

Ari Kaplan taking expertise to mediation realm

BY JULIUS MELNITZER

For Law Times

Ari Kaplan of Koskie Minsky LLP is one of Canada's leading pension lawyers. Now, after 17 years as a pensions practitioner, he's also taking his expertise to the field of mediation.

"What I intend to expose the mediation and litigation community to is my original expertise in pension law," he says.

"Over the course of my career, I've found that pension issues engage a broad range of litigation and dispute resolution formats because they affect a wide swath in the community."

Toronto-based Kaplan is a qualified mediator who has devoted more than half of his training to family law, including screening for power imbalances and domestic violence. He has also run into family issues regularly in the course of his pensions practice.

The complexity of pension issues, he believes, raises access-to-justice concerns that expert mediation could address.

"At the most human level, pension issues arise when spouses separate because they must be taken into account when considering support or net family income," he says. "But the issues

can be difficult, so family lawyers and judges are anxious that they be resolved."

There's considerable value, Kaplan maintains, in having experience in what's frequently a significant part of a family law dispute.

"Substantive and practical experience in pension law can allow spouses to find options they may not have known about in order to resolve a legal impasse," he says. "Knowing how large public sector plans operate or how sponsors will administer separation agreements can be helpful in crafting appropriate solutions."

While Kaplan is focusing on acting as a traditional mediator with a special expertise, he also sees opportunities as a co-mediator.

"It's not uncommon for family mediators to call in both financial professionals for valuing assets and parenting professionals to deal with custody and access issues despite the fact that these co-mediators may not have substantive experience in family law," he says. "There's no reason why they shouldn't call in a pensions professional where appropriate."

Similarly, pension expertise has a place in labour and employment disputes.

"It could be very useful to



Mediation over pension issues can cover a range of legal areas, says Ari Kaplan.

have... a mediator or co-mediator who knows the mechanics of pension law," says Kaplan.

Corporate restructuring and similar matters, of course, also beckon.

"The pension piece can be an important part of any corporate restructuring or transaction, including mergers and acquisitions, so it's not a bad idea to have an expert around to deal with these issues as a mediator or co-mediator," says Kaplan.

Indeed, Kaplan's interest in mediation stems from a case in which a large company and three unions negotiating a pen-

sion agreement retained him as an expert.

"I helped to identify the issues and set up negotiating parameters as well as giving legal opinions," he says. "In point of fact, I became a mediator."

The experience also crystallized the similarities involved in assessing any dispute that deals with a collective agreement.

"I've spent much of my career representing large groups of employees and pensioners because pension rights are by nature group rights," he says. "And whenever there is a compromise of pension rights that affects a large group, as in class action settlements or insolvency proceedings, adjudicators need assurance that the deal arrived at has been fair to all stakeholders and classes of pensioners."

Providing that assurance, according to Kaplan, is a feature of mediation practice.

"Writing a report, for example, can be very helpful in assisting a judge or adjudicator reviewing a settlement," he says. "It can also be helpful even when there is no litigation and a board of directors or governors want support for a decision they've made or direction they've taken."

Allan Stitt, president and chief executive officer of ADR Chambers, says Kaplan has

some good ideas but he suggests they could be a tough sell.

"It's a challenge to get lawyers who aren't used to mediation to buy into the discussion," he says. "And when they do get their head around mediation, it may be hard to convince them of the value of subject-matter expertise."

For his part, Stitt believes subject-matter expertise can be quite valuable but he notes that a large part of the mediation community thinks otherwise.

"Still, Kaplan's approach could be very popular if he can get lawyers and mediators to understand the value of getting involved in creative solutions, where subject-matter expertise can really make a difference," he says. "If he can do that, his phone will be ringing off the hook."

Stitt points out that co-mediation is quite common, especially for less experienced mediators who learn their craft by mediating with more experienced individuals.

"The subject-expert model, however, is less common because very few parties are interested in paying two mediators," he says.

Nevertheless, Stitt believes the pension bar will be most welcoming.

"That's the right place to start," he says.

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