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Alternative Dispute Resolution Symposium

Studio Bell · Calgary, AB

May 6, 2019

DERER LUTZ

Timing & Structure

8:00 am	Registration opens – refreshments served
8:30 am	Opening comments and the day's overview by hosts
9:00 am	Panel #1 – Mediation Fundamentals and Best Practices
10:15 am	Morning refreshment break
10:30 am	Panel #2 – Best Practices in the Conduct of Mediation – Insurance Disputes
11:30 am	Panel #3 – Best Practices in the Conduct of Mediation – Non-Insurance Disputes
12:30 pm	Lunch with Keynote Address by the Right Honorable Beverley McLachlin, P.C.
1:45 pm	Conversation between Beverly McLachlin and audience
2:30 pm	Afternoon refreshment break
2:45 pm	Panel#4 – Arbitration Fundamentals and Best Practices
4:00 pm	Closing remarks from hosts including overview of topics being formulated for 2020 Symposium
4:30 pm	Closing reception featuring Ruthie Foster

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Respect, Integrity, Effectiveness

- GREETINGS
- Why is “reboot needed and essential”?
- Exploding demand for and use of private dispute resolution services (mediation, arbitration and med/arb), exciting but highlights a less than optimum understanding and utilization of these dispute resolution platforms by counsel, clients, mediators and arbitrators
- World is complicated, people are complicated and when people or world is in conflict, increased complexity in striving for resolution and peace
- Expose complexity, understand in dispute resolution context and build from it to achieve satisfactory outcomes through principled process
- Private Dispute Resolution Services – Why needed?
- Private Dispute Resolution Services – Why exciting?
- The current state of Private Dispute Resolution Services – Why worry?

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Why needed?

- Traditional litigation – inaccessible – cost, risks, delays
- JDRs – benefits, shortcomings

Why exciting?

- Viable alternative to JDR and traditional litigation – increasingly mainstream
- Resolutions that incorporate participation, input and needs of the parties through a satisfactory process – less cost, angst, less delay, more creative solutions

Why worry?

- Less than optimum understanding of process options and fundamental principles by some mediators (or counsel serving in that role), counsel and clients leading to erosion of effectiveness, integrity and thereby undermining long term appeal and viability of process. Similar considerations apply to arbitration.

- Put another way – problematic conduct by those conducting mediation and counsel participating in them relegating quest for resolution needlessly more difficult, complicated and in the process erode effectiveness and integrity of mediations.

- Access to Justice Issue – for ex. cost, parties left dissatisfied or disillusioned with process

Process – Starting with Today's Program

- Guest Speakers – process and criteria employed
- Audience – diverse and experienced
- Panels #1, #2 and #3
  - Progression from Mediation Fundamentals to Practice Considerations and Challenges – Insurance and Non-Insurance Contexts
- Principal Practice Focus Mediation or Arbitration
  - Multiple interconnections between the two – interchangeable lessons to learn and apply – stick it out!
- Panel #2
  - Why start with practice considerations in insurance context?
  - Moderated by Marney
- Panel #3
  - Lessons to be learned and applied in non-insurance dispute context
  - Unique challenges and opportunities in non-insurance dispute context
  - Moderated by Ivan
  - Emphasis on practice issues
    - Active audience participation essential for Panels #2 and #3

Process – Starting with Today's Program

- Noon Hour
  - Keynote Address by The Right Honourable Beverley McLachlin followed by moderated conversation with Marney and audience
  - Lunchtime arrangements
- Book signing at merchandise table
- Panel #4 – Arbitration Fundamentals and Best Practices
  - Program change – now to be moderated by Ivan
  - Principal practice focus and interest – mediation – don't change the channel – multiple interconnections with arbitration
- Closing remarks – glimpse into program development for 2020 – for ex. process design, role of A. I. in dispute resolution work – short video to whet everyone's appetite – evolving supplement to our work from technology advancements?
- Closing Reception - Ruthie Foster – ENJOY!
  - Be sure to check out Ruthie's cds and merchandise for sale at the same table as the book signing

- **Substance of Program - Big Picture**
  - Process envisioned by Marney and Ivan doesn't end today – encourage ongoing interaction and through it finalize program for Year Two – planning already unfolding
  - Cast net broadly for Year One – solid, broad foundation for diverse dialogue, more programs to follow – all in cause to preserve and enhance relevance, integrity and effectiveness of dispute resolution and thus appeal of it
  - Our objective in achieving our objective – serve as catalyst
  - Expanding our collaboration platform to encompass all of you

I. MEDIATION – FUNDAMENTALS AND CONSIDERATIONS

- **Voluntary Process** – bullying in its various forms both inappropriate and ineffective - FULL STOP
- **Party Autonomy** – Defined and in practice
- **Considerations in Selection of Mediator**
  - Trust
  - Approach / Technique "Labels"
    - Interest-based / Rights-based
    - Evaluative
    - Facilitative
    - Narrative
    - Transformative

"… our whole tendency (as conflict resolution practitioners) to identify our work by whether we take an evaluative, facilitative, narrative or transformative approach is at best artificial and at worst rigid and even manipulative. Our work is as complex as the conflicts that we intervene in, and there is no single simple approach that is always appropriate or effective. Most conflicts require a multiplicity of different interventions, and most experienced conflict resolvers use these. An evaluative mediator without good facilitative skills is likely to be considered less effective at intervening in a complex conflict. Even dedicated facilitative mediators use evaluative techniques at times. They might not tell parties how strong their case is should they adjudicate it, but they may well evaluate the pros and cons of different approaches to communication, framing of issues or constructing a table … What disputants need from conflict resolvers is more than process: they need understanding, engagement, creativity, strength, wisdom, strategic thinking, confrontation, patience, encouragement, humour, courage, and a host of other qualities that are not only about process or substance. Each of us brings a difference set of personal and professional characteristics and skills to the table that helps people work their way through conflict as best they can …"[1]

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[1] Mayer, B. S., *Beyond Neutrality* (Jossey Bass: 2004) p. 145

II.

- Apparent Decline in Effectiveness and Success Rates in Mediations – possible factors?
  - Rapid explosion in growth and number of parties and counsel seeking out mediation – puts focus on instances and frequency of poor preparation, poor rapport amongst counsel (civility issue) and confusion over role of mediator and process for and at mediation.
  - Poor / ill-advised / unacceptable practices by too many serving as mediators – undermines integrity of process generally and the necessary level of trust parties and their counsel have for all mediators.
  - Strategizing of counsel and clients previously focused on "winning" at trial (which now rarely occurs) now transposed to mediations, starting with attempts at "strategic" selection of mediator.
  - Less case law over time to guide negotiation and valuation of claims in mediation.
  - Diminishing trial experience of counsel and mediators – anyone can read case law – it is significant trial experience that informs counsel and mediator concerning practical risks and judicial tendencies associated with case presentation and determination at trial …
  - More posturing with opening positions at commencement of mediation, in advocacy of counsel, and in negotiations – reflection of considerations noted above – preparation, a "win" strategy, little to no trial experience to draw upon.
  - Increasing pattern of good progress made toward resolution at mediation but complete closure realized in days/weeks that follow mediation – again, reflection of multiple factors including "win" strategy – expectations/hope other side will "blink" post-mediation to close remaining gap to resolution.
  - Excessive wait times for trial dates – some degree of pressure / urgency removed to settle at mediation, cases presented at mediation not close to trial ready (for ex., no defence experts yet retained). All fodder for more unhelpful strategy employed.
  - Resolutions reached in past – common and quite easily achieved – perhaps lead to perception that more aggressive positions can be maintained by parties and mediator should be able to still conclude a settlement.

III.

- **Selection of Mediator – Practical Reality in Insurance Dispute Context**

  - In first instance, must be acceptable generally to insurers / defence
  - Fine line thereafter – being acceptable to and trusted by all sides
  - "Strategic" selection / imposition of mediator – clear and unhelpful implication – a benefit / advantage is perceived or expected by the defence in both process and outcome
  - Bias – whether real or perceived potentially develops – "label" fatal to any aspiring mediator in longer term; destructive to integrity of mediation in longer term

  - **TRUST** = "currency" of a mediator[2]
    - Won't favour one side or the other in process or outcome and will guide a fair and balanced process to resolution

  - Engaging in good faith and constructive discussion amongst counsel regarding best choices for mediator lays foundation of trust in process and mediator early on
  - "Strategic" imposition of mediator breeds laziness on the part of counsel, lack of trust in and engagement with mediator by plaintiff and counsel, unnecessary conflict and complications along path to possible resolution

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[2] Adams, G.W., *Mediating Justice: Legal Dispute Negotiations (2nd Ed.)* (CCH Canadian Limited: 2011)

IV.

- **Sampling of Poor / Unfortunate / Unacceptable Practices by those serving as Mediators**
  - Imposing process from outset – "… what I need or expect in advance of mediation …"
  - Once convened for a mediation – imposing process on parties and counsel without consultation – will there be an opening session? If so, how structured, what issues if any to be addressed, willingness to hear from parties? Mediator quick to provide overview of risk, worse yet, specific, uninvited, poorly timed evaluative input – the uninvited private adjudication phenomenon
  - Upshot – very divisive and generally poor management approach to the mediation process
- **Focus on Evaluative "Label" - Example of Multiple Consideration That Apply**
  - Recent historical perspective – interest-based/rights-based evolve to more evaluative
  - Typical trap to new / inexperienced mediators – propensity to offer quick, specific opinion on merits – polarizing and divisive and wrong if offered without invitation from parties
  - Mediator should continually find ways during course of mediation to build rapport and trust with parties and their counsel – hindered by poorly timed and executed evaluative input
  - Offered prematurely, undermines and disturbs right and opportunity of parties to advocate positions and exercise some progressive negotiation strategy
  - Consider the source of opinion – trial experience of mediator – anyone can read a case
  - Sensitivity to solicitor-client relationship plus pressures counsel are under to deliver for client
  - Counsel often seek reassurance from mediator experienced in litigation regarding settlement quantum – fair reflection of merits of claim? Background with "standard of care" litigation a bonus

Components to Mediation Practice
the good, the bad and the ugly

Plaintiff

Defence

1. State of Readiness of Case for Mediation
2. Thoughtfulness, Civility and Accuracy of Discourse between Counsel re: Mediator Selection
3. Attitude or Desire to "Win", for ex., "Strategic" Imposition of Mediator
4. Preparation of Client
5. Advocacy

   ("It's Not About the Nail…")
6. Negotiations
7. Unhelpful Antics, Comments and Conduct at the Mediation – Counsel and Clients
8. Balance between Interests of Counsel and those of Client
9. Impact on Credibility with Colleagues – on Prospects as Aspiring Mediator – Marketing Considerations for Aspiring Mediators

1. State of Readiness of Case for Mediation

- Attempts at resolution early in litigation is laudable – but unique challenges
- Increasing frustration seen from insurers who would prefer to attempt settlement via direct negotiation before mediation – is mediation really necessary?

2. Thoughtfulness, Civility and Accuracy of Discourse between Counsel re: Mediator Selection
   - Counsel needlessly dismissive and disrespectful re: mediator options
   - "… I think A is better suited than B …" vs. "… are you kidding me …"
   - "… neither I nor my client will agree to A …" – vs. reality – ongoing and regular mediations conducted with insurer involved
   - Little or no thought given to setting the stage properly for a constructive mediation process
   - Candid discussion about expectations for process. If there is a degree of optimism about prospects for success, further discussion about process and goals.

3. Attitude or Desire to "Win"
   - Strategic selection / imposition of mediator – extreme examples
   - Multi-party scenario – one stubborn counsel hold out – don't accede to it – rewarding disrespect and negative conduct
   - Options for plaintiff's counsel (and, on occasion, defence counsel)
     - Push back – plaintiff counsel – "… why would I agree to another defence counsel at the mediation table?..."
     - Indifference – "… I know how to neutralize or work around the proposed mediator …" or worse yet, matters not to me – unfortunate
     - Experienced defence counsel to Ivan – "… I've basically come to the conclusion that any senior litigator can serve as mediator…" – respectfully, think again
     - Be strategic yourself – our evolving practice (Marney and Ivan)
   - "Win" through superior preparation, advocacy and negotiation strategy at mediation

4. Preparation of Client
   1. The basics of mediation – what to expect generally from the process;
   2. Information about the principles of confidentiality and "without prejudice";
   3. What paperwork to bring to mediation;
   4. Some information about negotiation strategy – clients must understand that there will be give and take;
   5. Guidance on the appropriate division of roles between lawyer and client - what is valuable for clients to say as distinct from lawyers, and some written material on the client's role and how the client can prepare; and
   6. Discussion on the different purposes of mediation; for example, when the goal should be gaining a better understanding of what the issues are rather than striving for settlement.[3]

   - Some bad examples …. Increasing tendency – drop a mess on mediator's lap to solve

5. Advocacy
   - Often a lost opportunity at mediations
   - Aggressive vs. constructive; zealous advocacy ≠ effective "settlement" advocacy
   - Counsel's credibility and reputation – huge factor
   - Sincerity
   - Personalizing position
   - Common defence counsel submission – "…for you it is personal, for us it is business…" – Where did this come from and why?
   - Common expressions – "… brief speaks for itself …"; "… it is what it is …"

6. Negotiations
   - Be smart, be flexible, work with not against mediator, be constructive, be efficient, utilize and maintain credibility and reputation throughout
   - Common approach near end of mediation – counsel on both sides to mediator – "… just get their best number …"
   - Counsel will often say regarding initial exchange of offers – "…will be telling about our prospects for the day…" - it tells you nothing
   - Second half of mediation, well into negotiations – some plaintiff counsel will ask/direct mediator to seek "best position" from defence (when, for ex. plaintiff's position $500K beyond objectively reasonable settlement target and defence position $100K below it) - problematic

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3 Simmons, Martha E., In Search of Resolution: Complex Issues in Mediation Advocacy (Thomson Reuters, 2018)

7. Unhelpful Antics, Comments and Conduct
   - "… if I can't have my way / achieve fairness at mediation, I will get it at a JDR or trial …"
   - Comment from plaintiff's counsel to mediator – "… Ivan, it is unfortunate that we have not had much success of late at these mediations …?" – Implication? Not cool
   - Observation from defence counsel – "… but Marney, I chose you as mediator …" – Implication? Not cool
   - Fanning unhelpful flames - plaintiff's counsel demonizing the insurer and counsel; on the defence side - trivializing the plaintiff and his/her counsel
   - Counsel half way through mediation – "… We are leaving. We don't seem to be getting anywhere …" – other examples of "strategic" expressions of frustration.
   - Misquoting mediator's evaluative input at the mediation post-mediation. Not cool
   - Obstructing the work of the mediator at mediation
   - Insincerity, needlessly negative attitude, injecting toxicity into the process
   - Risk of crash landing on the "no fly list" of multiple mediators

8. Balance between Interests of Counsel and those of Client

9. Impact on Credibility with Colleagues and Prospects as Aspiring Mediator, including Marketing Considerations – word and negative experiences travel fast amongst counsel and mediators
   - Don't be inconsistent in practice – promoting certain mediators or retired judges, with a "win" strategy in mind, as mediator on your defence files but concurrently promoting yourself as a worthy mediator choice to colleagues – quick way to tank your rapport and respect with opposing counsel
   - Don't misrepresent your experience, training or style
     - "I have the same training as Sabri, Marney…."
     - "I basically use the same mediation style / approach as Ivan…"
   - Don't push too hard, be patient, show consistent commitment

Poor Practices by Some Impact Credibility of Process and Effectiveness for All

Respect, Integrity, Effectiveness

- Just allow market to weed out mediators who are not, over time, viewed in satisfactory light
- "… Ivan, I was with a mediator two weeks ago – volunteered an opinion when not sought … you won't do that to us will you? …"
- Counsel antics – misquoting evaluative input of mediator post-mediation, consistent and disruptive conduct and strategy employed by counsel … etc. – undermines trust and faith in mediator
- Complaints voiced regarding experiences with various mediators – "… will never use A again …" – drags down integrity and standing of all mediators and process
- Not an experienced vs. inexperienced mediator issue – largely senior litigation counsel / retired judges who should know better (with all due respect)
- "… can't recall how you, Marney, like to run these mediations …"
- "…Ivan, another mediator I was urged to try several months ago didn't want to let plaintiff speak… are you ok with that?..." – Really?
- During mediation – suggestion by mediator – "… let's try this negotiation approach …" – to which counsel respond, "… tried something similar to that a couple of weeks ago with another mediator – didn't turn out so well …"
- Plaintiff's counsel: "… not too keen on Ivan as mediator – doesn't fight hard enough for plaintiff …" Poorly managed mediation gets needlessly confrontational and argumentative – leaves some with impression that without a good scrap, best outcome not being achieved. Four of many critical attributes for mediator – optimistic, calm, patient, respectful engagement throughout

Poor Practices … cont'd

Respect, Integrity, Effectiveness

- Plaintiff's counsel in middle of negotiation – "… Ivan, I like and respect you but I find your evaluations of cases to be conservative … just like our judges …"
- Counsel to mediator early in process – "… Ivan – mediator A always willing to give evaluative input – you seem more reluctant – what's up? Implication – less confident in assessment? Reticence is process based not substance based
- Counsel to Marney half way through mediation – "…But Marney, Ivan gives his views on merits, what gives?"
- Artificial impediments to mediations articulated by some mediators – for ex. - if liability or credibility of a plaintiff in issue – "…I can't help you…" – Really?
- "…Marney, other mediators ask a plaintiff questions in opening session – you not so much – why?..." – Here's why – trial experience
- Random faux pas – Mediator too chummy with one side or the other during mediation, soundproofing of caucus rooms – too much loud laughter in defence room
- Ill-advised comments by mediator – for ex. at end of mediation to plaintiff's counsel – "…I wouldn't have paid you that much…" – Really?

- Lots of variation on a theme to mediation styles is good and to be encouraged. Problem – when integrity and effectiveness of mediation undermined by incontrovertible mis-steps and mistakes by mediators – that's a big problem. For ex. – the rest of us should not be forced to reassure counsel (and regain trust) that uninvited evaluative opinions will not be provided

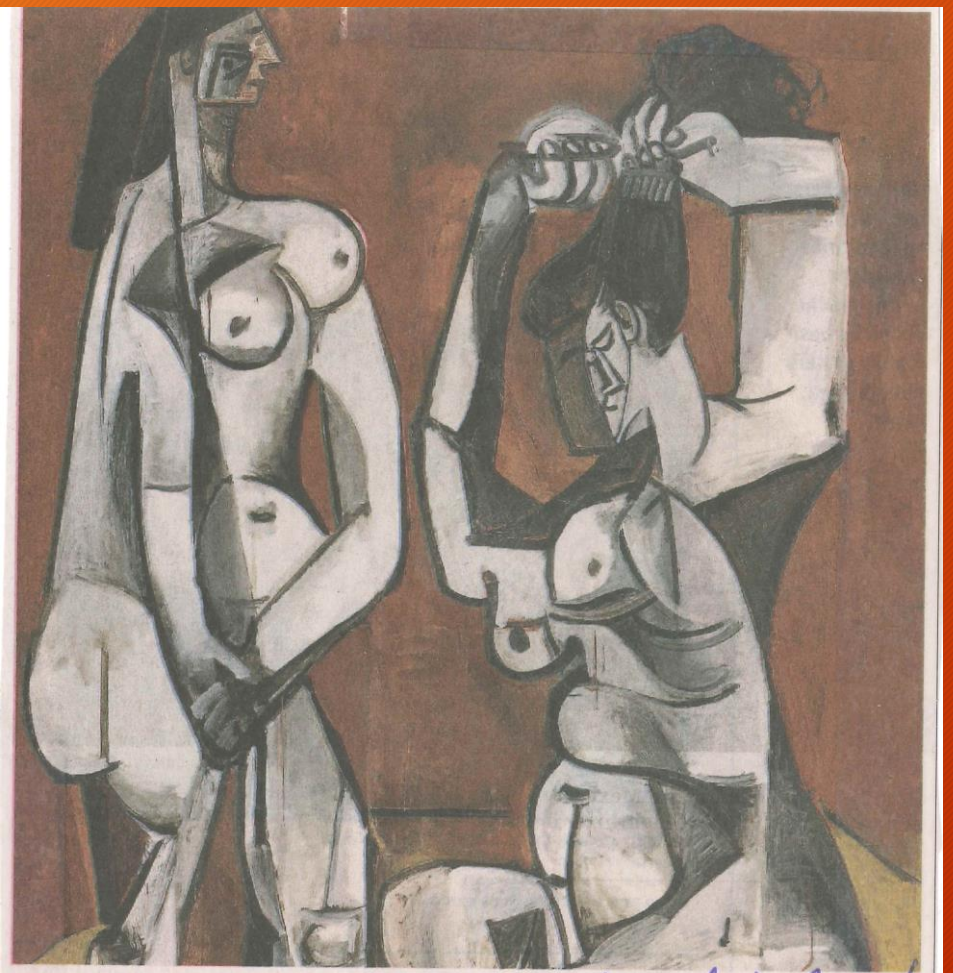
- **Arbitration Fundamentals and Best Practices - Panel #4**
  - Introduction of Panelists, Overview of Topics and Themes for Panel Presentation and Interaction with Guests (Ivan)
  - Mediation segue to Arbitration – Med/Arb, Party Autonomy (Perry)

  - Select Fundamentals (Sabri) Statutory frame work for provincial and international proceedings
    - Overview of and select topics regarding limitations
    - Recent case law regarding select procedural matters – for example, *Lafarge*

  - *Telus Communications Inc. v. Wellman*, 2019 SCC 19 – Overview, Import, Practical Ramifications (Tony)
  - Has arbitration lost its way? What needs to change? Discussion of diversity of arbitrators and panel generally; interplay between panelists; transparency and education (Adelle)
  - Arbitration in the Energy World (Kemm)
  - Top Three Best Practices Pointers – Perspective of Clients, their Counsel, the Arbitrator (all panelists)
    - Similarities to problematic patterns of conduct and practice in mediations?

Recommended Reading

1. Adams, G.W., Mediating Justice: Legal Dispute Negotiations (2nd Ed.) (CCH Canadian Limited: 2011)
2. Casey, Brian, J., Arbitration Law of Canada (2nd Ed.) (2011, JurisNet, LLC)
3. Donais, B., The Art and Science of Workplace Mediation (2014 Thomson Reuters Canada Limited)
4. Fisher, R. and Ury, W., Getting to Yes (Penguin Books, 2011)
5. Frye, N., The Educated Imagination (Harper Collins Canada Ltd., 2002)
6. Lederach, J.P., The Moral Imagination (Oxford University Press, 2005)
7. Macfarlane, Julie, The New Lawyer: How Clients are Transforming the Practice of Law, (2nd Ed.) (Vancouver: UBC Press, 2017)
8. Macfarlane, Julie, Dispute Resolution Readings and Case Studies (2nd Ed.) (2003 Emond Montgomery Publications Limited)
9. Malhotra, Deepak, Negotiating the Impossible (2016 Berrett - Koehler Publishers, Inc.)
10. Mayer, B.S., Beyond Neutrality (Jossey Bass - 2004)
11. Mayer, B.S., The Conflict Paradox (Jossey Bass - 2015)
12. Mnookin, Robert H., Beyond Winning (2000 - Harvard University Press)
13. Simmons, Martha E., In Search of Resolution: Complex Issues in Mediation Advocacy (Thomson Reuters, 2018)



National Post - Aug-4/18

FINE FOR ART The Montreal Museum of Fine Arts says an ad for its Picasso exhibit is back online after being rejected by an ad-review algorithm for violating Facebook's anti-nudity policy. Museum spokeswoman Pascale Chasse says it was blocked because it showed Picasso's painting entitled "Femmes a la toilette," which features two nude women. Facebook is reviewing its ad standards.

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Respect, Integrity, Effectiveness

Thank you for joining us today;
there will be more to follow…

2nd Annual Symposium in 2020

- Marney & Ivan