remember them while preparing for his testimony or while in the witness box.

Burden of Proof

Written witness statements have the effect of shifting the burden of proof to the opposing party. Typically drafted by legal counsel, written statements are often calculated so that, standing alone, they are designed to diminish or eliminate any risk of the type of impeachment which could occur during direct oral examination of a witness.

International Arbitration

Legal writers have observed that written witness statements are the norm in international arbitration based in Europe, Asia and the Middle East, usually because lawyer involvement in drafting (and perhaps putting an influential "spin" on) affidavit testimony is far less prevalent or tolerated in those cultures than in other countries.

Written vs Oral Communications

Academic scholars have opined on the differences between written and oral communications, and have concluded as follows:

- Written language can be significantly more precise. Written words can be chosen with greater deliberation and thought, and a written argument can be extraordinarily sophisticated and intricate;
- A reader can read quickly or slowly or even stop to think about what he has just read. A reader always has the option of re-reading and the mere possibility of re reading has an effect upon a reader's comprehension;
- A speaker, though, has more ability to engage the audience psychologically and to use complex forms of non-verbal communication;
- Oral communication can be significantly more effective in expressing meaning to an audience. This distinction between precision and effectiveness is due to the extensive repertoire of signals available to the speaker: gestures, intonation, inflection, volume, pitch, pauses, movement, visual cues such as appearance, and a whole host of other ways to communicate meaning. A speaker has significantly more control over what the listener will hear than the writer has over what the reader will read.

Cost

A legal writer has commented that crafting affidavit testimony is labour intensive and, therefore, costly because "every word [is] researched, fixed, revised, reconsidered, criticized, amended, reconsidered, contrasted, and then done once or twice more for quality control."

ADR in Canadian Insolvency Proceedings: An Overview

Introduction

As the Chief Justice of Ontario recently highlighted, the Ontario Superior Court of Justice heard at least 200,000 virtual hearings in the twenty-two-month period ending in February 2022.[1] With Canada's central bank raising interest rates aggressively to rein in inflation,[2] as well as geopolitics and unusually low levels of insolvency filings during the pandemic, insolvency proceedings will likely increase, putting even more pressure on the court system. This article considers the extent to which alternative dispute resolution ("ADR") can address increased demands on Canadian and international insolvency systems. ADR's values and goals are sometimes at odds with those of insolvency's established court-based model. Mediation and arbitration have both been used in insolvency cases, but relevant jurisprudence and practices are in the process of evolving.

Mediation and Insolvency Overview and Examples

We are increasingly seeing companies enter insolvency proceedings through Canada's *Companies Creditors' Arrangement Act ("CCAA")* when mass litigation threatens their ongoing viability. In this context, ADR can play a key role. Generally, this occurs when a presiding CCAA judge directs parties to participate in mediation overseen by either another judge or a private neutral person. Since 1998, at least 14 *CCAA* proceedings[3] adopted mediation as a part of their process, and this approach has become increasingly popular. By way of illustration, a CCAA court made mediation orders in complex proceedings such as Nortel, Sino-Forest, CannTrust Holdings Inc., Imperial Tobacco Canada, Laurentian University of Sudbury, and Sears Canada Inc.

In a CCAA proceeding, the presiding judge makes orders on nearly every aspect of the case, ranging from approving the hiring of financial advisors to sanctioning the reorganization plan. But many disputes can be resolved by a "neutral" who hears arguments and weighs evidence that the parties do not want to share with the presiding judge. In this way, the other aspects of the CCAA proceeding can be resolved through the usual motions while specific matters are delegated to the mediator for resolution. In the American context, some commentators have described, with concern, situations where the mediator exerted the type of pressure on the parties that a presiding bankruptcy judge would not exert in order to obtain a quicker resolution. This type of comparison is unlikely to apply in the Canadian context, as Canadian commercial courts are known for "real-time" resolution of issues and a fast-paced approach encouraging resolution, first popularized by Justice Farley and followed ever since.[4] That is, Canadian judges have a great deal of discretion to apply the necessary amount of pressure to achieve a fast-paced resolution that may not be available to American judges in the same way.[5]

The proceedings and results of mediation are often confidential, which is consistent with the efficiency and procedural fairness goals of mediation in the CCAA context. Recently, mediation has encouraged settlements of the securities class action claims

NATASHA MACPARLAND

As a partner at Davies, Natasha MacParland provides clients with smart solutions for their complex insolvency and restructuring challenges. She advises on debt restructuring, corporate debtor/creditor rights enforcement, turnarounds, workouts, and plans of arrangement. Natasha is a member of the International Insolvency Institute and the Insolvency Institute of Canada. https://www.dwpv.com/en/People/Natasha-MacParland

STEPHANIE BEN-ISHAI

Stephanie Ben-Ishai is a Distinguished Research Professor at Osgoode Hall Law School and an Affiliated Academic at Davies. She is recognized for her expertise in the areas of insolvency, contract, corporate governance, and commercial law. Stephanie recently completed the Toronto Commercial Arbitration Society's prestigious Gold Standard Course on commercial arbitration and has been doing research at the intersection of insolvency and arbitration law.

against CannTrust holdings, a cannabis company. CannTrust is an example of how mediation can be used in "new industries" such as cannabis as we consider the future of digital assets, including crypto-currency and potential insolvency proceedings in this sector. CannTrust and most of the defendants in class actions pending in the United States and Canada reached a global resolution of the claims asserted against them with the assistance of a court-appointed mediator who was a retired appeal court judge. The defendants included officers, directors, and underwriters of CannTrust, ranging from individuals to large separate corporations that acted as underwriters. The Ontario Superior Court of Justice (Commercial List) approved the proposed settlements with a sanction order entered on July 16, 2021.[6]

In another example, Crystallex International Corporation, the court ordered the parties to attempt to resolve a number of motions and cross-motions through confidential mediation, in part due to the interconnectedness of the issues and the confidential nature of the evidence.[7]

CannTrust also highlights the ways in which ADR can be used to assist a court in cross border insolvency cases.[8] Similarly, the early experience with mediations that took place in Nortel provide insights into how ADR processes complement each other and the types of areas (allocation decisions in this context) that can benefit from ADR, while allowing the overall insolvency process to reach a conclusion. Overall, we expect that ADR processes will increasingly be used as a complement to courts in dealing with cross-border insolvency proceedings. With experienced counsel and mediators, this approach can promote efficient, fair and timely resolution of insolvency proceedings.

Mediation and Insolvency: Benefits and Challenges

Two benefits to the use of mediation in Canadian insolvency proceedings stand out:

(1) Mediating judges or private neutrals limit the time demands on the presiding judge while honouring lawyers' and parties' interests in a preliminary judicial evaluation of their cases, and

(2) Where sitting judges are used, the practice improves access to justice by shifting some of the costs of the mediating judges' services from the litigants to the public, particularly in cases where there is significant disparity in the parties' abilities to pay.

In the American context, questions have arisen about transparency and disclosure, which are hallmarks of insolvency practice, when a mediator is used in insolvency proceedings. The concern is that if debtors launch immediately into private, confidential mediation between only certain parties, other stakeholders—often those with little power—may be left out of the negotiations before they fully understand the case. For example, recent cases such as *Purdue Pharma LP and Madison Square Boys & Girls Club Inc.*[9] have involved a sitting bankruptcy judge other than the one assigned to their case to mediate and ultimately broker major deals with creditors. However, allowing the debtor to set the mediation parameters at the case's outset, such as selecting the mediating judge or participating creditors, raises fairness questions.

The Canadian CCAA process, with the additional court officer, subject to the supervision of the Office of the Superintendent of Bankruptcy—the Monitor—offering an oversight role, and providing regular publicly available reports, significantly addresses these concerns.

Arbitration

The Supreme Court of Canada recently considered the scope of another aspect of ADR activity in the insolvency context, namely, arbitration. In British Columbia, as in other provinces, section 15 of the *Arbitration Act*, a provincial piece of legislation, requires a court to enforce valid arbitration agreements by staying court proceedings commenced in breach of the agreements.[10] In *Petrowest Corporation v Peace River Hydro Partners (Petrowest)*, the British Columbia Court of Appeal concluded that section 15 of the *Arbitration Act* is not engaged when a receiver has been appointed under the federal *Bankruptcy and Insolvency Act ("BIA")* and disclaims an arbitration agreement made between the debtor and a counter-party.[11] The appeal court held that the litigation commenced by the receiver was distinguishable from litigation commenced by the debtor pre-insolvency. The debtor was put into receivership, and the receiver was also its licensed insolvency trustee.[12] The appeal court pointed out that both the receivership and the bankruptcy fall under the umbrella of the federal BIA.[13] It also noted that the power of the receiver to disclaim contracts illustrates the fundamental difference between the receiver/licenced insolvency trustee and debtor/bankrupt relationships. The "party" that commenced legal proceedings within the meaning of section 15(1) of the Arbitration Act was not Petrowest but the receiver.[14]

The appeal court concluded that it is open to the receiver to disclaim the arbitration agreement, notwithstanding that it had adopted the containing contracts for the purpose of suing on them. This result, the court held, flows from the receiver's

particular powers and position, and from the separability of the arbitration agreements. Finally, section 15 was not engaged because the receiver had disclaimed the arbitration agreements and the action was not commenced by a party to the arbitration agreement.[15]

An appeal of that decision was heard by the Supreme Court of Canada on January 18, 2022[16] and a decision was released on November 11, 2022.[17] From an insolvency perspective, the questions raised during the hearing highlighted two key areas of concern:

- The relationship between a receivership and a bankruptcy on the one hand and the role of the licensed insolvency trustee versus that of the receiver on the other.
- The relationship between provincial arbitration legislation and federal bankruptcy legislation as well as the statutory and inherent discretion in each piece of legislation.

The Supreme Court of Canada held that while valid arbitration agreements are generally to be respected, "in certain insolvency matters, it may be necessary to preclude arbitration in favor a centralized judicial process." The particular facts at play in Petrowest offered an example of such a matter, in the form of a national court-ordered receivership, where participating in multiple arbitrations would compromise the orderly and efficient conduct of the receivership.

The majority decision in *Petrowest*[18] set out the following principles for applying Sections 15(1) and (2) of the Arbitration Act (BC) and comparable legislation:

(i) Undertaking to file a defence is not a "step in the proceedings" precluding an application to the court to stay legal proceedings under section 15(1).
(ii) A court appointed receiver may be a "party" to an arbitration agreement under section 15(1) based on ordinary contractual and interpretive principles and because a court appointed receiver claiming through or under a debtor is consistent with a central purpose of the Arbitration Act (BC).
(iii) Disclaimer cannot render an arbitration agreement "void, inoperative or incapable of being performed" under section 15(2).
(iv) A court may find an arbitration agreement "inoperative" due to a receivership under 15(2) based on the text, scheme, and purpose of the Arbitration Act (BC) and because sections 243 and 183(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 provide jurisdiction to find an arbitration agreement "inoperative".

Most significantly, the majority of the Supreme Court of Canada set out the five factors for assessing whether an arbitration agreement is "inoperative" under Section 15(2) of the Arbitration Act (BC) due to insolvency proceedings. Each of the five factors is to be differently weighted depending on the circumstances of the case:

(i) The effect of arbitration on the integrity of the insolvency proceedings.
(ii) The relative prejudice to the parties from the referral of the dispute to arbitration.
(iii) The urgency of resolving the dispute.
(iv) The applicability of a stay of proceedings under bankruptcy or insolvency law. If such a stay applies, the debtor cannot rely on an arbitration agreement to avoid the bankruptcy or insolvency; the agreement becomes inoperative.
(v) Any other factor the court considers material in the circumstances.

The party seeking to avoid arbitration bears a heavy onus to establish a clear case of inoperability or incapacity to perform the impugned arbitration agreement. It must prove on a balance of probabilities that one or more of the statutory exceptions set out in s. 15(2) of the Arbitration Act (BC) apply and if not proven, the court must grant a stay in favour of arbitration.

The Supreme Court of Canada's decision in *Petrowest* will likely prove helpful in navigating the role that one aspect of ADR—arbitration agreed to before the insolvency proceeding—will play in future insolvency proceedings. The decision was highly anticipated considering the recent decision in Mundo Media from the Ontario Court of Appeal.[19]

Similar to *Petrowest, Mundo Media* involved questions regarding receivership powers in the face of an arbitration. At issue was whether a receiver had to assert a debtor company's claim against a counterparty in arbitration proceedings in New York, or whether the claim could be dealt with in the Ontario receivership proceedings alone.[20] The motion judge strayed from the approach of BC's appeal court in *Petrowest* regarding separability and found that a third party's set-off claim to recover from a debtor is likely significant to all creditors, and the single-proceeding model, central to insolvency proceedings, must be preserved. Therefore, the claim should be heard in an insolvency proceeding as opposed to being advanced in an arbitration.[21]

Munro Media is an example of how ADR's goals can be complicated by insolvency's single-proceeding model. While ADR provides an efficient backdoor to conflict resolution, it may be difficult to reconcile with the main purpose of insolvency: to have a single forum where all claims are heard and prioritized accordingly. Further, insolvency proceedings, by their very nature, always involve a range of stakeholders and representatives. *Munro Media* and *Petrowest* demonstrate that there remain gaps in the interpretation and intersection of insolvency and arbitration. Skilled ADR counsel and insolvency counsel will need to continue to work together to creatively carve out a way that the two systems can interact and adequately address what role the various stakeholders and court-appointed officers will have in a proceeding that would benefit from ADR processes as well.

Another branch of arbitration— arbitration agreed to in the course of the insolvency proceedings—is also evolving and an example of how counsel have creatively navigated the two systems to reach creative solutions for stakeholders involved. For example, in the context of the *Urbancorp Toronto Management Inc.* insolvency proceedings, consensual arbitration was utilized to adjudicate a complex claim before a retired judge who is now a private arbitrator/mediator and had been the supervising judge in the case before retiring.[22] In another example, in *YSL Residences Inc*, arbitration was employed to determine certain key facts in a complex claim that relied heavily on conflicting *viva voce* evidence pertaining to the existence (or not) of an oral profit-sharing agreement and its essential terms.[23] Having a definitive ruling on such key facts, the proposal trustee was then in an informed position to make a recommendation to the court on the adjudication of the claim. An issue that recently arose in this context was which party or parties should pay for the costs of arbitration, leading the Court on a funding motion to order the parties to reach further agreements in the context of the bankruptcy proposal and its implementation.[24]

Conclusion

As 2023 progresses, readers can continue to monitor trends in arbitration and mediation in the insolvency context. The Canadian and international insolvency systems will continue to benefit from ADR to potentially lighten the impact of an expected uptick in filings on insolvency systems. ADR and insolvency law often collide and have unresolved tensions regarding party autonomy and legislative intent of both the federal insolvency and provincial arbitration legislation, for example. Further, ADR requires respecting parties' autonomy, but choice and participation can clash with insolvency's goal to expeditiously preserve assets of an insolvent company in a single proceeding.[25] ADR's advantages of expediency and consideration of stakeholders is important to the insolvency context as it moves forward and expands to meeting increasing demands. Balancing these elements requires more input from courts in the future, and interested practitioners can look forward to the application of the Supreme Court of Canada's decision in *Petrowest* to provide further guidance on how to navigate ADR and insolvency, to achieve the best possible outcomes for all stakeholders involved.

1. Chief Justice Morawetz, Notice to the Profession Regarding Mode of Proceedings for Southwest Region (17 March 2022), online: ***Superior Court of Justice***, ← https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/sw-notice-proceedings/→.
2. Alicja Siekierska, "Canada's big banks raise prime rates after Bank of Canada's latest hike" (7 September 2022), online: *Yahoo Finance Canada*, ←https://ca.finance.yahoo.com/news/canadas-big-banks-raise-prime-rates-after-bank-of-canadas-latest-hike-192750489.html→.
3. We have tracked this information using the Office of the Superintendent Bankruptcy's CCAA records list and exploring monitor reports for any mediation orders, online: Office of the Superintendent of Bankruptcy Canada, ← https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html→.
4. See for example: https://www.theglobeandmail.com/life/after-stelco-judge-farley-decides-to-call-it-a-career/article1328402/.
5. Canadian courts have also used their discretion to determine that mediation is not appropriate where "it is pure speculation to suggest that a mediated resolution will save costs" in the context of a Claims Process Order that did not provide for a mediation process of individual claims. See *Laurentian University of Sudbury*, 2022 ONSC 5802 (CanLII), ←https://canlii.ca/t/jsrrc→.
6. *CannTrust Holdings Inc., et al. (Re),* 2021 ONSC 4408 (CanLII).
7. *Crystallex International Corporation (Re)*, 2011, Court File No. CV-11-9532-00CL. Note that Davies acted as counsel to the Debtor.
8. *Supra* note 6. Davies had extensive early experience on these issues as counsel for the EMEA Debtors in the Nortel proceedings.
9. In re: MADISON SQUARE BOYS & GIRLS CLUB, INC., Case No. 22-10910, online: *Thomson Reuters*, ←https://fingfx.thomsonreuters.com/gfx/legaldocs/gdvzyggokpw/madison%20square%20first%20day%20declaration.pdf→
10. *Arbitration Act*, SBC 2020, c 2, s. 15.
11. Petrowest Corporation v. Peace River Hydro Partners, 2020 BCCA 339 (CanLII).
12. *Ibid* at para 14.
13. *Ibid* at paras 45-46.
14. *Ibid.*
15. *Ibid.*
16. *Peace River Hydro Partners, et al. v. Petrowest Corporation, et al. (British Columbia) (Civil) (By Leave)*, Docket 39547.
17. *Peace River Hydro Partners, et al. v. Petrowest Corporation, et al. (British Columbia) (Civil) (By Leave),* 2022 SCC 41.
18. The majority reasons on behalf of Wagner, Moldaver, Côté, Rowe, and Kasirer JJ were written by Justice Côté. The concurring reasons of Karakstanis, Brown, Martin, and Jamal JJ were written by Justice Jamal. The disagreement between the majority and the concurring opinion was surrounding the primary basis for finding the arbitration agreement inoperative. The Concurring Opinion would begin the analysis with the terms of the Receivership Order.
19. *Mundo Media Ltd. (Re)*, 2022 ONCA 607 [*Mundo Media*].
20. *Ibid* at paras 4-5.
21. *Ibid* at paras 6-7.
22. *Urbancorp Toronto Management Inc. (Re*), 2021 ONCA 613 (CanLII). Davies acted in this proceeding.
23. *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178 (CanLII). Davies acted as counsel to the Proposal Trustee.
24. *YG Limited Partnership (Re)* 2022 ONSC 6138.
25. Darius Chan & Sidharrth Rajagobal, "To Stay or Not to Stay? A Clash of Arbitration and insolvency Regimes" (2021) 38:4 J Int Arb 457 available at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5405&context=sol_research.

Facilitated Dialogue Model: A Rebel in ADR?

> *[Mediator secrets] enable parties separately to unburden themselves to the mediator, so as to receive assistance which would be otherwise unavailable to them.*[1]
>
> *—Lord Briggs*

What is the Facilitated Dialogue Model (FDM)?

In the current global landscape where change is rapid, Alternative Dispute Resolution (ADR) must continue to evolve and respond to new circumstances. In this spirit, we offer an original approach that re-imagines the use of assets called "mediator's secrets" and "private information" in a process called Facilitated Dialogue Model (FDM). FDM is a directive, fast-paced, time efficient model for a neutral facilitator to conduct direct dialogue between clients in conflict, but it is not simply a version of facilitative mediation.

In our process, mediator secrets and private information are related and important concepts. Michel Kallipetis expanded on Lord Briggs' comment and identified what he called "private information":

> an important part of the mediator's role is to encourage the parties to trust him or her with private information, their views, hopes and fears about the dispute that they do not wish the other party to know. Lord Briggs calls them 'mediator's secrets.' Thereby the mediator becomes uniquely appraised of aspects of all parties' attitudes to the dispute (such as their 'must haves', 'cannot live with', 'would like to haves') which may enable the mediator to promote a compromise route which would not occur to them, sufficiently meets their different secret concerns, and forms the basis of a durable settlement…Lord Briggs accurately observes: "it enables the parties separately to unburden themselves to the mediator, so as to receive assistance which would otherwise be unavailable to them".[2]

Private information and mediator's secrets are assets that may not—but ought to be—widely utilized in ADR.

SHAARON JONES-CRAWFORD

Shaaron Jones-Crawford, LLB, LLM, Barrister, Attorney, EC.CM (Windsor Law), Chartered Mediator (ADRIC), Adjudicator (Osgoode), can be found at LinkedInSJC

HAROLD TAN

Harold Tan, LLM (ADR), Qualified Mediator (ADRIC), Adjudicator (Osgoode), can be found at LinkedInHT

DAVID STINSON

David Stinson, Mediator, Investigator, BAA, can be found at LinkedInDS

FDM permits an ADR practitioner to use these assets in a more directive way that we call FDM Knowledge. This use includes the design of a questionnaire and the development of an agenda that provides the platform for the parties to have a direct dialogue with each other. Their dialogue leads to an expanded form of collaboration with the potential for a mutually satisfying agreement.

What is novel about FDM?

FDM is novel in:

(a) its active use of mediator's secrets and private information; and

(b) its time efficiency. The entire FDM process takes no more than 5.0 hours and can be completed in as few as 5.0 days.

Who is FDM for?

FDM requires:

(a) a retaining client, as distinct from participants, who has a legal, financial and/or contractual authority over and who nominates potential participants

(b) a facilitator who is experienced, intuitive, observant, analytical and skilled, and

(c) participants who are articulate, diligent, committed, collaborative, and are able to engage in a direct dialogue with each other.

In no particular order FDM participants could include:

- civil, commercial and corporate lawyers
- chief executive officers
- team leaders in fields such as sports, manufacturing, medicine, and technology.

Suitability and Criteria for FDM

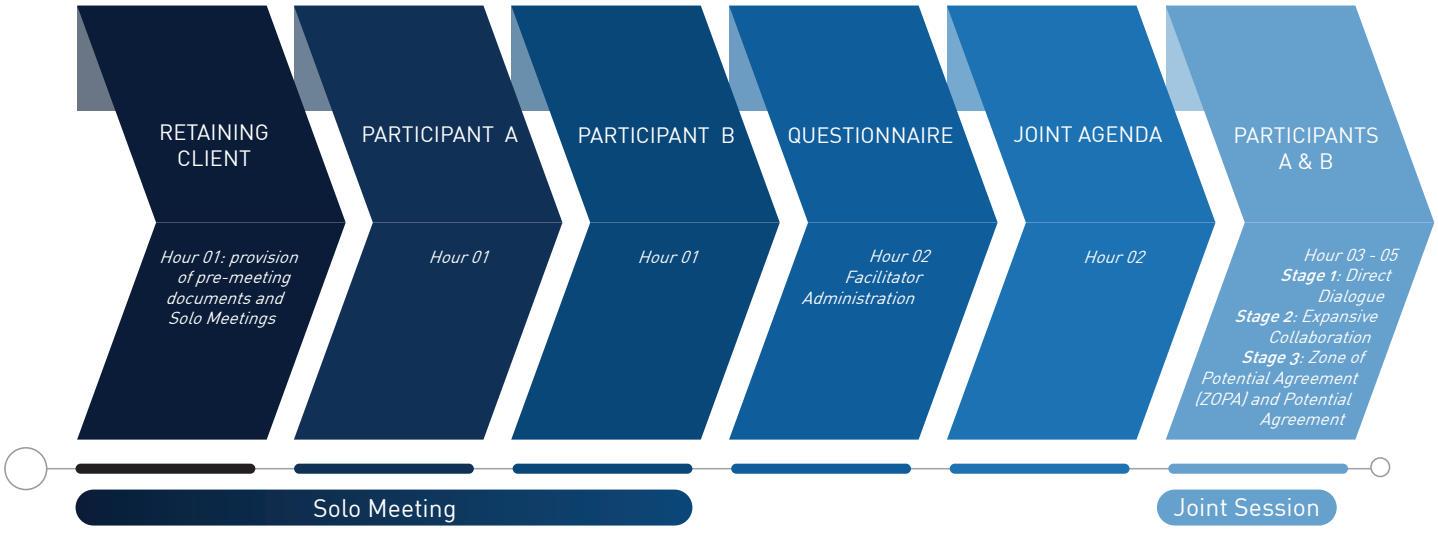
FDM may be applied in business and commercial sectors where time, financial restraints, and overall efficiency are paramount. The entire FDM process was created to take no more than 5.0 hours and could be completed in as little as 5.0 days. Additionally, FDM was specifically developed for conflicts that have been in existence for less than one-and-a-half years. In our design, conflicts that have lasted longer may be too positional and complex for FDM. FDM does not preclude access to other ADR or litigation options.

FDM participants engage in a time-defined dialogue where they speak directly to each other and are not permitted to restate, summarize, or rebut what has been said. FDM was not designed for entrenched interpersonal conflicts, family, and estate matters or similar disputes.

As with all ADR, FDM is private, confidential, and voluntary. The facilitator meets with the retaining client and provides an overview of the process, benefits, and roles and responsibilities. The retaining client exercises critical judgment in selecting the participants and conveys to them the value of FDM to them and the organization.

Stages of FDM

A flow chart overview is provided below for ease of reference. Each step shown on the chart is described in more detail below.



Step I: Solo Meetings

Once the retaining client secures the agreement of the participants to engage in FDM, the facilitator meets with each participant separately to briefly outline the process, their specific roles and responsibilities, and opportunities/benefits.

In explaining the joint session protocol, the facilitator informs participants that there is no restatement or rebuttal and that participants have an active role in identifying potential threads of "Expansive Collaboration," an FDM Technique explained below in Step IV.

At the conclusion of the solo meetings, the facilitator notifies the participants that they will simultaneously receive a customized questionnaire. Participants are required to return their completed questionnaire to the facilitator within 12–24 hours.

Step II: Questionnaire

The questionnaire is composed of three questions:

- Question 1: participants are directed to identify no more than 3 issues (with a strict, word count limit) they each wish to communicate to the other;
- Question 2: participants self-identify what role they may have contributed to the situation(s);
- Question 3: participants explore their Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA), and bring other solutions and considerations to the table.

The facilitator analyzes the question 1 responses only and uses their professional skills (such as reframing, rephrasing and negotiation) to build a fused agenda composed of no more than three items. The agenda should cover all of the confidential topics identified in the questionnaire and build the platform that will permit direct dialogue.

Questions 2 and 3 responses are exclusively and confidentially for the facilitator's use. This information is one of the key sources of "private information" which constitutes what we call "FDM Knowledge." One of the novel features of FDM is that the facilitator explicitly directs participants via the questionnaire to provide secret information in a clear and concise way. The questionnaire informs participants that the information they confidentially disclose in questions 2 and 3 will be used to develop a foundation for Expansive Collaboration in the joint session. The facilitator's use of this secret information to develop a strategy in the joint session is one aspect of FDM's technique.

Step III: Agenda

The facilitator uses the responses from question 1 to prepare an agenda for the joint session that maintains participant confidentiality and uses neutral language to captures all issues. The ability to effectively reframe participant language and create agenda categories expansive enough to capture all issues are instances of FDM techniques.

Once the agenda is prepared, the facilitator simultaneously sends the agenda to the participants 12–48 hours prior to the joint session date to give participants the opportunity to decide and practise what they want to say in direct dialogue. The agenda is accompanied by specific instructions:

(a) each agenda item is allotted a specific amount of time. This time is tightly controlled by the facilitator;

(b) the agenda has a maximum of 3 items; and

(c) participants are to speak exclusively to the issues identified in the agenda.

Step IV: Joint session

The date of the joint session is determined by the facilitator, and the session is no more than 3.0 hours in total, including breaks. It consists of three stages.

Stage 1 – Direct Dialogue

The facilitator opens the meeting with a brief reminder of the benefits of the process, participant roles and responsibilities, and mutually-agreed standards around respectful dialogue. For agenda item #1, the participants take turns speaking and listening in equal measure. At the conclusion of agenda item #1, a break is called. This pattern is repeated for remaining agenda items.

After the participants have concluded their speaking and listening roles for all of the agenda items, a further break is called. This concludes the direct dialogue stage. When the break is over, the facilitator informs the participants that they are moving to a stage called "Expansive Collaboration" where their input is encouraged based on what they just heard in their listening roles.

Stage 2 – Expansive Collaboration

Whilst maintaining professional neutrality, the facilitator garners the FDM Knowledge from questions 2 and 3 to formulate a strategy that will elicit comments and questions for Expansive Collaboration.

Expansive Collaboration goes beyond the traditional ADR understanding of the word "collaboration." Authors like Adam Kahane[3], Nobukhosi Ngwenya and Liza Rose Cirolia[4], John Forester[5] and Malcolm C. Burson[6] use terms such as "stretch collaboration," "communicative collaboration," "conflict gradient," and "community/collaborative." Common to all of these terms is the recognition that Expansive Collaboration is "a critical skill for coordinating the ideas and contributions of diverse sets of people…"[7]. Unlike classical collaboration that requires the parties to work together to produce a mutually and equally satisfying outcome that meets as many of their interests as possible, Expansive Collaboration requires less mutuality. In this regard it is less idealistic; the parties' cooperation can be as minimal as fingers touching, rather than a full hand-shake. What is important is that the parties are committed to working together on finding some common ground.

The facilitator's ability to use the secret information provided by the participants in the returned questionnaire and plan a strategy for Expansive Collaboration are components of the FDM technique. Expansive Collaboration may lead to the broadest Zone of Potential Agreement (ZOPA).

Stage 3 – ZOPA and Potential Agreement

The facilitator guides participants towards a future-focused, enhanced collaborative plan of action that may lead to an agreement. Ideally, such an agreement respects divergent positions and offers the widest possible ZOPA. For example, one participant may have 60% of their needs met and the other participant 40%. A 60/40 split, or any other combination, is perfectly acceptable as long as both participants are in agreement.

An FDM case which illustrates ZOPA was a commercial dispute involving two adjacent property owners who required gate access to a shared property line. The owners were extremely polarized, and the completed questionnaires revealed that both of them insisted on exclusive possession. One of the agenda items for the joint session asked the owners to explore all current gate access options, and in direct dialogue one owner proposed a technology option (virtual padlock) for the first time. The other owner accepted, as it permitted 24/7 monitoring.

How Long Does FDM Take?

The entire FDM process was conceptualized to be time-efficient (5.0 hours) and expeditiously results-oriented (may be completed within a standard work week). Additionally, the following elements illustrate the time-efficiency of FDM:

- At the conclusion of the solo meetings, the questionnaire is simultaneously sent to the participants with a direction that the participants complete and return the questionnaire within 12–24 hours;
- After receiving the completed questionnaires, the facilitator prepares an agenda that is delivered simultaneously to both participants with a turn-around time of 12–24 hours;
- The pre-agreed date for the joint session is held 12–48 hours upon receipt of the agenda.

Benefits of FDM

FDM navigates all the traditional professional skills and ethics for ADR practitioners, including independence, neutrality, confidentiality and transparency. In addition, FDM may give ADR practitioners the means to build opening trust with the participants, and it allows them to ethically and effectively leverage FDM Knowledge to build a fused agenda. Appropriate use of FDM Knowledge leads to enhanced collaboration and an enlarged ZOPA which in turn may lead to agreement.

Concurrently, FDM offers advantages to the organization:

(a) highly-focused and efficient problem identification;

(b) customized, facilitator-designed questionnaire and agenda which provides a focused platform for participants to have a direct, specific dialogue;

(c) enhanced collaboration that adapts the traditional rules, leading to an expansive ZOPA;

(d) expedited process designed to be completed in 5 hours or less over multiple days; and

(e) a scalable process which may include more than two participants.

Another completed case which illustrates the benefits of

FDM was a commercial dispute involving a Canadian retailer and a U.S. electronic manufacturer over delivery of goods with an impending holiday shopping deadline. The traditional shipping routes (air, rail, sea and road) from the U.S. to Canada had been disrupted because of global crises. In ZOPA, the participants were encouraged to explore previously untapped road transport routes. There was a recognition that returning trucks may be under-utilized northbound. The parties agreed to explore this untapped route in their agreement. The result was that empty produce trucks were used to ship the goods to Canada within the required contractual delivery time.

Conclusion

In a non-scientific survey of our colleagues, we learned that many jurisdictions and practice areas globally have shifted to virtual delivery. We also observe a revolution in the practice of offering ADR services to clients within the majority of the international corporate and commercial world. This includes the challenge of ethical service delivery that preserves core principles of confidentiality and transparency, while balancing the imperative to be efficient and expeditious. These professional changes offer the opportunity for ADR practitioners to conduct national and transnational meetings virtually (e.g. Zoom, Teams, WebEx), thus reducing the cost and time associated with physical travel and increasing our professional "green footprint."

From a sampling of conferences, journals, publications and blogs within the ADR sector[8], it appears that ADR practitioners are continually seeking ways to:

(a) expand client self-determination;

(b) recognize time and fiscal responsibility;

(c) are more directive;

(d) are transparent and analytical; and

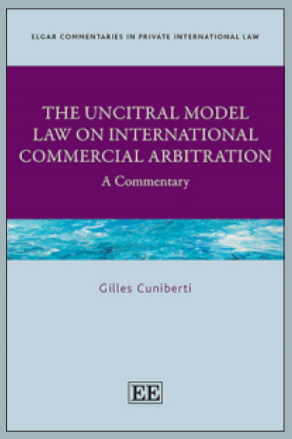
(e) support clients in being more collaborative and diligent.

These foundational elements are incorporated into FDM.

The combination of the advanced skills of the facilitator, FDM Knowledge, and FDM techniques forge a process which provides the option for an agreement containing divergent and unequal positions if the participants agree to such. FDM permits experienced ADR practitioners to modify some deeply-held and established professional practices in a way that is still legal and ethical. In FDM, sacred traditions and principles such as confidentiality and neutrality are re-formatted and re-imagined (through the questionnaire and agenda) and yet continue to be transparent. Our premise is that FDM is unique and a rebel in ADR.

---

1. Lord Briggs. (April 2009). Mediation Privilege. *New Law Journal*, Issue 7364. Retrieved from https://www.newlawjournal.co.uk/content/mediation-privilege-0
2. Michel Kallipetis, KC. Thought Leaders Elite – Mediation 2022 Q&A. *WWL*. Retrieved from https://whoswholegal.com/michel-kallipetis-kc
3. Kahane, Adam (2021). *Facilitating Breakthrough: How to Remove Obstacles, Bridge Differences and Move Forward Together*. Oakland: Berrett-Koehler.
4. Ngwenya, Nobukhosi and Liza Rose Cirolia (2021). Conflicts Between and Within: The 'Conflict Rationalities' of Information Occupation in South Africa. *Planning Theory and Practice, 5:22.* Retrieved from https://www.tandfonline.com/doi/full/10.1080/14649357.2020.1808237?scroll=top&needAccess=true
5. Forester, John (2013). Planning in the Face of Conflict: The Surprising Possibilities of Facilitative Leadership. American Planning Association.
6. Burson, Malcolm C. (Spring 2002) Finding Clarity in the Midst of Conflict: Facilitating Dialogue and Skillful Discussion Using a Model from the Quaker Tradition. *Group Facilitation: A Research and Applications Journal, 4:55.* Retrieved from https://inns.innsofcourt.org/media/195462/contributions-of-caucusing-and-pre-caucusing-to-mediation.pdf
7. Spangler, Brad (July 2003). Facilitation. *BeyondIntractability.org*. Retrieved from https://www.beyondintractability.org/essay/facilitation
8. Examples include: *ADR Update* (ADRIO - Ontario), *Canadian Mediation and Arbitration Journal* (ADRIC - Canada), mediate.com (U.S.), *ADR Times Perspectives* (ADR Times – U.S.), *Journal of Law and Policy* (U.S.), *New Law Journal* (U.K.), Osgoode PD (Canada), *India Law Journal* (India), *UNSW Law Journal* (Australia), et al.

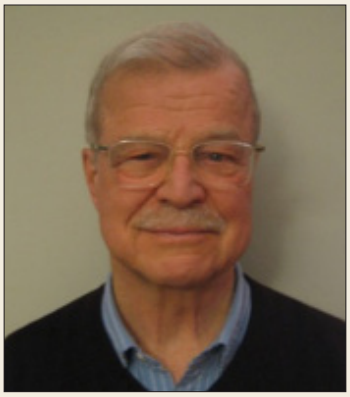


The UNCITRAL Model Law on International Commercial Arbitration: A Commentary

Gilles Cuniberti
Edward Elgar Publishing, 2022

ISBN 978 1 78811 033 4 (hard cover)

Reviewed by: John D. Gregory



JOHN D. GREGORY

John Gregory practised commercial law in Toronto then joined the provincial government, where for over 30 years he developed legislation and policy in alternative dispute resolution, private international law, and information technology, etc. He is now a legal consultant especially on the law of electronic communications. https://www.euclid.ca/Bio.html

Gilles Cuniberti, a professor of comparative and private international law at the University of Luxembourg, has published a very comprehensive commentary on the Model Law on International Commercial Arbitration in practice. For journal readers who may not practise in the area of international arbitration some background is in order.

When people do business across national borders, their transactions often resemble traditional domestic affairs in that from time to time, they disagree. They understand the elements of the transaction differently. They do not perform as the other party expects. They change their minds. Circumstances change.

The traditional recourse for resolving such disagreements is the court system provided by the state. However, over the past half century, businesses have often preferred a different path: arbitration. Having a neutral person adjudicate disputes instead of a judge offered several advantages over the courts: it was private, so neither the details of the disputants' business nor the particulars of the dispute became public; the adjudicators could be chosen by the parties, either for their expertise in the subject matter of the dispute or for their general wisdom; the adjudicators could be available when the parties wanted them; the procedures could be designed to suit the dispute. So long as the results of the adjudication were enforceable, the process had many attractions.

These attractions are multiplied for international disputes. Parties do not have to worry about the impartiality of courts in other countries, especially in the country of the other party. Arrangements can be made for differences of legal system and language.

As with domestic arbitrations, enforcement was essential—and internationally, that was less predictable than within a country. As a result, the United Nations as early as the 1950s created its Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), providing for international enforcement of awards made in any contracting state, with limited exceptions and limited exposure to national legal systems. The convention has been widely ratified, as its commercial and legal advantages were clear.

Over time, attention was paid to the process of arbitration itself. Expectations were being created and best practices developed, and they needed to be supported more firmly by law. As a result, the United Nations Commission on International Trade Law (UNCITRAL) prepared a Model Law on International Commercial Arbitration, adopted in 1985. Since that time some 85 countries have implemented the Model Law, sometimes in multiple versions within federal states (so about 115 different statutes in all). Canada was the first country to implement it, though some provinces and territories took longer than others to legislate.

The Model Law took that form to provide more flexibility to parties than a convention would have done. Local practices and the circumstances of disputants needed to be recognized. As a result, the common base of the Model Law has expanded to accommodate statutory explanations and qualifications of its rules.

After 35 years from its first implementation, along with a significant set of amendments in 2006, users of the Model Law needed some strong guidance as to its meaning and its use. What questions of interpretation arise, which ones have been settled, which are current—and which will always be current because of the nature of international business and disputants?

Professor Cuniberti's text follows that of the Model Law, with 36 chapters named after the articles of the Model Law itself, from Scope of application and Definitions under the General Provisions through to Grounds for refusing recognition and enforcement at the end. Each article is reproduced at the outset of its chapter, usually with a couple of major variations to the article as enacted somewhere in the world.

Professor Cuniberti has read with care the official commentary on the Model Law, original and revised, and has reviewed all the legislation implementing the Model Law and much if not all of the jurisprudence too, whether assembled in the CLOUT database or elsewhere. He seems able to draw on it at will for his examples – here Japan, there Italy, another place Peru… whether a statute or a judicial or arbitral decision.

In this way he can support his findings that the provisions of the Model Law are settled in their interpretation, or that there are a few major variants, or that there is continuing uncertainty. He notes the stated intentions of the drafters (through the official commentary) and points out where he thinks those intentions have or have not been realized.

For example, he notes at the outset that though the Model Law limits itself to international commercial arbitration, it does not deal with the fundamental question of arbitrability, leaving it to other law. (1.01) Likewise, he points out that the concept of what is commercial is defined only in a footnote, and the concept of arbitration itself is "poorly" defined.(1.04) He sets out the characteristics that legislation has given to it in some countries – his examples range from Qatar through Lithuania to Zambia, the British Virgin Islands and Korea - but notes that most Model Law countries have no definition, leaving the courts to extrapolate what they can from provisions about arbitration agreements.

This early example demonstrates his expository technique, in expanding stages: first a high-level mention, then a list of the principal elements of the topic, then longer sections for each element. The longer sections are referred to in footnotes in the earlier discussion, so readers can go quickly to the elements that interest them.

Who are these likely readers? Principally one thinks it would be arbitrators and counsel to parties to international arbitrations. The book is designed to dip into, to find what one is looking for to solve problems, rather than to read as a treatise. Little time is spent on questions of theory or on situating arbitration among other possible methods of resolving disputes. The focus is on what works, what may require further detail than what the Model Law offers, and what other countries have provided instead of or alongside the Model Law.

They could benefit at the drafting stage—what shall we put into our arbitration agreement? - and at the dispute resolution stage – what do these provisions mean in practice? The book considers legislation and litigation as sources of law.

That said, it could also help policy developers who need to consider arbitration or broader dispute resolution legislation. It is a convenient source of a lot of international precedents that are not otherwise easy to find.

Professor Cuniberti does not hesitate to indicate the logical or procedural consequences of provisions of the Model Law. For example, in discussing judicial assistance in the appointment of arbitrators, he says "it seems clear that the goal was to be as exhaustive as possible" in the potential choice. Thus "Article 11(4) should be considered to be the foundation of the power of the default appointing authority to intervene." "It should therefore be interpreted to include, for example, groups of more than two arbitrators." "It should also extend to the case where the parties had (unwisely) agreed on the name of the arbitrator in the arbitration agreement." (11.46) "When the parties have agreed on an appointment procedure, the power of the default appointing authority should be considered as subsidiary." (11.47)

In short, the author has his views about the right way to do things, and he is not reluctant to express them. Such are his background, his learning and his use of sources in support that he is usually persuasive.

On other occasions, however, he simply recounts the inconsistent interpretation of a provision of the Model Law and leaves us without his own guidance. For example, his discussion of the duty of an arbitrator to disclose conflicts of interest and the consequences of an arbitrator not doing so if not challenged for it, notes that some courts have simply let this go – if the other party does not care, then the court does not – and others "have taken the duty to disclose more seriously and have held that its violation could contribute to the existence of a reasonable apprehension of bias, or even be a ground for challenge" of the arbitrator's appointment. [12.17] He does not tell us which he thinks is right.

He does, however, describe in detail the dynamics of challenging arbitrators, though noting that "very few [Model Law jurisdictions] have clarified the grounds for challenges themselves." He describes the contributions of practitioners and arbitral institutions to fill the gap. (12.07, 12.08)

On a point that was much discussed in Canada in implementing the Model Law, on what if anything should be said in the statute about the nationality of the arbitrators—is it a possible point of bias to be considered by the appointing authority, or does human rights legislation prohibit a statute from authorizing discrimination on the basis of nationality—Professor Cuniberti is clear: "the common nationality of one party and one or several arbitrators does not reveal any kind of prejudice against parties of other nationalities. The argument has often been raised by parties challenging arbitral awards, and was always rejected in the absence of any other concrete element" justifying the allegation of partiality. "This would be the case…also where the nationality of all three arbitrators was the same as the nationality of one of the parties" (citing a German authority). (12.25)

The treatment of another issue on which Canada spent some time – the role of electronic communications – shows the complexity of the interactions of the provisions of the Model Law among themselves and with the New York Convention that governs the enforcement of foreign arbitral awards in much of the world.

Article 7 prescribes the form of the arbitration agreement. The original Model Law said it had to be in writing, described as being "in a document signed by the parties or in an exchange of letters, telex or telegrams or any other means of communication which provide a record of the agreement…". The 2006 amendment said that an arbitration agreement is in writing "if its content is recorded in any form…"

Professor Cuniberti points out that the language of the original Model Law—"any other means that provide[s] a record of the agreement"—was broad enough to cover electronic means, without amendment. It was "arguably unnecessary to add facsimile or email to the list." [7.13]

The author adds that the provision of new article 7(3) "does not require that the record [of the agreement] be in writing, but it is hard to imagine how it could be otherwise." [7.22] One thinks of a voice recording, or a recorded phone message confirming the agreement. Probably the extended concept of writing, such as the UNCITRAL language, would cover these records too.

That language is found in the provision that the requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference. In other words, it imported the rule from the UNCITRAL Model Law on Electronic Commerce of 1996 and the UN Convention on the Use of Electronic Communications in International Contracts (the E-Communications Convention) of 2005.

He adds that "the addition of a specific provision concerned with electronic communications could be useful, perhaps, to define it." [7.24] Moreover, the concept of "accessible for subsequent reference" could mean the information was accessible online, or printed from an electronic record in the computer of one of the parties. [7.25]

(Option II of the 2006 version of article 7 simply required an agreement to arbitrate, with no form requirements. One would just prove the existence of the agreement like any other. Professor Cuniberti suggests that saying nothing about form creates a "strong risk" that silence might not be interpreted as being liberal as to the form of the agreement. This could affect enforcement later. He recommends spelling out that there is no form requirement, or that agreements may be made orally or in writing. [7.28] Canadian law reformers were tempted by Option II – it was certainly consistent with Canadian law - but decided that it risked straying too far from the enforcement language of the New York Convention.)

He also observes that the use of language from the electronic communications instruments "is an invitation to refer to these instruments not only for interpreting the relevant

concepts, but also more generally for all aspects of the regime of electronic communications regulated by those instruments." [7.24]

That invitation is useful in two other areas of the Model Law. First, article 3 on communications between the parties does not deal with the medium of communication. Professor Cuniberti says that in the absence of amendments to the Model Law's language with "express provisions clarifying that the mailing address of the addressee includes his electronic mailing address", communications by electronic means is not allowed. [3.10]

However, if the applicable law includes the relevant UNCITRAL e-commerce texts, then probably the law on international arbitration does not need to repeat those texts for them to govern the arbitration procedures. (Implementation of the Model Law on Electronic Commerce often excludes court-based communications but not arbitral proceedings.)

The second area in which the UNCITRAL instruments would be helpful is in enforcement of arbitral awards. The Model Law contains enforcement rules designed to reflect those of the New York Convention but to the extent that they differ, for example about what is accepted as writing, there could be problems in enforcing awards.

If the applicable law includes the E-Communications Convention, however, that Convention expressly authorizes the interpretation of other conventions to which the state is a party in according with its rules, including those on electronic equivalents of writing. The E-Communications Convention names the New York Convention as one candidate for this interpretation.

The Model Law requires that arbitral awards be made in writing and signed. In many places, including all Canadian jurisdictions, awards made electronically could satisfy this rule. It is less clear that the New York Convention would accept them. Being able to rely on the electronic functional equivalents of those actions, in reliance on either or both of the UNCITRAL texts, would be reassuring for arbitrations in the electronic age.

However, the author also points out that "[t]he New York Convention does not prevent the application of more liberal legislations on the enforcement or recognition of arbitral awards."[36.09] Article VII of that convention provides that it "shall not … deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

In adopting the 2006 amendments, UNCITRAL also approved a recommendation encouraging Model Law jurisdictions to apply the more favourable Model Law regime under article VII of the convention. However, some courts "have found that arbitration agreements can meet the formal requirements of the Model Law, but fail to meet the standard of the New York Convention." [7.11]

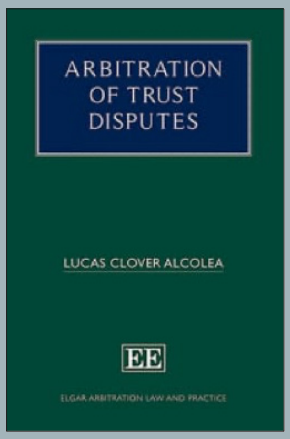
To the extent that such a ruling touches on the e-communication provisions of the 2006 Model Law, such courts seem deplorably out of touch with contemporary legal analysis around the world on the media of communication – aside altogether from the convention's offer in its article VII.

In discussing enforcement, the book also deals with the dual regime of challenges to arbitral awards: either attack the award where it was made or attack its enforcement. The Model Law allows both means of recourse. If a challenge to the award does not work, enforcement can be resisted on the same grounds. However, not all courts have allowed parties to double up in this way. Some have refused to entertain challenges to enforcement on grounds that have failed – in another jurisdiction – in attacking the award. [36.10ff]

These few examples give a taste for the author's approach, the subtlety of his analysis and the breadth of his sources, all impressive. He maintains all of them from the beginning to the end of the arbitration process, with all the complexities and interactions that arise in its course.

One might also note, for a work of this size (500 pages), the quality of the typography. The text appears on the page in a clean and open manner, easy to read and easy for readers to situate themselves in the argument, thanks to consistently numbered paragraphs keyed to the Model Law article being discussed. It is not an intimidating work to approach, as it might well have been.

Professor Cuniberti has done a valuable service to practitioners of international commercial arbitration (though he himself sees little need in policy or principle for the restriction to commercial matters). His work is likely to become a standard reference on the topic.

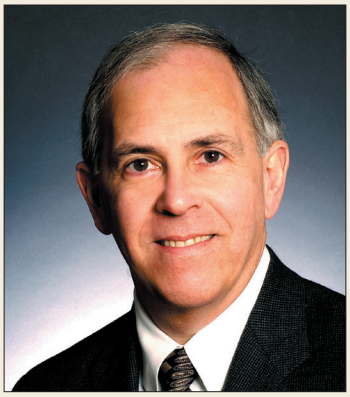


Arbitration of Trust Disputes

Lucas Clover Alcolea
Edward Elgar Publishing, 2022

ISBN 978 1 80220 131 4 (hard cover)

Reviewed by: Barry S. Corbin



BARRY S. CORBIN

Barry Corbin practices tax and estate planning and estate administration and acts as a mediator of estate disputes through Corbin Estates Law Professional Corporation. He was called to the Ontario Bar in 1982. He is certified by the Law Society of Ontario as a specialist in Estates and Trusts Law and is a Fellow of the American College of Trust and Estate Counsel. Barry is the co-founding editor of the monthly newsletter, Money & Family Law, in publication since 1986, and is a past Editor-in-Chief of the Estates Trusts & Pensions Journal.

Estates practitioners in Canada (or, at least, in its common law jurisdictions) might be forgiven for thinking that a book with this title would belong in the "Fiction" section of a bookstore. For the past century, arbitration has been established as a fundamental component of commercial contracts, whether national or international in scope, as a primary means to resolve disputes arising out of such contracts. And yet, arbitration is virtually unknown in Canada as a means for resolving disputes involving trustees and/or beneficiaries.[1]

However, it would be a facile conclusion to draw that this book has nothing to offer to estates practitioners in this country. There can be no argument regarding the significant costs of estate litigation, both financial and emotional, to the parties, or the protracted nature of disputes before the courts (even without consideration of appeals of the lower court decision to a higher judicial authority). In some cases, a testator or a settlor of an inter vivos trust, having intimate knowledge of the personalities involved, will be live to the strong likelihood of later disputes involving the trustees and/or the beneficiaries. Or, the testator or settlor may simply wish to do everything possible to avoid having the estate or trust property squandered in estate litigation. Why should the person setting out the rules governing the administration of the estate or trust not have a say in how such disputes should be resolved?

Among other things, this book will educate the reader as to how arbitration of trust issues in other jurisdictions has come to be part of the dispute resolution landscape, whether through domestic law, jurisprudence, multi-national treaties, or a combination of the three. Might progressive thinkers not be motivated to look for ways that domestic laws might be amended in ways that recognize the value of having estate and trust disputes resolved by arbitration?

Following a broadly focused introductory chapter identifying some of the key issues that arise in regard to arbitration of trust disputes, the book's succeeding chapters look at a number of these issues in fine detail, including the following:

1. Chapter 2, which discusses whether a given issue in dispute is even "arbitrable". This topic takes the reader through some fundamental concepts such as whether a provision in a will or trust that purports to divert a dispute to mandatory arbitration will be odious to the courts as being an attempt to oust their jurisdiction; whether such a provision could have the effect of violating the principle of the "irreducible core of the trust;" and the scope of the remedies that an arbitral award may offer.

2. Chapter 3, which explores the question as to how "parties" in a trust can be bound to an arbitration clause in the will or trust document, including how statutes and jurisprudence in various jurisdictions

have found ways to bind a beneficiary in the absence of a written agreement. One finds here also a very thoughtful discussion as to the extent to which a forfeiture clause or a condition precedent might offer an effective means to coerce a beneficiary to agree to arbitration of a trust dispute.

3. Chapter 4, which looks at trust arbitration and due process in the context of: (a) the European Convention on Human Rights; and (b) common law principles of natural justice.

4. Chapter 5, dealing with both problems and solutions regarding how to bind the beneficiary who is a minor, mentally incapable, unborn or unascertained.

5. Chapter 6, which deals with conflicts of law issues and the Hague Convention on the Law Applicable to Trusts. This is an important discussion, having regard first, to the fact that the trust as a legal concept is not known in a significant number of legal systems and second, to the fact that some jurisdictions have trusts that are so unique – viz., the STAR trust in the Cayman Islands or the British Virgin Islands Vista Trust – that they may not necessarily be recognized in other common law jurisdictions.

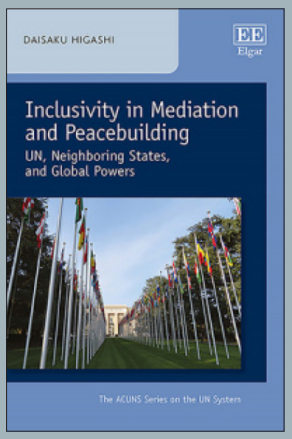
6. Chapter 7, which examines existing statutory frameworks for trust arbitration in a dozen different jurisdictions. In a most convincing manner, the author grades the various arbitration statutes on a range of factors, identifying their respective strengths and weaknesses. He gives top marks to the statutory regimes in New Zealand, the Bahamas and the Dubai International Financial Centre, while relegating to the bottom, or near-bottom, of the heap the statutory schemes in Arizona, Missouri, Wyoming, Florida and Delaware. Were there interest on the part of governments in any of the Canadian provinces or territories (or those lawyers advising them) in establishing a statutory framework for arbitration of estate and trust disputes, this chapter would be a most useful resource.

7. Chapter 8, which deals with enforceability of trust arbitration awards under: (a) the New York Convention; and (b) English and Commonwealth law.

8. Chapter 9, which identifies the key issues for the consideration of the lawyer who is drafting a will or trust where the client wants to include a trust arbitration clause. The commentary reflects all that has been discussed in previous chapters, offering a checklist of the critical issues that the drafting lawyer should be considering. Of course, unless or until there is a statutory scheme in place in a Canadian province or territory, this might be considered to be somewhat of a blue-skying exercise.

This book offers a meticulously researched story of how arbitration of trust disputes first appeared on the scene and the twisting journey it has taken to reach its current state. For anyone who wants to contemplate where the arbitration of trust disputes in Canada may, or should, be headed in years to come, it is essential reading.

1. That said, non-judicial resolution of such disputes is explicitly recognized in some common law jurisdictions in Canada. Merely by way of example, *Ontario's Rules of Civil Procedure* contain special rules governing mediation of estate disputes. First, where an estate dispute arises in the City of Toronto, the City of Ottawa or the County of Essex, Rule 75.1 requires the parties to participate in mediation before the matter can proceed to a formal court hearing, unless a court order has been made dispensing with this requirement. Second, for estate disputes arising anywhere else in the province, the court may order the parties to participate in mediation, whether at the behest of one of the parties or by the court *proprio motu*, in which case Rule 75.2 governs the process.



Inclusivity in Mediation and Peacebuilding

Daisaku Higashi
Edward Elgar Publishing, 2022

ISBN 978 1 80088 051 1 (hard cover)
ISBN 978 1 80088 052 8 (eBook)

Reviewed by: Genevieve Chornenki, C.Arb, C.Med

GENEVIEVE A. CHORNENKI, LL.M.(ADR), C.MED, C.ARB

Genevieve is the author of Don't Lose Sight (2021) and co-author of Bypass Court (2015). She holds a Certificate in Creative Writing from the University of Toronto and a Publishing Certificate from Ryerson University. She was inaugural chair of the Ontario Bar Association's ADR section and serves on ADRIO's C.Med accreditation committee.
www.genevievechornenki.com

The title *Inclusivity in Mediation and Peacebuilding* suggests multi stakeholder conflicts like the citing of a nuclear facility, the occupation of Canada's capital, or disagreements about the distribution of assets among family members. Not so. Daisaku Higashi writes about something infinitely more profound—world peace. Who, he asks, should be included in negotiations to end armed conflicts and construct stable post-war societies? With that focus, a less obscure book title might be *Armed Conflict and Post-Conflict Peacebuilding: Who Gets to Sit at the Negotiating Table?*

Higashi is eminently qualified to write about his chosen subjects. He is a professor of international relations at the Centre for Global Education, Sophia Institute of International Relations, Sophia University, Tokyo. He has conducted field research and/or in-depth interviews with key actors in conflicts in South Soudan, Afghanistan, Syria, Yemen, East Timor, and elsewhere, and he is intimately familiar with the stages of many armed conflicts and peace negotiations around the world. He participated in the development of the United Nations General Assembly's resolution on mediation in 2014, and writes that he "directly witnessed the different perspectives on the question of inclusivity in mediation during armed conflicts."

Higashi demonstrates his expertise in detailed chapters such as "Challenges of inclusivity in peace negotiations: the case of Afghanistan" and "The role of the UN, neighbouring states, and global powers in mediation: the case of Syria." Charts and tables illustrate more complex ideas, and extensive footnotes let readers access background papers, policies, and publications.

Higashi writes about two different negotiating scenarios. The first relates to active, armed conflict, the second to the creation of a civil societies that citizens, post conflict, will recognize as legitimate. The nature of inclusivity differs between these scenarios.

When there is armed conflict, Higashi espouses a "flexible approach" to inclusivity. That really means a limited numbers of participants in mediation because a peace agreement may not be possible if too many people are at the table. By contrast, post-war reconstruction—what Higashi calls "post-conflict peacebuilding"—is a case for more bodies at the table, and here Higashi maintains that more is better; it is critical to avoid political exclusions such as those that happened in Iraq or Afghanistan. According to Higashi, an inclusive political process is more likely to lead to a civil society that is widely recognized as legitimate. Legitimacy promoted by participation, he writes, "drives compliance [with social institutions and laws] not by coercion."

One wonders whether Higashi's generous approach to participation, albeit pertaining to post-conflict reconstruction, should have applied

to the occupation in early 2022 of Canada's capital by convoy protesters. Does Higashi mean to suggest that all positions are morally equivalent, or only that we should set aside questions of morality in favour of pragmatism? Should parties who deny the legitimacy of longstanding institutions and organs of government in a democratic society have a place at the negotiating table? Thoughts to ponder.

Readers of this book will ask who should serve as mediator in the situations Higashi describes. At the armed conflict stage, Higashi maintains that mediation should be conducted by global powers and neighbouring states who can bring pressure to bear on the warring parties. In other words, influential parties with pragmatic concerns favouring peace, not necessarily individuals or groups affected by the armed conflict. Although Higashi does not use the word "power" when he advocates a limited table in armed conflict situations, he is really talking about including those who exert power in the rawest sense of that word.

In post-conflict peacebuilding Higashi's view is that the United Nations can and should play a central role since it can be seen as impartial. Global powers or very powerful states, on the other hand, have, by implication, their own agendas and cannot really be considered to be neutral.

Readers who seek a prescription for world peace or who devote themselves to the immediate relief of suffering will be disappointed by this book. The author offers no solutions. Nor should readers expect sweeping generalizations about humanity and the condition of the modern world, psychological explanations for tyrants, or professional instructions and advice on how to mediate high conflict cases. To the extent that Higashi makes recommendations, they are understated and in the nature of policy suggestions. His book is primarily descriptive with careful chronologies of events in particular geographic locations and details of the stakeholders and their motivations.

This book will surely be of interest to students and practitioners of international relations, as well as to journalists and general readers who like to keep up to date on world current events. It is part of "The ACUNS series on the UN System," an interdisciplinary series that accepts submissions from scholars working in circles such as international politics, human rights, international development, and global governance. Since the book targets dispute resolution in very specific and challenging contexts, it cannot be classified as a dispute resolution text for generalists.

Yet there are lessons for dispute resolution practitioners closer to home. A key lesson—and one that challenges received wisdom in the dispute resolution field—is that participation is not a magic elixir. More is not always merrier. When powerful entities are in direct conflict, the moral claims and suffering of their victims are irrelevant and ineffectual in bringing about a cessation of hostilities.

In his chapter on South Sudan, Higashi illustrates this point and documents how extensive stakeholder participation may make no difference in the mediation process and may, in fact, hamper progress towards agreement. In 2018, more than 20 political and military groups were brought together as part of ongoing peace negotiations. Participants included women, youth, faith leaders, academics, and business leaders—just the sort of diverse collection that many dispute resolution practitioners would endorse. One optimistic UN official, encouraged by such broad participation, commented, "These groups 'without guns' can keep expressing how restoring peace is crucial for ordinary South Sudanese people and pressuring military leaders to make compromises and deal with the agreement." But the official's optimism was not borne out. The groups "without guns" lacked the power to accomplish anything. No serious progress was made towards peace and there was no reduction in violence on the ground. Only later when neighbouring states with shared pragmatic concerns (high volumes of refugees) were able to exert sufficient pressure on the warring parties was a form of peace approached.

In 2020, about 50 armed conflicts raged around the globe, and the war in Ukraine can now be added to the list. What lessons can be taken from the peace processes that Higashi documents in this book and extrapolated to Russia's invasion of Ukraine? Interested readers can find Higashi's insights on that issue here https://www.gc.cuny.edu/news/lessons-previous-conflicts-russian-invasion-ukraine-daisaku-higashi.

ADRIC BENEFITS OF MEMBERSHIP

Recognized as Canada's preeminent Alternative Dispute Resolution (ADR) organization, the ADR Institute of Canada sets best practice standards in Canada, while providing leadership, value and support to our clients and individual and corporate members.

ADRIC provides education and accreditation (recognized internationally), promotes ethical standards and competency, and advocates for all forms of ADR for public and private disputes.

ADRIC AFFINITY PLANS

ZOOM VIDEOCONFERENCING PLAN

Do you need to conduct your meetings online more and more in these busy times? ADRIC has an outstanding plan which includes: the Enterprise Plan; breakout rooms; screen sharing; unlimited recording; unlimited cloud storage; webinar capability (up to 500 participants per meeting); training videos & 24/7 tech support.

PROFESSIONAL LIABILITY PLAN

The Insurance plan covers liability damages arising from rendering of, or failure to, render any type of ADR service. Enjoy special enhanced coverage with dramatic discounts for ADRIC members. Members comment this insurance program alone is worth the cost of membership! Additional optional coverages are available: commercial general liability; personal legal expense insurance; cyber coverage; property; mobile office loss; and ID restoration services.

PERSONAL HOME, AUTO, TRAVEL & LIFE INSURANCE PROGRAM

ADRIC members have access to the TD Insurance Meloche Monnex program - preferred insurance rates and expanded coverage on a wide range of home, car, travel and life insurance coverage that can be customized for your needs. Feel confident your home, condo, renter's or car insurance coverage fits your needs

Learn more about all ADRIC member benefits: http://adric.ca/membership/member-benefits/

Congratulations to our New Designation Recipients!

We congratulate ADR Institute of Canada members who were recently awarded the designation of Chartered Mediator, Chartered Arbitrator, Chartered Med-Arbitrator, Qualified Mediator, or Qualified Arbitrator.

NEW CHARTERED ARBITRATORS

Praveen Sandhu, C.Arb [BC]

NEW CHARTERED MEDIATORS

Catherine Wood, C.Med [AB]

Timothy Galvin, C.Med [ON]

NEW QUALIFIED ARBITRATORS

John DeVellis, Q.Arb [ON]

Rachel Hopf, Q.Arb [AB]

Pramila Javaheri, Q.Arb [ON]

Marcel Mongeon, Q.Arb [BC]

Sze HonSun, Q.Arb [BC]

Maureen Smith, Q.Arb [ON]

NEW QUALIFIED MEDIATORS

Jill Raddysh, Q.Med [SK]

Teri Halmrast, Q.Med [SK]

Angelica Howlett, Q.Med [SK]

The Chartered Mediator (C.Med) and Chartered Arbitrator (C.Arb) are senior designations. These, as well as the Qualified Mediator (Q.Med) and Qualified Arbitrator (Q.Arb) are Canada's only generalist designations for practicing mediators and arbitrators. They demonstrate the member's specific credentials, education, and expertise. Recognized and respected across Canada and internationally, they allow the holder to convey their superior level of experience and skill. Clients and referring professionals can feel confident knowing that ADR practitioners holding an ADR Institute of Canada designation have had their education and performance reviewed, assessed and verified by a team of senior and highly respected practitioners.

ABOUT ADRIC

ADRIC brings together seven affiliates in addition to major corporations and law firms to promote the creative resolution of disputes internationally and across the country. Our broad membership base allows for diverse skills and experience that address all types of dispute resolution needs in Canada. Numerous organizations refer to ADRIC for guidance in administering disputes between organizations, their clients or customers, between employees, or between employees and management using ADRIC's Rules for Mediation, Arbitration and Med-Arbitration. Members adhere to ADRIC's Code of Ethics and are subject to disciplinary policies. Those who have achieved the required education and practical experience may apply for recognition as designated Qualified Arbitrators, Chartered Arbitrators, Qualified Mediators, or Chartered Mediators as generalist practitioners and now, Family practitioners.

2022-2023 BOARD OF DIRECTORS

ADRIC CORPORATE MEMBERS

Alberta Energy Regulator
Borden Ladner Gervais LLP
Burnet, Duckworth & Palmer LLP
Cox & Palmer
Deloitte LLP
Dentons Canada LLP
Environmental Appeals Board
Fairway Divorce Solutions
Gowling WLG
Conciliation and Arbitration Board for Canada
Imperial Oil Limited
Insurance Bureau of Canada
KPMG
MNP LLP
Osler, Hoskin & Harcourt LLP
Rose LLP

BECOME A CORPORATE MEMBER:
Contact: executivedirector@adric.ca

ACKNOWLEDGMENTS

Natural Sciences and Engineering Research Council of Canada (NSERC) and Humber College Office of Research and Innovation.

Pramila Javaheri, Executive Director, ADRIO and Bruce Ally, ADRIO Board Member for their ongoing guidance and support throughout this research project.

Special thanks to our editorial staff Jason Katsikaris and Robert Pennant as well as graphic designer Sarena Elias for their efforts in bringing this issue to fruition.

ADR Institute of Canada
Institut d'arbitrage et de médiation du Canada TM/MC

LEADING DISPUTE RESOLUTION IN CANADA
À L'AVANT-PLAN DE LA RÉSOLUTION DES DIFFÉRENDS AU CANADA

ADR INSTITUTE OF CANADA, INC.

Suite 407, 234 Eglinton Avenue East
Toronto, ON (Canada) M4P 1K5
Toll Free: 1-877-475-4353, Phone: 416-487-4733

Email: admin@adric.ca
Website: www.adric.ca

ADR INSTITUTE OF BRITISH COLUMBIA

347 - 1275 West 6th Ave
Vancouver, BC V6H 1A6

Toll Free: 1-877-332-2264 (in BC)
Phone: 604-736-6614
Fax: 604-736-6611
Email: mcrelations@adrbc.com
Website: www.adrbc.com

ADR INSTITUTE OF ALBERTA

#225, Tower 1
3697 Mill Woods Road NW
Edmonton, AB T6K 3L6

Toll Free: 1-800-232-7214
Phone: 780-433-4881
Fax: 780-433-9024
Email: info@adralberta.com
Website: www.adralberta.com

ADR INSTITUTE OF SASKATCHEWAN

Box 22015, RPA Wildwood
Saskatoon, SK S7H 5P1

Toll Free: 1-866-596-7275
Email: info@adrsaskatchewan.ca
Website: www.adrsaskatchewan.ca

ADR INSTITUTE OF MANITOBA

c/o 141 Marion Street
Winnipeg, MB R2H 0T3

Toll Free: 1-877-489-7452
Email: admin@adrmanitoba.ca
Website: www.adrmanitoba.ca

ADR INSTITUTE OF ONTARIO

Suite 405, 234 Eglinton Avenue East
Toronto, ON M4P 1K5

Toll Free: 1-844-487-4447 (Outside GTA)
Phone: 416-487-4447
Fax: 416-487-4429
Email: info@adr-ontario.ca
Website: www.adr-ontario.ca

INSTITUT DE MÉDIATION ET D'ARBITRAGE DU QUÉBEC

1445, rue Stanley, bureau 1501
Montréal (Québec) H3A 3T1

Phone: 514-282-3327
Fax: 514-282-2214
Email: info@imaq.org
Website: www.imaq.org

ADR ATLANTIC INSTITUTE

Box 123
Halifax CRO, NS B3J 2M4

Email: admin@adratlantic.ca
Website: www.adratlantic.ca