ADR Institute of Ontario

ADR **UPDATE**

ISSUE 107 | SUMMER 2021

Featuring...

"We recognize that when people feel heard, understood and acknowledged they can move towards hearing and understanding those on the other side." – pg. 5

"One key finding was People of Colour, Indigenous Peoples, those with mobility challenges and LGBTQ2 individuals are more likely to deal with social isolation and loneliness than the general population average." – pg. 8

"Generating options is the most creative element of the mediation process. It requires thoughtful engineering of solutions with the clients' needs in mind." – pg. 12

"I have seen leaders who have the ability to share ideas, incorporate their emotions and capture the imagination of others as they speak. The conversation creates participation, instead of answering questions." – pg. 16

"On day one of any course, college students are very much like parties to a mediation. We have an idea of what we want, though we hold an uncertainty for what we have gotten ourselves into." – pg. 20

"The role of local courts and the legal system play a significant role in determining whether a seat can become more attractive to users of the international arbitration regime." – pg. 23

...and much more!

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It has been my pleasure working with the ADRIO membership over the last six months. I'm constantly inspired by the beautiful people I speak with daily and how hard they work to make their dreams come true. ADRIO is excited to announce that we have managed to stay above the 1000-member mark for 2021 and hope to continue climbing. In the month of July, we have created a new opportunity for members to stay in touch with ADRIO Staff. I welcome anyone who has questions about membership, designations and their ADR journey to stop by "Rachael's Office Hours" the first and third Tuesday of every month from 1pm to 2pm. Please email me for more details at membership@adr-ontario.ca. I look forward to finishing this year strong and helping our members reach their goals.

Rachael Whitzman
Member Experience Specialist

Tommy Lam
Interim Executive Director, Professional Development and Communications Specialist

Welcome to the summer 2021 edition of *ADR Update*! You are in for a treat. This newsletter contains stimulating thought pieces from ADR experts, as well as brilliant contributions from ADR students and new practitioners.

Enhancing support for ADR students and new practitioners continues to be a priority at ADRIO.

We strive to create a culture where seasoned professionals feel empowered to give back, share their knowledge and seek opportunities to mentor those who are at the beginning of their ADR career path. This is because we know that as a community of diverse conflict management enthusiasts, we are at our best when students and new practitioners – in a word, the *future* of the ADR industry – feel heard, valued and represented.

August is a particularly special month, as it is traditionally the time of year when we place a focalized lens on making space for activities and projects that are meaningful to students and new practitioners; I am specifically talking about the Aspiring ADR Practitioners Week. If you have not yet registered for an ADRIO event in August, I highly recommend starting off with the Speed Mentoring program.

Feel free to contact me if you want to learn more about any of our programs or about ADRIO more generally. Please email me at events@adr-ontario.ca.

Happy summer reading!

ADR Update Newsletter Committee

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Each edition of *ADR Update* is crafted with *you* in mind.

The Newsletter Committee strives to produce high-quality publications that will provide readers with a sense of connection to the community of Conflict Resolution Professionals in Ontario, a richly diverse group that is constantly expanding and evolving.

Through communications regarding current events, best practices, as well as innovative and stimulating thought pieces, each edition of *ADR Update* aims to illuminate, amplify and celebrate the diverse voices in the ADR field, from seasoned practitioners to students and newcomers.

Did you know…?

You can use the *ADRIO Dispute Resolution Professionals Directory* to search for ADR Practitioners in Ontario who offer Online Dispute Resolution

www.adr-ontario.ca/directory

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BEING TRUE LEADERS IN HEALING CONFLICT

PRESIDENT'S MESSAGE

JOAN CASS, MSW, RSW, Q.Med

I have been President of ADRIO for just over a year. I will not lie—it has been a tough year. In my last message I wrote about the unprecedented effects of the pandemic on all of us, and ADR professionals in particular. Along with the ongoing effects of the pandemic, there has been a huge upsurge of attention worldwide to increasing hate and violence being aimed at particular groups: women, black people, Indigenous people, Muslims, Jews, Asians, LGBTQ2S people, the list goes on.

The leadership and staff of ADRIO have taken great care to ensure that we respond to these local and international examples of openly expressed hate and violence, as well as more covert systemic obstacles to equity and inclusion, in ways that are meaningful rather than performative. We responded to George Floyd's murder and its aftermath by developing a Diversity, Equity and Inclusion policy framework and recognizing the need to systemically weave anti-racism into everything we do at ADRIO. As anti-Asian sentiment grew and erupted into shocking amounts of virulent hate and violence, we made a heartfelt statement re-committing ourselves and our organization to fighting hate and racism of all kinds. Recently, it seems that there is one event after another exposing the depth and breadth of ugly hatefulness and persecution towards specific groups of people. The discovery of the remains of 215 Indigenous children buried at the site of a BC residential school and the pre-meditated, hate-motivated killing of a Muslim family in London, ON are two of the most impactful of those recent events.

In Board discussions about how to respond, I have found myself talking a lot about "whose house is on fire right now," while others have expressed strongly that we should always try to address all groups who experience ongoing persecution.

As a Jewish child of Holocaust survivors, I am no stranger to the rampant and rising anti-Semitism that continues to plague our society and I feel deeply the suffering of all persecuted people. Social media and mainstream media have amplified the frequency and speed with which hateful narratives and conspiracies are spread. Fear, anger and blame rage on social media and in the streets. It is hard to really "know" which source is telling the "truth." Everyone's opinion, informed or horribly ignorant, is given airtime. I am starting to feel like all our houses are on fire. We are increasingly targets of hate and hostility for all kinds of reasons. People seem to be dividing into groups intent on identifying the "victims" and the "oppressors."

As conflict resolution professionals, we know that it is not as simple as that. We know that in conflict, people can be both victim and oppressor, torturer and tortured.

We recognize that when people feel heard, understood and acknowledged they can move towards hearing and understanding those on the other side.

(This message continues on the next page.)

Although we are educated to be "neutral," perhaps what is called for is to truly hear and acknowledge the feelings and lived experiences of everyone, including those we may have considered to be "enemies." In this way, we can be true leaders in healing conflict, not just managing it. Healing the hate in the world begins inside every one of us. What is required is to approach ourselves, others and our work with openness, love and compassion.

"May all beings everywhere be happy and free, and may the thoughts, words and actions of my own life contribute in some way to that happiness and to that freedom for all."
- Lokah Samastah Sukhino Bhavanta - Sanskrit Mantra

Stay safe and well,

Joan Cass
ADRIO President

Being a member of ADRO gives me a home base and a sense of belonging in a brand new career. It gives me a place I can make my contributions for the growth and well-being of the Dispute Resolution profession, meet others in the field, learn at workshops, conferences and other events. It provides a structure and sense of purpose to my passion for what I do.

I Get More Opportunities with Membership

www.adr-ontario.ca/join

Joan Cass
MSW, RSW, Q.Med
ADRIO President

Congratulations
On Your New Designations!

Qualified Arbitrators (Q.Arb)

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Dana Campbell
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Kristie Irving
Sherri Koven
Laurel Marshall
Julie Morton
Saba Quadri
Marie-Josée Smith
Glenndon Whitaker

Chartered Mediators (C.Med)

Anik Beland
Jason Dykstra

ADR Institute of Ontario

An ADR Reckoning

August 23, 5:30pm – 6:30pm

Two Concurrent Streams of Dialogue

This will be a fun networking event with two facilitated discussions and a LinkedIn "Connect-a-Thon." This event is free and open to members and the public! *Advance registration is required.* Register and enrich the conversations with your perspective!

Co-Facilitators:
Joya Mukherjee and Shaneil Stewart

Register: www.adr-ontario.ca/ADRReckoning

HOW LONELINESS MAY INFLUENCE CONFLICT RESPONSE

PENNY VAN DEN BERG, BA, CD

Précis:

Loneliness is a state of being that has been highlighted over the past year because of COVID-19. What are the dimensions of loneliness and how does it affect the brain? This article will explore these questions and in doing so, provide conflict management specialists with an opportunity to reflect on their current practice and how they can best support a client who is both lonely and experiencing conflict.

Looking inside the brain: loneliness and conflict

Humans are social beings and our well-being depends upon connection to one another (Cook, 2013). However, the COVID-19 pandemic has directly influenced interactions and for some, led to loneliness due to perceived social isolation.

Loneliness and social isolation are not mutually exclusive: one can be both lonely and socially isolated. It is also possible for one to be lonely and not socially isolated, or vice-versa. In 2019, the Angus Reid Institute presented its research findings on social isolation and loneliness amongst Canadians. Five groups were identified: The Desolate (those both lonely and isolated), the Lonely but not Isolated, the Isolated but not Lonely, the Moderately Connected, and the Cherished. The Desolate and Lonely but not Isolated groups made up 23% and 10% respectively. One key finding was People of Colour, Indigenous Peoples, those with mobility challenges and LGBTQ2 individuals are more likely to deal with social isolation and loneliness than the general population average (Angus Reid Institute, 2019).

There are five dimensions to loneliness, and it can be experienced when at least two dimensions are present (Rokach, 2020). The five dimensions include:

1. **Emotional distress**. Can come in the form of pain, hurt and anxiety.
2. **Social inadequacy and alienation**. Feeling inadequate, ignored and not valued.
3. **Interpersonal isolation**. The thought that one does not matter to others.
4. **Self-alienation**. Experiencing the body as separate from the mind as a defense mechanism to prevent the feeling of pain of loneliness.
5. **Growth and discovery**. Realization of having more resources to cope than initially thought, appreciation of others, interpersonal relationships and better understanding of oneself and one's world.

Recent research conducted by R. Nathan Spreng and associates identified that loneliness alters brain regions

(This article continues on the next page.)

associated with perceptual, attentional and affective processing of social information, though the most notable shift occurs within the default mode network (DMN) (Spreng, et al., 2020). The DMN is made up of regions of the brain associated with internal thought and mental representation of oneself over time and space and others, including their intentions, identity and affiliation (Pressman, 2020) (Spreng, et al., 2020). The DMN is involved in certain types of social cognition processes such as obtaining, retrieving and processing information about life, relationships and mental states of self and others (Mars, et al., 2012).

Social neuroscience pioneer, John Cacioppo, and colleague Louise Hawkley conducted research on social isolation and cognition that revealed loneliness impairs executive functioning of the brain. Executive functioning is one's capacity to control attention, cognition, emotion and/or behaviour to better meet social standards or personal goals (Cacioppo & Hawkley, 2009). The frontal lobe of the brain is responsible for executive functions. The medial prefrontal cortex, one of the regions that makes up the DMN, is found within the frontal lobe.

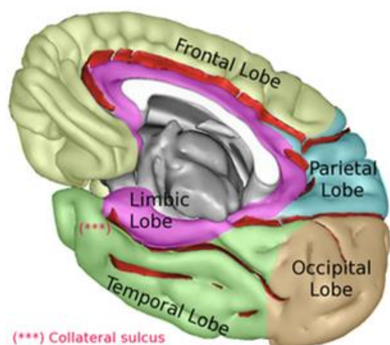

Image: CC BY-SA 3.0; Sebastian023

The altered processing of social information, representation of self and others and impairment to executive functioning influences how one engages with their environment. In addition, loneliness plays an instrumental role in mood, anger, anxiety, optimism, self-esteem and related states (Cacioppo J. T., et al., 2006). Because of heightened feelings of insecurity and sensitivity to threats and rejection, lonely individuals may view themselves as passive victims but be active contributors in interpersonal interactions because of their self-protective and self-defeating interactions with others (Cacioppo & Hawkley, 2005).

How might a lonely individual respond to a conflict situation?

Conflict is inevitable; the consequences of it can be either positive or negative depending on how it's managed. When conflict is present, the limbic system and thalamus regions of the brain are engaged. The limbic system supports emotion, behaviour and long-term memory, while the thalamus is important to processing information that creates perception (Rekow, 2018). It is known that brain regions are affected by conflict and that loneliness alters the brain and influences perception of self, others and engagement with the environment. Because of this it would be reasonable to suggest that a lonely individual would have difficulty managing conflict effectively. One might expect behaviours such as short attention span, longer time required to process information, difficulty to acknowledge contribution in a conflict situation, struggle to control emotions, conflict avoidance, sensitivity to feedback and feelings of worthlessness may manifest.

As we begin the move toward a post-COVID environment, a conflict management specialist may encounter a higher percentage of clients than pre-COVID who either self-describe or present themself as lonely. Consequently, conflict management specialists may consider reviewing their intake and the structure of the client meeting to best support a lonely individual as it may take more time to develop trust, support de-escalation of emotion and create the foundation for psychological safety in the eventuality the client is prepared for conflict engagement. A starting point could be to incorporate questions that identify where an individual is on a continuum representing the five dimensions outlined by Rockach.

(This article continues on the next page.)

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***Penny van den Berg** is a Canadian Armed Forces member and currently working within the Integrated Conflict and Complaint Management Program as a trainer of Alternative Dispute Resolution for Defence Team members. She holds a Psychology degree with additional education in both mediation and conflict management coaching. Recently, Penny received her Conflict Dynamics Practitioner certification. She is an associate member of ADRIO.*

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"I am proud to be a member of ADRIO. Membership has provided me with the opportunity to discuss important topics with like-minded ADR professionals. I am grateful for the networking opportunities and the relationships that I have built through my association with ADRIO. A variety of interesting events and CLE workshops are always available throughout the year. I am particularly looking forward to co-teaching the ADRIO-approved Comprehensive Arbitration Training certificate course in October. I definitely have received a return on my investment by joining ADRIO, and highly recommend membership to those wishing to expand their career horizons in the ADR field.

I Get More Benefits with Membership

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Dana Hirsh
Lawyer, Mediator
ADRIO Member since 2014

ADR Institute of Ontario

August 25, 12:00pm – 1:30pm | 3 CEE Points

Online Learning Session

This event is ideal for new mediators and students!

MEDIATOR MENTOR

This will be our seventh **Mediator Mentor** session. Designed to help new mediators learn, network and refine their skills, these sessions will be held 4-5 times a year. Each session will be facilitated by a uniquely qualified expert mediator and will cover a specific topic. Come prepared to ask questions, share your own experiences and learn new strategies to add to your conflict management toolkit!

Mentor:

Marc Bhalla
LLM (DR), CCI (Hons)
C.Med, Q.Arb, MCIArb

Mediator & Arbitrator

The Business of Mediation

It is becoming virtually impossible to succeed in the Mediation profession without an entrepreneurial spirit. Marketing and business development skills are part and parcel of what makes a successful mediator. This session will explore:

- what it takes to be a good conflict management professional from a business development perspective;
- a framework for building your practice with actionable steps;
- strategies for effective networking; and
- how to balance work and life as a business owner.

Marc Bhalla (he/him) [biracial] is a mediator, arbitrator and trainer who specializes in conflict management and dispute resolution. He has been affiliated with Elia associates professional corporation, barristers and solicitors since 2002. Marc is based in Toronto, Canada and he practices online. Read more about Marc at: https://456dr.ca/about

Attend Online!
Member $35
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Register: http://www.adr-ontario.ca/mediatormentor7

* +HST on all rates. Cancellation Policy: If you are unable to attend, your registration is fully transferable to another person in your organization. If you must cancel, notice must be received in writing before August 13, 2021. No refunds after August 13, 2021. Sessions, speakers and times are subject to change. Registrations are tentative until August 24, 2021. Should ADRIO need to cancel this event, you will receive a full refund. Once payment has been processed, this policy applies under all circumstances.

MEDIATION – CREATING OPTIMUM RESOLUTIONS

AFSANA GIBSON-CHOWDHURY, Q.Med

Mediation can be a powerful tool for resolving legal actions without having to go to trial. If mediation is not mandated, lawyers and self-represented parties can opt for this at any stage of their case before the commencement of a trial.

There are many reasons why mediation is a chosen method for resolving cases. Time and expense often rate as the top motives. Another reason may be that the clients are searching for workable solutions that will not be explored during trial; for example, preserving a working relationship with a colleague or long-term business strategies that are impinged by short-term disputes.

Mediators have specialized skills and training in assisting with finding the right solution for both parties. Though there are no official rules or procedures on how to conduct a successful mediation, mediators often receive training through the various courses that are offered across the world. The highly-lauded Harvard School of Law methods on Principled Negotiation offers one technique of dispute resolution which has proven to be highly effective for at least three decades. One of the elements of principled negotiation is "option generation" and in a mediation the mediator assists in generating some options for the parties (who are negotiating with each other) to help resolve the dispute.

Generating Options

"If you want creative workers, give them enough time to play." — John Cleese

Generating options is the most creative element of the mediation process. It requires thoughtful engineering of solutions with the clients' needs in mind. Active listening while clients tell their stories and engage in meaningful negotiation are important elements in a mediation. However, building a relationship that harbours trust with the clients can be extremely beneficial when the mediator attempts to assist the parties to create optimal solutions in their best interests.

A helpful basis to begin a rapport with the client is to take the time to find out who the client is. At law school, there is a heavy emphasis on how to manage and settle legal problems, with little focus on the clients. Building trust with the clients is a work-in-progress that should happen over a period of time. It is worth it for all the parties and the mediator to engage in meaningful conversation at the earliest possible stage of the dispute. This will help the mediator to understand the individual client's expectations.

Beginning a resolution process through pre-mediation conferences provides the opportunity for clients to engage with the mediator in a way that may not necessarily happen on the actual mediation day. It assists the clients in getting to know the mediator and build trust. There is no requirement to negotiate or make any decisions during the pre-mediation conference. Instead, it is a time to gain better insight

(This article continues on the next page.)

and an opportunity to reassess the clients' positions, if required. Gaining this insight for the mediator means that they can use their skills to guide a better decision-making process.

The Right One

Choosing the right mediator deserves attention. When choosing a mediator, the client's needs must take priority. Often lawyers choose mediators based on past working relationships or they select one who they regularly use. Whilst this could work in some cases, in others it may lead to impasse.

Choosing a mediator with a variety of work and life experience can help identify underlying issues of the conflict. Mediators with diverse backgrounds (including gender, race, ethnicity and age) has been much of the conversation for many years in the mediation profession and its value has been recognised. However, the use of diverse mediators is still low in numbers. Understanding emotional attachments, cultural backgrounds and other sensitivities can help the mediator take a better approach in tackling the problem. It can allow the mediator to suggest options not previously considered.

To choose the right mediator, there are two things which need to happen. Firstly, the lawyers need to recognise that there may be underlying issues. Secondly, the lawyers from both parties need to discuss these issues and decide on a mediator together rather than exchanging a list. Not only will this set the tone for a collaborative process, it will also reduce time going back and forth to choose a mediator. It is also a good idea to talk with the mediator before engaging them. This provides an opportunity for the lawyers of both parties to speak with the mediator and ensure they are making the right choice for their clients, while confirming impartiality can be maintained.

Choosing an Option

Many mediators have said that the success of a mediation is not always in a settlement. I tend to agree. Clients may not always resolve their dispute on the day of the mediation. If the mediator can open meaningful discussions and generate realistic options, it offers the clients a useful decision-making process. Mediators can follow up with the clients to table next steps, which may lead to a second mediation session. The second session could be an opportunity to optimize the benefits of the options previously listed. There is value in allowing a break in the mediation process to consider the options. The parties may want to continue engaging with the mediator to help conclude the dispute.

Carefully guided mediation can be an effective tool for dispute resolution. A well thought-out plan on how the process should begin can be the difference between settlement and trial. Choosing the right mediator to help generate sustainable options allows parties to self-determine outcomes they can be satisfied with — if the mediator provides enough time to allow their minds to flow creatively. It is my hope that the clients will have optimised their opportunity to seal an agreement which is best for them.

--

Afsana Gibson-Chodhury *is a qualified Mediator and the founder of "Gibson Chowdhury," a Toronto mediation boutique, specializing in civil and commercial disputes. She is a coach and advocate on EDI issues affecting mediation.*

"I cannot think of a single organization that has had more of an impact upon my career than ADRIO. I have always been impressed with ADRIO's ability to advance the interests of our membership in meaningful ways. In addition to helping to add structure to the profession, ADRIO has helped newer practitioners to succeed by offering practice advice, matching them with more long term practitioners and in some cases even generating work. The staff of ADRIO have always been eager, helpful and competent in offering help to our membership. Whenever I walk into the ADRIO office it feels like coming home.

I Get More Collegiality and Professional support with Membership

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Blaine Donais
C.Med, Q.Arb
ADRIO Member since 2002

ADR Institute of Ontario

Online Speed Mentoring & Networking

Grow your Network.
Build Opportunities.
Connect with ADR Experts and Leaders.

Thursday, August 26, 2021
5:00pm – 7:30pm
$20 for Members, $40 for Non-Members

Join us on August 26 for our fourth annual Speed Mentoring and Networking event. This evening networking program, with an incredible faculty of ADR Practitioners from multifaceted professional backgrounds, will provide participants with a unique opportunity to learn and network in a focused and small group setting. Come prepared to ask questions about professional growth, career development, practice management, strategies to improve professional visibility as well as ADRIO membership and much more. Participants will be given the opportunity to meet and talk with each mentor by the end of the event.

Meet the Mentors

How to keep your Mediation Boat Afloat
Lynn Catzman
C.Med, Mediator, Coach

Getting ahead in ADR by thinking Outside of the Box
David (Dave) Lewis
Q.Med, OCGC-ADR, Mediator, Coach

Effective ADR: Making it Work
Marvin J. Huberman
LLB, LLM (ADR), FCIArb, Past President, ADRIO

Register: www.adr-ontario.ca/mentoring2021

* +HST on all rates. Cancellation Policy: If you are unable to attend, your registration is fully transferable to another person in your organization. If you must cancel, notice must be received in writing. All refund requests received on or before August 20, 2021 will receive a refund less 50%. No refunds after August 20, 2021. Sessions, speakers and times are subject to change. Registrations are tentative until August 25, 2021. Should ADRIO need to cancel this event, you will receive a full refund.

MEDIATION TRAINING

live online using ZOOM

featuring instructors and coaches

We offer three levels of ADR training. Completion of the ADR and Advanced ADR workshops will satisfy the educational requirements for membership in the ADR Institute of Ontario.

"I completed a Harvard course via ZOOM. I found the quality and organization of your courses superior to the Harvard course. In particular, Stitt Handy Group provides considerably more time for practical skill development through drills and mock mediations with coaches. Further, the smaller class size allows for more participation."

Danielle Daroux, Daroux Law, Trail, BC

LEVEL 1

Alternative Dispute Resolution

- Determine what causes conflict
- Manage relationships, trust and communication
- Identify your negotiation tendencies
- Avoid negotiation pitfalls
- Determine which negotiation style is best for you
- Avoid making dangerous assumptions
- Use the 7 Elements of Principled Negotiation
- Deal with difficult people
- Be creative to get better results
- Determine what you should disclose in negotiation
- Decide when to say yes and when to walk away
- Prepare for a negotiation in a structured way
- Deal with strong emotions
- Be more persuasive
- Get people to listen to you
- Handle a complex meeting with multiple parties
- Observe a live mediation demonstration
- Find people's underlying interests
- Understand and facilitate the 7 stages of mediation
- Mediate to resolve disputes between other parties
- Resolve workplace conflict
- Prevent mediations from getting out of control

LEVEL 2

Advanced Alternative Dispute Resolution

- Handle inflammatory conduct
- Mediate harassment cases
- Deal with power imbalances
- Transition from gathering interests to generating options
- Make sure people stick to a deal
- Mediate when people have different versions of the facts
- Mediate distributive problems when parties do not desire an ongoing relationship
- Close the gaps and move parties through to closure
- Help parties craft appropriate settlement agreements
- Co-mediate
- Mediate legal disputes
- Observe a professional mediator on video
- Facilitate communications in a charged atmosphere
- Build relationships
- Mediate when lawyers are present
- Facilitate in other contexts, like town halls & consultations
- Encourage reluctant people to use ADR
- Deal with parties who are not forthcoming
- Deal with lawyers and difficult personalities
- Modify the mediation model for other contexts
- Deal with people who lie in mediations
- Manage confidentiality concerns

LEVEL 3

Applied Alternative Dispute Resolution

- Deal with parties who mislead on important facts
- Mediate with lawyers and with unrepresented parties
- Resolve complex issues
- Use evaluative and facilitative facilitation styles
- Use shuttle mediation techniques
- Use pre-mediation meetings and caucuses
- Mediate purely financial cases
- Work from and towards a draft agreement
- Handle ethical challenges, harassment issues, racism, strong emotions, and entrenched history
- Deal with unreasonable parties
- Deal with confidentiality issues
- Obtain closure

Participants will also participate in a mentoring session with an instructor, working on a topic of their choice.

After the course, they will have the opportunity to sit in on a real mediation in Toronto or via ZOOM.

Visit **sfhgroup.com** for 2021 workshop dates.

Graduates receive a certificate from the University of Windsor Law School.

Windsor Law
University of Windsor

CONFLICT RESOLUTION LEADER

ETHAN JERRY MINGS, Q.Med

I was asked the question, "What is a conflict resolution leader?" After some careful thought, I wanted to share with you my perspective on the question.

A conflict resolution leader is a person, not just a title. It is a person who strives to think beyond self to the individual, couple, group or organization with whom they engage. It is an individual who thinks and acts to enable people to make the best possible decisions with the information at hand. Finally, it is an individual who supports and builds relationships with and between the people they engage with.

In search of my answer, I found four common life skills present in leaders who are conflict resolvers, which together make it possible for meaningful change in individuals and groups. The four skills brought out the best in people, enabled individuals to participate, generated meaningful answers to tough questions and built relationships. Let me share them with you.

Ability to Listen

I marvel at the leader who can sit and listen. They listen with intent, eyes focused on the other person, confirming what they have heard and asking the right question at the right time.

I have learned over the years that there are many ways to listen. Some leaders listen for the facts or bits of information that line up on a timeline. Other listen to the experiences of others to understand how the series of events changed their life. Some listen to the speaker through the various lenses of time – long-term, short-term, right now. Overall, they have multiple tools[1] to help them listen with care.

The common element in their listening craft is the ability to use the following skills. They consistently demonstrate the ability to:

- ✓ Summarize a speaker's contribution to the conversation
- ✓ Create opportunities for people to illustrate what they are hearing
- ✓ Help individuals articulate their ideas, even though the ideas may not be clear on initial presentation

Ability to Engage

I am amazed at how leaders can engage people and hold their attention. They speak, and people listen carefully to their words.

I have seen leaders who have the ability to share ideas, incorporate their emotions and capture the imagination of others as they speak. The conversation creates participation, instead of answering questions. The conversation structure[2] often includes some facts, feelings, critical thinking and identification of next steps. Each part of the conversation opens the door for participation, observations and engagement.

(This article continues on the next page.)

[1]Kaner, Sam and Noakes, Nelli. *Listening in Multiple Time Frames*. Community at Work, San Francisco, 2018.

[2]Stanfield, R. Brian. *The Art of Focused Conversation – 100 Ways to Access Group Wisdom in the Workplace.* The Canadian Institute of Cultural Affairs*,* Toronto, 1997.

The common element in their conversation craft is the ability to use the following skills. They consistently demonstrate the ability to:

- ✓ Use a conversation framework as a lifelong skill
- ✓ Allow space to include the ideas of others
- ✓ Willingly pause and listen during a conversation

Ability to Facilitate Decisions

I smile at how leaders enable individuals and groups to make good decisions. The group talks about how they arrived at a decision they could act on and support. They trust the leader to help them make decisions that count.

A leader enables and supports individuals to make decisions. They step back and away from making the decision. Instead, they support the development of decisions through a process[3] that engages the group's thinking, experience and knowledge. The ability to let a group explore a topic, poll for resolution and reopen the subject for more conversation engages the group; collectively they can see where they sit relative to a decision.

The common element in their decision-making craft is the ability to use the following skills. They consistently demonstrate the ability to:

- ✓ Let the individual or group make the decision
- ✓ Give adequate time for the decision-making process
- ✓ Keep the group focused on meaningful decisions

Ability to Build Relationships

I watch leaders build relationships with a variety of people, including people who oppose the leader, support the leader or sit back and wait to see what the leader will do.

A leader builds relationships. They support relationships between people who do not know each other and people who do know each other. They work on understanding what people value in a relationship[4]. For example, some will push the relationship and explore ideas and activities. Others will appreciate ongoing contact and information sharing. Some will engage and disengage throughout the relationship. Finally, some like others to reach out and engage them. No two relationship partners are the same, but the relationship is always essential for success.

The common element in their relationship-building is the ability to use the following skills. They consistently demonstrate the ability to:

- ✓ Appreciate that no two relationships are the same
- ✓ Build relationships throughout life
- ✓ Watch for clues for a successful relationship

Final Thoughts

A conflict resolution leader brings four essential skills to their work, each of which facilitates the ability of those around them to make significant decisions. The leader does not hold back their knowledge to answer questions or problems but enables the group to find new solutions and new directions. The best part of this role is it does not have to occur in a mediation, arbitration or litigation – it can start with the people in your community, organization or family.

[3]Kaner, Sam et al. *Facilitators Guide to Participatory Decision-Making*. Jossey-Bass, San Francisco, 2014.

[4]Thomas, Tommy, and Thomas, J.W. *The Power of Opposite Strengths – Making Relationships Work.* Opposite Strengths, Austin Texas, 2006.

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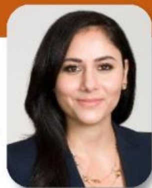

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BEYOND THE JOINT SESSION

JONATHAN ENCARNACION

The Principled Approach as a means to Adjust our Social Bearings in the Virtual Environment

On day one of any course, college students are very much like parties to a mediation. We have an idea of what we want, though we hold an uncertainty for what we have gotten ourselves into.

Per student, the scope of interests varies. The most common "want" is to get a passing grade. Beyond that, perhaps a desire to discover something that can carry over to a forthcoming career. Until the semester's agenda is revealed, a common fear is "What am I bracing myself for?"

When the past year forced a move to online learning, these interests were projected, so to speak, on our laptop screens. This brought the added concern – if only in passing – on whether classroom learning from a distance would remove something fundamentally important to the learning experience.

The advantages to online learning quickly became apparent. Daily commutes were reduced to pressing a power button. A hot breakfast could be prepared while in class instead of being skipped to beat the morning rush. With the ability to turn the audio/visual off, we now had the luxury of multi-tasking should the need arise.

With these newfound conveniences, the concern quickly dissipated. But as the online learning environment settled in, there came signs that it perhaps should not have been dismissed so quickly.

Fast-forward to later in the semester. "Let's start with a quick review of last class," the professor says. "Who remembers the four elements of principled negotiation?"

Silence.

"Would anyone like to start us off?"

Lingering –

"Anybody?"

– Awkward, even.

On the first day, some comfort was found in knowing that online, our standard-issue avatars can shield us from participating clumsily towards first-impression oblivion. But each successful deflection made it easier to sink behind those shields so deeply that they became a virtual analog of the proverbial classroom seat.

Factors contributing to the problem can be found in peer conversations, though not recognized immediately as such. For instance, "I miss the chats that happen before class starts." This led to discussions on how "logging in" does little to encourage a preamble of casual conversation which might have fostered some communal familiarity to "warm up" the encouragement to participate. The concept of "it's so much easier to just wake up and log on" led to considering whether a more conscious effort is required to commit to being "present," since alertness is no longer necessitated by waking up hours before class to prepare and arrive.

Elements that previously influenced engagement,

(This article continues on the next page.)

simply by virtue of routine, are now removed. As more weeks passed, and because the inference of assembly is validated only by the schema of being in a chat room, attendance would drop for some classes in favor of watching the online replay. These detrimental effects from the online configuration were not so apparent until exam time, lingering afterwards through a "sense" that "It's kind of harder to focus online but I don't really know why."

Meanwhile, though the medium of our education has changed, the expectations of a professor have not. The implied deference borne from social norms often entangle their role to be viewed as somewhat similar to a mediator, wherein the responsibility of adjusting for online orientation shifts in their direction to make sure that proceedings yield the desired effect.

But in the virtual world, the professor has lost some of the tools by which they could gauge. No body language to read and no social conventions to rely upon inherent to an in-class setting. They have the unenviable task of developing new tools to analyze engagement towards formulating precedents that can set the table effectively in this uncharted territory.

If the online environment is here to stay, these are challenges to be considered. Thus far, the virtual platforms we use, have not been around long enough to benefit from feedback and refinements to compensate.

In every course, there is always an opportunity to find some unexpected value: picking up something that goes beyond benefits in career and applies to life in general. With respect to Alternative Dispute Resolution, the concept of principled negotiation presented itself as something which fitted that description. Immediately, it offered a shorthand to consider the online challenges that we students inherently sensed, and from there continue accordingly.

At one point in the course, some confusion arose regarding the link used to enter class. (The platform has multiple – sometimes redundant – options.) From the student perspective, the answer is expected to be simply: "This one." But until our professor opened the discussion to provide more context – that the professor's interface is substantially different from ours – we would remain unaware that the professor is unable to "go to the same page" to discern the requested point of reference. A small example, but also perhaps one of the "new preambles" that can nudge towards deeper discussion. Specifically: how to invent further options for mutual gain now that we are all online.

Indeed, it served that purpose here, as an effective transition to separate students and professor from the problem we mutually face. Just as the issue aligned with the students' interest to learn, it also highlighted the professor's desire to teach. This provided an opportunity to forge a mutual problem statement and from there inform how our interests can be met inside this setting.

As students during this "virtual interim," logging on with the mindset of being a collaborative participant – just as one would for a principled negotiation – could service the communication and commitment challenges we face quite well. This provides an alternative until advancements in technology can supplement otherwise.

Beyond how such efforts yield benefits in the "now," the precedents that result could go on to help future classrooms and perhaps virtual platform design as a whole. Applying the principled approach to make these existing problems a thing of the past is an interesting concept to consider as we move forward.

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Jonathan Encarnacion *is a recent graduate of the Seneca College paralegal program. His prior career experiences include freelance writing in entertainment journalism, airline operations and emergency planning. He is currently in a clerk position while preparing for the Law Society of Ontario Paralegal Licensing Exam, 2022 intake.*

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A BRIEF COMPARATIVE ANALYSIS ON THE "ENFORCEABILITY OF (FOREIGN) AWARDS" IN ONTARIO AND LONDON (UK), A LEADING ARBITRATION SEAT

HYUNJU (CRYSTAL) PARK, LLB, LLM

I. Introduction

The New York Convention of 1958 ("NY Convention") allows for the enforcement of cross-border arbitral awards through a simplified regime. But implementing the NY Convention does not mean all foreign awards stemming from arbitration procedures are automatically entitled to enforcement;[1] an award's enforceability in a jurisdiction depends on applying an established framework of rules and principles. However, the enforcing court usually still has the discretion to enforce the award based on domestic law.[2] According to the *2018 International Arbitration Survey: The Evolution of International Arbitration* conducted by Queen Mary University of London (QMUL) and White & Case LLP, "enforceability of awards" was perceived to be the "most valuable"[3] attribute of international arbitration. In their follow-up *2021 International Arbitration Survey*, survey participants were asked, "what adaptions would make other seats more attractive to users?" The following options topped the results: (1) "greater support for arbitration by local courts and judiciary"; (2) "increased neutrality and impartiality of the local legal system"; and (3) "better track record in enforcing agreements to arbitrate and arbitral awards."[4]

The role of local courts and the legal system play a significant role in determining whether a seat can become more attractive to users of the international arbitration regime. This article discusses enforcement mechanisms of arbitral awards in Ontario and compares them with the mechanisms in place in London, which has ranked alongside Singapore as the most preferred seat globally.[5] It attempts to identify what Ontario's courts can do to make the province an attractive and sought-after arbitration seat, comparable to London.

II. Ontario (Canada)

Canada ratified the NY Convention and subsequently implemented it with the passing of the *United Nations Foreign Awards Convention Act* in 1986. Except for Quebec, Canada adopted a reservation to limit the recognition of foreign awards to disputes where they are considered to be "commercial." All 10 Canadian provinces and three territories have enacted legislation that recognizes and incorporates the NY Convention, and unless a ground for refusing enforcement can be made out, Canadian courts will enforce international commercial arbitral awards rendered in Canada.

Article 34 of Ontario's International Commercial Arbitration Act (ICAA), which is modelled similarly to Article 36 of the UNCITRAL Model Law, states that an arbitral award may only be set aside in the following four circumstances – (1) when a party to the arbitration

(This article continues on the next page.)

[1] Jonathan Hill, "The Exercise of Judicial Decision in Relation to Applications to Enforce Arbitral Awards under the New York Convention 1958" (2016) 36:2 Oxf. J. Leg. Stud. 304 at 304.

[2] *Ibid.*

[3] Queen Mary University of London & White & Case LLP, "2018 International Arbitration Survey: The Evolution of International Arbitration" (2018) at 7.

[4] Queen Mary University of London & White & Case LLP, "2021 International Arbitration Survey: Adapting arbitration to a changing world" (2021) at 8.

[5] *Ibid.* at 6.

agreement is under some incapacity or invalidity; (2) when the party making the application is not given proper notice and unable to present their case; (3) the award falls outside of the scope or terms submitted by parties to the arbitration; and (4) the composition of the arbitral tribunal was not in accordance with the parties' agreement.[6] However, Canadian courts have interpreted these grounds narrowly, tending to enforce awards.[7]

A party seeking to recognize and enforce an international arbitration award in Ontario must commence a proceeding following the province's Rules of Civil Procedure, within the limitation period governed by ICAA (i.e., 10 years running from the date on which the award was made or the date on which the proceedings were concluded).[8] The length of enforcement may vary depending on the case's complexity, ranging from six months (if unopposed) to three years (if contested).[9]

III. London (United Kingdom)

According to the QMUL & White & Case LLP *2021 International Arbitration Survey*, London is ranked first alongside Singapore as the most preferred seat globally, and 66% of survey participants in the North American region preferred London.[10] This could derive from London's long-standing reputation for being one of the truly global international arbitration centres and recognition for international finance.[11] Still, it is critical to understand how the English courts have interpreted and applied the terms of the NY Convention to garner trust globally in the international arbitration space.

The United Kingdom (UK) acceded to the treaty in 1975, 11 years before Canada. The UK has implemented the local *Arbitration Act 1996* ("AA"), and since then, when setting aside an award, there must be grounds for refusal; similar to Ontario's ICAA, the burden of proof rests on the respondent. Nothing in the AA authorizes English courts to substitute their decisions for an arbitral tribunal's decision, making awards deemed final and binding on the parties.[12]

Where a losing party disputes an arbitral award, there are two ways that it can be enforced. The first is to obtain leave of the court to enforce the award as a judgment or order of the court; the second would be to bring an action on the award and seek judgment from the court. Case law demonstrates that the English courts provide a degree of deference toward the enforcement of foreign arbitral awards, and prudently decline to enforce awards only when there are serious public policy considerations[13] – but that threshold is extremely high.[14] In *Dallah*, the UK Supreme Court confirmed that its stance follows the "pro-enforcement" policy reflected in the NY Convention.[15] The possibility of appeal on a point of law is also extremely limited under Section 69 of the AA. Overall, the English courts' stance of accommodating the recognition and enforcement of arbitral awards strengthens the perception of England and Wales as an arbitration-friendly jurisdiction.

Statistics released by the English Commercial Court (ECC) in 2018 also demonstrate that English courts are reluctant to interfere in the arbitral process. Out of 274 claims brought under the AA from 2015 to March 2018, only six were ultimately successful.[16] This provides strong confidence to parties who most value "enforceability of award" and "greater support for

(This article continues on the next page.)

[6]*International Commercial Arbitration Act,* SO 2017, c 2, Sch 6, s34.

[7]Matthew J Latella, Christina Doria & Glenn Gibson, *Arbitration procedures and practice in Canada: overview,* online: Thomson Reuters Practical Law <https://ca.practicallaw.thomsonreuters.com/0-502-1672?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a423955>

[8]*Supra* note 6 at s10.

[9]*Supra* note 7.

[10]*Supra* note 4 at s10.

[11]Lughaidh Kerin & Anthony Cullen, "Enforcement of foreign arbitral awards: a London perspective" (2017) 3;4 Int. J. Diplomacy and Economy 388 at 388.

[12]*Ibid.* at 391.

[13]*Soleimany v. Soleimany* 1999 QB 785*, Honeywell International Middle East Ltd. v. Meydan Group LLC,* 2014 EWHC 1344, *and Dallah Real Estate & Tourism Holding Co. v. Pakistan,* 2010 UKSC 46.

[14]Illias Bantekas, *An Introduction to International Arbitration* (Cambridge: Cambridge U.P., 2015) at 245.

[15]*Dallah Real Estate & Tourism Holding Co. v. Pakistan,* 2010 UKSC 46.

[16]Commercial Court Users' Group, "Meeting Report", published on March 13, 2018. *See also* Ben Sanderson, *Appeals under the English Arbitration Act 1996,* online: DLA Piper <https://www.dlapiper.com/en/uk/insights/publications/2018/05/appeals-under-the-english-arbitration-act-1996>

arbitration by local courts and judiciary" when selecting a seat. In contrast to the English courts' stance, a Canadian arbitration award may be appealed to the court on a question of law, fact or mixed fact and law, if the arbitration agreement provides that the remedy is available.[17] Furthermore, if the agreement is silent about the availability of such remedy, the award can still be appealed to the court on a question of law, with leave.[18] The court's determination can be appealed again to the provincial Court of Appeal, with leave.[19] In 2014, the Supreme Court of Canada (SCC) held that the relevant courts "may grant leave if it determines that the result is important to the parties and the determination of the point of law may prevent miscarriage of justice."[20] This judgment essentially identified contractual interpretation to be a question of "mixed fact and law."[21] This may enhance deference to arbitrators, but still leaves the critical question of whether it is sufficient to increase parties' confidence that courts will not unexpectedly or unpredictably interfere in the arbitration process.

IV. Conclusion

The wording of Ontario's ICCA and the English AA are similar with respect to challenging arbitral awards, and the NY Convention is applicable in both jurisdictions, but the position of the judiciaries in applying these statutes has been slightly different. English courts have created an atmosphere that conveys to parties that they are "pro-arbitration" and will most likely not interfere with the arbitration process; Ontario courts have paved the way in the same direction but are still behind. If attracting more (international) arbitration in Ontario is the end goal, it may be advantageous to analyze statistics of successful and unsuccessful challenges to arbitral awards in the past decade. Ontario courts should continue to support the integrity of the arbitration process and convey deference to arbitrators when the strict grounds for challenging arbitral awards have not been met.

[17]*Supra* note 6 at s45(2) and s45(3).

[18]*Supra* note 6 at s45(1).

[19]*Supra* note 6 at s8(3).

[20]*Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, at para. 68.

[21]*Ibid.* at para. 50.

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- Power-of-Sale
- Divorce
- Estates
- Family Wars
- Other Complicated Real Estate Difficulties

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