

Manitoba ADR (Alternative Dispute Resolution) Section

Report to the National Alternative Dispute Resolution Section of the Canadian Bar Association, 2008-2009

Introduction

The Alternative Dispute Resolution Section of the Manitoba Bar Association promotes various models of negotiation, mediation, arbitration, restorative justice and therapeutic justice, as alternatives to the formal court process. The Alternative Dispute Resolution Section is interested in all dispute resolution mechanisms, whether civil, labour, family or criminal.

Executive

Chair: George Derwin
Vice-chair: Lawrie Cherniack
Secretary/Treasurer: Kelli Forbes
Past Chair: Patricia C. Lane
Member-at-Large: Heather Dixon
Member-at-Large: Sarah Hill

The Canadian Healthcare Safety Symposium 8 October 23-25, 2008

The Canadian Healthcare Safety Symposium is one of Canada's flagship events in healthcare safety. The series seeks to provide information about healthcare from other industries and around the world. It presents ideas, knowledge, skills and attitudes that present opportunities for the improvement of healthcare safety in Canada.

George Derwin provided the keynote presentation "*Medical encounters and everyday life: why apologies heal*" with Dr. Aaron Lazare. Dr. Aaron Lazare, professor of psychiatry at the University of Massachusetts Medical School, conducted research on the importance of understanding the patient's perspective on clinical outcome and applying a negotiating paradigm to the doctor-patient relationship. This research, conducted in the mid-1970s, generated more than \$1 million in National Institute of Mental Health funding over a period of eight years. Dr. Lazare is author of "*On Apology*", in which he provides an analysis of the power of apology for individuals, groups and nations.

Dr. Aaron Lazar discussed the importance of apologies in medical practice, which emerged from the growing international interest in apologies, beginning in the mid 1990s. Dr. Lazare focused on 10 to 12 specific healing factors in the apology process. For healthcare service providers, who face complex social

dynamics on a daily basis, the analysis was important. People require different healing factors in response to various offenses. Dr. Lazare discussed the common threads that run through all apologies on a universal basis. Even though apologies have much in common, each apology is a unique transaction between two parties.

George Derwin described and reviewed the status and effects of Canadian apology legislation in relation to healthcare. While the effects are not quantifiable, the overall result was seen by the healthcare industry as a positive direction, helping to change the way people think about the legal aspects of adverse events.

**The Manitoba Bar Association 2009 Mid-Winter Meeting
Dispute Resolution & Mediation Skills for Lawyers
January 22 to 24, 2009**

The Alternative Dispute Resolution Section sponsored a continuing legal education seminar for the Manitoba Bar Association 2009 Mid-Winter Meeting called "Dispute Resolution & Mediation Skills for Lawyers".

The speakers were:

George Derwin, Deputy Public Trustee for the Province of Manitoba

Vivian Hilder, University of Manitoba, Faculty of Law

Prof. Jennifer Schulz, University of Manitoba, Faculty of Law

Justice Michael Thomson, Court of Queen's Bench

Moderator: - Lawrie Cherniack, Cherniack & Cherniack

The seminar provided practical information to lawyers, advising them as to what to do when engaged as a mediator. Lawyers attending this session heard a discussion about strategies for managing a mediation session. At this seminar, lawyers will learn about conflict management techniques that to be used in their daily practice. The presentation provided a range of methods to resolve different forms of conflict and provide skills that practitioners can bring to the process. Lawyers received information about the importance of dispute resolution skills, regardless of the area of practice. The session also provided information about how mismanaged conflict can escalate hostility into a costly conflict.

**Dispute Resolution in Labour Relations
May 12, 2009**

Grant Mitchell, labour lawyer and educator, discussed the various dispute resolution mechanisms available in labour relations. Grant Mitchell provided the historical background to labor dispute resolution in provincial and federal statutes

and the relevant jurisprudence. Grant Mitchell discussed the mechanics of resolving labor disputes on an informal basis.

Mediators Beyond Borders April 7, 2009

Mediators Beyond Borders of Manitoba was recently created by law students at the University of Manitoba. It is the first chapter in Canada. The organization has only been on operation for a few months. Members of Mediators Beyond Borders have expressed an interest in working with the Manitoba Alternative Dispute Resolution Section. To date, not much progress has taken place, as the organization is still working on getting itself up and running in Manitoba. The Manitoba ADR Section plans on entering into further discussions with Mediators Beyond Borders in the near future.

Mediators Beyond Borders - Partnering for Peace & Reconciliation is a non-profit, humanitarian organization established to partner with communities worldwide to build their conflict resolution capacity for preventing, resolving and healing from conflict. This partnership involves the design and implementation of sustainable peace building initiatives responsive to the needs and culture of the communities, and to the history of each conflict. MBB is not a first responder, and is not prepared to intervene in the midst of violent crises.

Mediators Beyond Borders interprets "beyond borders" broadly. It acts across geographical, political, economic, societal, and cultural boundaries. MBB partners with NGO's, universities, political and activist groups, community organizations, professional societies, environmental, commercial and other entities worldwide to develop skills for group facilitation, public dialogue, strategic planning, collaborative negotiation, peer mediation, restorative justice, and public policy consensus building.

MBB considers the term mediator to be inclusive of a broad range of conflict management and resolution endeavors. Activities such as conciliation, consulting, facilitation, consensus building, conducting public dialogues, system design, restorative justice initiatives, education and capacity building to mitigate or prevent violence are all encompassed within a sweeping definition of mediator.

Manitoba contact information:
Amanda Faulkner: amanda.faulkner@hotmail.com
Derrick Stewart
Website: www.mediatorsbeyondborders.org/

Private Prosecutions Court Mediation Project

In 2007, the Manitoba Bar Association, at the urging of the ADR Section, lobbied for government funding to provide for Mediators in private prosecutions court. In

2008, the Province of Manitoba provided the requested funding. Disputes that appear in Private Prosecutions Court usually arise in the context of ongoing relationships in the community that have taken a turn for the worse. Many of the disputes arise out of a failure to communicate effectively. When tensions between the parties escalate, parties become openly hostile towards each other. In the end, one or both parties may wind up seeking to obtain a peace bond pursuant to section 810 of the Criminal Code of Canada.

The adversarial, criminal process exacerbates already strained relationships. The underlying problem is not remedied by the court process. The court process addresses the symptoms of the problem, not the root cause. Mediation is an important component of the process, as it provides an alternative to the formal court process. Mediation gets the parties to communicate with each other, in order to gain insight into the other person's perspective.

In Manitoba Provincial Court, mediation is now the first resort formal court hearings are now used only as a last resort.

Another advantage of mediation is that the parties are able to craft their own solutions. Experience has shown that people who are personally involved in crafting a resolution to a dispute are more likely to voluntarily comply with any agreement reached. Additionally, the resolutions are not constrained by the legal constraints of types of orders that a court may make.

The timely intervention is helping resolve differences in an amicable fashion. According to Mediation Services Winnipeg, mediating of private prosecutions matters will likely reduce the court workload by approximately 60%.

This project has now been fully implemented; greatly reducing trial wait times by resolving disputes quickly and informally. This project is very cost-effective, with a budget of only \$25,000 per year. It is anticipated that the government funding will continue.

Judicially Assisted Dispute Resolution

The Manitoba ADR Section examined the continuing success of the Judicially Assisted Dispute Resolution process.

The Manitoba Court of Queen's Bench, unlike many other courts in Canada, has not introduced formalized mediation rules or mandatory mediation rules. In fact, the process is completely devoid of any rules. The rationale of the Manitoba courts for the process without rules is that the existing civil litigation rules created the complexities of litigation; therefore, the court rules committee did not want to create more rules to ameliorate the mischief created by the original complex civil litigation rules.

The JADR process is not contained in the Manitoba Court of Queen's Bench Rules. It would appear that the relative freedom from the formal process gives Manitoba's JADR process its strength. Parties are free to fashion their own process. The parties, in conjunction with a Court of Queen's Bench judge, set out the terms and requirements of the JADR proceedings.

One of the advantages of JADR is that the parties can choose the judge they want to mediate the matter. A list of three or four potential JADR judges is jointly prepared by counsel. Counsel may, if they want, specify order of preference. The lawyers send a joint letter to the Chief Justice or Associate Chief Justice of the Court of Queen's Bench, advising the court of their selection and order of preference. Although any judge of the Manitoba Court of Queen's Bench may be named as a potential JADR judge, the assignment of the JADR judge is in the discretion of the court. If the proposed judges are unavailable, due to other commitments, you may have to submit a revised list.

In reviewing Statements of Claim filed in comparison to the number of trials heard, only 2% to 3% of the claims filed actually proceed to trial. The remaining 97% to 98% of the Statements of Claim filed are settled, discontinued or abandoned. In regard to the Statements of Claim set down for trial, only 23% to 32% of the cases actually proceed to trial. For JADR cases set down, 81% to 84% of the cases proceed. The settlement rate is unknown, as the Court of Queen's Bench does not maintain any statistics in this area. Anecdotal information would indicate that the JADR settlement rate in Manitoba is in the range of 85% to 95%, depending on the information source. Even without verifiable data, it is evident that the JADR process has been an immense success. Presently, in Manitoba, more cases are set down for JADR than for trial. Civil litigation matters are three to four times more likely to proceed to JADR than to trial.

**Chair of Alternative Dispute Resolution Section
George Derwin**