

# Canadian Arbitration and Mediation JOURNAL d'Arbitrage et de Médiation Canadien

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# Who are we?

The ADR Institute of Canada, Inc. was created from the Arbitrators' Institute of Canada, Inc. in 1974 as the first Canada-wide professional association for dispute resolution. Its primary function was to provide the public with the means of resolving disputes and to act as a national centre of information, education and services in the field of alternative dispute resolution.

The Institute is a non-profit organization which brings together not only arbitrators, mediators and other ADR professionals, but also major corporations and law firms who work together to promote the creative resolution of conflicts and disputes. This broad membership base brings diverse skills and experience to the Institute and contributes to the development of the field of dispute resolution in Canada.

The National institute works in collaboration with seven Regional Affiliates throughout Canada to develop and promote standards for practice. The Regional Institutes develop programs and services targeted to regional needs.

All members throughout Canada adhere to the Institute's Code of Ethics and are subject to its disciplinary policies. Members who have achieved the required education and practical experience may apply for recognition as a Chartered Arbitrator or Chartered Mediator.

In 2002, the ADR Institute of Canada launched new national rules for administered ADR. These new rules provide parties to a dispute with a professional third-party neutral (as have past rules). The new national arbitration rules also provide for administration of disputes by the Institute.

With an expanded membership and expanded ADR services, the National Institute and its Regional Affiliates are poised to become the dispute resolution leaders in Canada.

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# Qui sommes nous?

L'Institut d'Arbitrage et de Médiation de Canada, Inc. est originaire du Fondation des Arbitres du Canada en 1974 comme la première association professionnel de RED canadienne. Sa fonction primaire était de fournir le public avec les moyens de résoudre des disputes et de servir comme centre national d'information, d'éducation et d'améliorer les services dans le domaine.

L'Institut est une organisation à but non-lucratif qui réunit non seulement des médiateurs et des arbitres mais aussi les autres gens de la profession, les sociétés commerciales et les cabinets d'avocats. Ils travaillent ensemble pour promouvoir des règlements extra-judiciaires, des conflits et des disputes. Cette base apporte des techniques et expériences diverses à l'Institut et font des contributions au développement dans le domaine au Canada.

L'Institut National travaille en collaboration avec sept Affiliées Régionales à travers le Canada pour développer et promouvoir des normes de pratique. Les Instituts Régionaux développent des programmes uniques à leurs besoins régionaux.

On exige de tous les membres qu'ils se soumettre au code de déontologie de l'institut et au procédures disciplinaires adoptées par celui-ci. Les membres qui ont acquis l'expérience et la formation requises conformément aux normes de l'Institut peuvent demander de la reconnaissance comme un Médiateur Certifié ou Arbitre Certifié.

En 2002, L'Institut d'Arbitrage et de Médiation du Canada a lancé des nouvelles règles nationales pour le RED administré. Ces nouvelles règles fournissent aux partis à une dispute une tierspartie professionnel neutre (comme aux anciens règlements); mais, les nouvelles règles d'arbitrage nationales pourvoient aussi à l'administration de conflits par l'Institut.

Avec un sociétariat diverse et des services augmentés, l'Institut National et ses Affiliées Régionales sont sur le point de devenir les dirigeants de règlements extra-judiciaires.

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# Message from the President



*Barry C. Effler, LL.B., C.Arb.*

*President of the ADR Institute of Canada, Inc./ Institut d'Arbitrage et de Médiation du Canada Inc.*

The world of ADR as we know it is in a state of change. Business, government and academic fields are embracing the concepts of dispute resolution. Everywhere I go, people are looking for better ways to resolve disputes. So, how does the ADR Institute of Canada fit into all this?

We are, and should be, leaders of change and growth in the field of dispute resolution. The strength of any national organization comes from credibility. For us, that credibility comes from being a national voice speaking for over 1600 full members and several hundred more student and associate members who are the heart of the professional dispute resolvers in Canada. Seven regional affiliates allow policies to be created that can then be implemented nationally and in the regions with those variations needed to make the policies valuable for the membership in that region.

Through our joining of the Arbitration and Mediation Institute of Canada with the Canadian Foundation for Dispute Resolution, our membership voice has been strengthened by the addition of our corporate and national law firm members. They bring to the table the perspective of the

users of dispute resolution and a clear vision of how dispute resolution can be used for their organizations.

OK, that lists some of our strengths. What do we need to do soon to build new strength?

Periodically, every organization needs to pause and review what it has accomplished and decide what the goals should be for the future. This is the task we have set for ourselves.

## Strategic planning with our Regional Affiliates

We need to pull together the dreams and goals of the regional affiliates and the national organization. We are partners and we need to set out our respective roles and needs to better serve both our membership and the general public.

To do this I have formed a national strategic planning group drawn from members of the Institute across Canada. Many of these members have had limited involvement with the national organization before. They bring a fresh perspective and experience drawn from previous involvements in

... continued on next page ...

strategic planning for a variety of national and provincial organizations.

In addition to myself, the planning steering committee members are:

- Gerald W. Ghikas, Q.C., C.Arb.  
(British Columbia),
- W. Harrison Goodwin Jr., A.A.C.I.  
(New Brunswick),
- Rhonda Reich (Alberta),
- Ken Selby, C.Med. (Ontario),
- Nick Tywoniuk Ph.D, P. Eng.  
(Alberta),
- Anne M. Wallace, Q.C., C.Arb., C.Med.  
(Saskatchewan), and
- Judy Ballantyne (national office).

This committee created a discussion document that has been circulated to all regions for commentary. If you have not already done so, please take the time to review it and let your regional office know your thoughts and ideas. You can request a copy by email from the national office.

A strategic planning meeting will be held at the end of January, 2003 to build consensus for joint national/regional action on issues of concern to all of us. The national directors will be joined by regional Presidents and other regional representatives to establish directions and programs that lead to growth and success for all of us.

I appreciate the opportunity to serve as President. My two personal goals for my term of office are the establishment of strong links between ADR Canada and the regions and the development of ADR Canada as the national body to facilitate the settlement of disputes. The National Arbitration Rules are a major step towards one goal and the upcoming strategic planning process is the next step for the other.

Please contact me with your comments and concerns. I can be reached by leaving a message at the national office or by sending an email to me at [bceffler@mts.net](mailto:bceffler@mts.net).

I look forward to hearing from you.



Barry C. Effler, LL.B., C.Arb.  
President of the ADR Institute of  
Canada, Inc./ Institut d'Arbitrage  
et de Médiation du Canada Inc.

## National Editorial Committee

The ADR Institute of Canada is seeking expressions of interest from Members for a National Editorial Committee. This committee will provide advice on direction and content of the Journal.

The Journal is usually published twice a year. It contains Institute news and articles of interest to ADR practitioners and users of ADR services. The Institute wishes to invite submissions, and requires a body of professionals to develop criteria and review submissions against these criteria.

If you are interested in this opportunity to serve the Institute, please respond by January 30, 2003. Please send your letter of interest and supporting materials to:

**National Editorial Committee**  
**ADR Institute of Canada, Inc.**  
#500, 234 Eglinton Ave. E.  
Toronto, ON M4P 1K5

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By Robert Nelson, LL.B.

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# Launch of new rules

The new ADR Institute of Canada, Inc. National Arbitration Rules were launched October 28, 2002 at The Essential ADR Seminar in Toronto. Also launched were the new Mediation Rules of the ADR Institute of Ontario to be used on an interim basis in conjunction with the National Arbitration Rules. The new rules provide a much-needed Canadian solution for Canadian business disputes.

"The rules fill a gap in Canadian business and legal practice," according to Barry Effler, President of the ADR Institute of Canada. They were developed and implemented in response to on-going requests to the Institute's national and regional offices.

Canada's leading law firms agree they are needed. "It is long overdue to have Canadian rules and administrative procedures for arbitration and mediation," says Randy Pepper, Partner at Osler, Hoskin & Harcourt LLP. "These made-in-Canada rules are designed to provide effective administration of disputes similar to – and better than – that offered by the American Arbitration Association."

The business world concurs. Keith W. Perrett, Managing Director, Litigation, Bank of Montreal says, "The new rules are flexible and efficient. I am confident that many difficult commercial disputes will be resolved through their use."

In an unprecedented collaborative venture, seventeen national law firms co-sponsored The Essential ADR Seminar that launched the new rules. They joined members of the Institute, and other law firm and industry representatives, in discussing issues and best practices in alternative dispute resolution in key business sectors.

Sponsors and supporters included:

- Baker & McKenzie,
- Bank of Montreal,
- Blake Cassels & Graydon LLP,
- Borden Ladner Gervais LLP,
- Davies Ward Phillips & Vineberg LLP,
- DuPont Canada Inc.,
- Fasken Martineau DuMoulin LLP,
- Fraser Milner Casgrain LLP,
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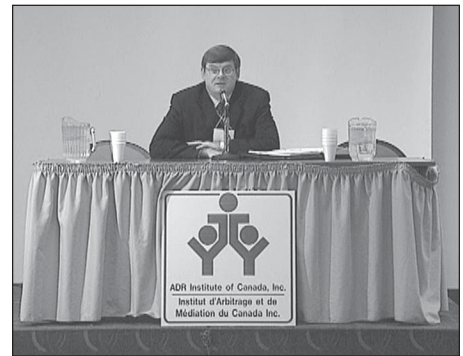
- Gowling Lafleur Henderson LLP,
- Imperial Oil Limited,
- Macleod Dixon LLP,
- McCarthy Tétrault LLP,
- McMillan Binch LLP,
- Miller Thomson LLP,
- Ogilvy Renault,
- Osler, Hoskin & Harcourt LLP,
- Stikeman Elliot,
- Torys LLP, and
- WeirFoulds LLP.

Participants had a unique opportunity to discuss issues and tactics related to effective use of ADR and the rules for business disputes. Sessions included:

- Using ADR Strategy to Advantage in Commercial Litigation;
- Dirt ADR - Real Estate and Condominiums; Disenfranchising Litigation - ADR in Franchise Disputes;
- Getting Out of the Trenches - Using ADR in Construction;
- Wired for Resolution - ADR in IP and Technology; Roadmap to Med/Arb and Night Baseball;
- Clearing the Air, Land and Water - ADR and the Environment;
- Mass ADR - Class Actions and Arbitration; and
- Workplace ADR - One Size Doesn't Fit All.

Participants were advised that the Institute is committed to a yearly review of the rules to ensure they continue to meet the needs of Canadians and Canadian business. They were invited to comment and make recommendations. The Institute has already received significant and substantive comments, and as a result is contemplating amendments to the rules this year, after which they will be posted on the National website and made available electronically to interested parties.

Our thanks to the planning committee, sponsors, session chairs, panelists, and participants for making the launch and seminar a resounding success.



Barry C. Effler, LL.B., C.Arb.  
President of the ADR Institute of Canada,  
Inc./ Institut d'Arbitrage et de Médiation du  
Canada Inc.



Gary Furlong, C. Med.,  
President of the ADR Institute of Ontario, Inc.



The panel presentation on Workplace ADR  
(seated left to right: Barbara Benoliel, Keith  
Perrett and Rivie Seaberg).

# Keynote Address

A highlight of The Essential ADR Seminar was the keynote address by William J. Hartnett, Assistant General Counsel - Corporate at Imperial Oil Limited. Mr. Hartnett, who was the founding president of the Canadian Foundation for Dispute Resolution, gave his perspectives on commercial ADR in Canada. He began with general observations.

## General Observations

- There has been tremendous progress in the acceptance and use of ADR in Canada, particularly over the past ten years, and it's moving more and more into the "mainstream" of how our society resolves commercial disputes - and it's here to stay.
- Mediation is rapidly becoming the first option of choice - and it will continue in importance as more people learn how to use it effectively.
- Arbitration will increase in popularity, as parties better appreciate that it is quite flexible, and it doesn't have to resemble litigation, and they'll realize the importance of drafting arbitration clauses appropriate for the circumstances of the particular agreement - and some may even see arbitration clauses as a way to avoid class actions.
- There is still much to do to ensure that ADR stays in the "mainstream" and continues to experience success - and much of that work will fall to us.

He believes ADR has made such inroads in how we resolve disputes because:

- Society is demanding changes, and now sees that it has choices other than litigation. Awareness of ADR is increasing
- Corporations in particular are much more willing to use ADR - in appropriate cases - to resolve business disputes. They see that it works, and that outcomes can be faster, better, and cheaper



William J. Hartnett,  
Assistant General Counsel -  
Corporate at Imperial Oil Limited

than with litigation. This new thinking recognizes that the price of justice may be too high in many cases, and that not every case warrants a "full dress" court proceeding even if it produces a more "just" result. Costs do matter: globalization and increasing competition make them matter more than ever before. More corporations are using multi-step ADR clauses in commercial contracts, and many industry associations include three clauses in standard-form industry agreements.

- Administrative tribunals are experimenting with ADR mechanisms as a way to help parties resolve disputes without the necessity of a hearing.
- There has been an "institutionalizing" of ADR processes in courts. Alberta and British Columbia pioneered mini-trials (but often just before trial, after significant time and considerable expense), many provinces use judicial mediation, and mandatory mediation in Ontario has put mediation "on the map" much more quickly than would have otherwise been the case.
- The Canadian Bar Association's *Task Force on Civil Justice* played a role in demonstrating the value of ADR to an audience of governments, judges, lawyers, and the public.

## Experience with ADR

Mr. Hartnett described his experience of the Syncrude coker-fire litigation, the key case that convinced him to think differently about dispute resolution. He detailed the extended time and extensive documentation of the proceedings, and described the evidence as complex and technically overwhelming. He recalled wondering how there could be "real justice" under such circumstances, and thinking there must be a "better way". In fact, a parallel mediation process did begin during the course of the trial to settle some discreet issues and save trial time. And ultimately, they settled before the defendants case was to begin - after 260 days of trial over about 2 1/2 years - saving at least 2 more years of trial time, and undoubtedly the time and cost of appeals. And they ended up with a result that all of the parties could live with.

His experience with this case led him to propose mediation in subsequent cases. Informal research suggested that there was a willingness among General Counsel in Alberta to learn more about ADR and consider using it in appropriate cases. There was support from large law firms in Calgary for the development of an ADR organization with a "user" focus. The result was the Canadian Foundation for Dispute Resolution, which placed a high value on access to excellent third-party neutrals. The Foundation merged with the Arbitration and Mediation Institute of Canada to form the ADR Institute of Canada because of a belief that one organization, reflecting the interests of "users" and "providers", would be more successful.

He added that there is also a need for an ADR organization in Canada to provide administration services - and the ADR Institute has more critical mass to succeed in this area than either of its predecessor organizations.

## Informal Survey

In preparation for his address at the seminar, Mr. Hartnett did an informal e-mail survey of thirty general counsel for their views on ADR. It was clear from their responses that mediation is the first option of choice. Most had used mediation over the past 2 years and were happy with the process. They reported a 76% mediation resolution rate, and savings in time and money. There was little experience with early-neutral evaluation. There were mixed views on arbitration, with widespread support for it in international agreements (largely due to concerns about exposure to courts in other countries). There seemed to be less willingness to consider arbitration in domestic agreements unless the disputes arise in specialized or highly technical areas. He has heard these same reservations over the years - having had a bad experience with it or having it cost too much time and money - and has asked if there were similar concerns about litigation. The answer was always "yes".

## Increasing Awareness

In his view, we need to create greater awareness of the fact that we can make arbitration what we want it to be.

- It can be quick and inexpensive, which is appropriate for certain types of disputes such as contract-interpretation questions that don't require extensive (or perhaps any) production of documents and discovery.
- Alternatively, it can have all the trappings of litigation - but we get to choose the decision-maker.
- We need to think through exactly what we want.

Mr. Hartnett believes that a substantial measure of certainty and control is possible by using arbitration provisions that actually fit the contract. Important considerations for arbitration clauses are:

- the type and scope of discovery,
- expectations about pre-hearing procedures and applicable timelines, and
- whether to use an administrative body to manage the arbitration.

More discovery than is really necessary can add costs, in terms of time and money.

## Administered Rules

He strongly favours the use of an administrative arbitral institution.

- It provides an important buffer between the parties and the arbitrator and helps prevent ex parte communication between a party and the arbitrator about the merits of the case.
- An institution can handle routine procedural and administrative matters at much lower cost than an arbitrator.
- It can assure the initial appointment of an arbitrator in the face of a party who delays or chooses not to participate in arbitrator selection.

He also favours choosing to reference a set of arbitration rules.

- The rules close the door to debate about the meaning and application of the arbitrator's authority and the rights of the parties under the arbitration process.
- They help avoid good-faith disagreements over rules and procedures.
- They also make it more difficult for a party - not operating in good faith - to frustrate, complicate, or delay the proceedings if it is in their interest to do so.

Mr. Hartnett applauded the fact that the ADR Institute of Canada is offering administration services. Feedback from his survey - and elsewhere - indicated there is an unmet need for this service in Canada. Recent court decisions have been supportive of arbitration, and this may result in the increasing use of arbitration clauses.

## Challenges to Arbitration

Challenges to arbitration have been made on the basis that arbitration agreements are one-sided, expensive, onerous, and that arbitration denies certain rights available through litigation such as punitive damages. The obstacles to using arbitration he has heard most often include the following.

- It can take just as long or longer than litigation, and cost even more because of payments to arbitrators - but it is within the power of the parties to define what kind of arbitration is appropriate in clauses and to tailor discovery and

other procedures to meet their needs - whether that happens to be an inexpensive or an expensive option.

- Many arbitrators "split the baby in half" so that no one wins or loses - but a study done by the American Arbitration Association found no empirical evidence to support that notion.
- Arbitrators don't always follow "black-letter" law as do the courts, and this imports uncertainty into business relationships - but there is always uncertainty in going to court, and courts are not at all reluctant to apply "equitable" principles such as reasonableness, fair-dealing, and good conscience. Judges are using their discretion to override contracts, set aside business transactions, and second-guess management decisions whenever appropriate to bring about a "just" result, even when in conflict with "black-letter" law.

## The Road Ahead

In Mr. Hartnett's view, the future will be a positive one for ADR in Canada. Our courts will continue to innovate with court-annexed ADR as governments face ever-more-significant challenges in meeting the expectations of those who use our civil justice system. Our courts compete for government spending with health care, education, social services, transportation, the military, and security. The way of the future will focus on dispute resolution in ways that give attention to the vast majority of disputes that are possible to settle without a trial - as well as to those disputes that require a trial - for one reason or another.

## Describing Success

Mr. Hartnett suggested that we can describe success for ADR when certain things happen or continue to happen.

- Success is when we reinforce our expectations to our lawyers that they need to understand ADR alternative and how to use them effectively. Some lawyers like to fight - and we do need them. But we need them to understand that using litigation for every dispute is like using a driver for every shot in a golf game.

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- Success is when we change our attitudes and working assumptions from confrontation to conciliation, with some importance on the values of balance and compromise to complement the traditional emphasis on “vindication of rights”.
- Success is when lawyers advise clients - in every case - and at every state of litigation - of the appropriateness of using ADR.
- Success is when lawyers and parties can suggest mediation without it being seen as a sign of weakness.
- Success is when we achieve broad acceptance - among lawyers and the public - that there is a wide range of cost-effective ADR methods for resolving disputes - and that they work.
- Success is when leaders in law, government, and business forcefully and frequently speak out in support of alternatives to litigation in order to open minds and change attitudes. Commitment is necessary to achieve long-lasting change.
- Success is when most people fully appreciate that litigation may only resolve the legal issues, and that it may not deal with - or solve - the underlying problems.
- Success is when we change our working assumptions so that once we reasonably understand the facts and the issues in a dispute, we will initiate settlement discussions or ADR. We won't postpone having these discussions until we've gathered all possible evidence and dealt with all possible uncertainties.
- Success is when we realize that even with comprehensive discovery, there are always uncertainties with litigation. Gathering all possible facts and researching every conceivable legal issue may not always be worth the time or the cost.

### **“To Win Without Fighting Is Best”**

Success is when our society begins to understand the “to win without fighting is best”. Those are the words of Sun Tzu, a mysterious Chinese warrior-philosopher, on military strategy over two thousand

years ago. The preface to a recent English translation calls this book one of the most influential books on strategy in the world today and notes that modern politicians, military leaders, and executives study it.

Sun Tzu's philosophy is that “the peak efficiency of knowledge and strategy is to make conflict altogether unnecessary”. That's not to say that he never had to fight. It's just that he'd rather “win” without fighting - that is, without losing soldiers and having to spend time and money on the battle.

The point is that out-and-out conflict is the least desirable outcome - although sometimes necessary.

While a trial is necessary in some cases, it isn't necessary in most cases. Even before the advent of ADR, about 95% of the disputes that found their way into the court system resolved themselves before trial. The problem was that too many of them settled on the courtroom steps just prior to trial - after considerable time and expense.

### **In Summary**

Mr. Hartnett closed by reiterating his opening comments and conclusions.

ADR is moving, more and more, into the “mainstream” of how our society resolves commercial disputes, and it's here to stay. Mediation is rapidly becoming the first option of choice, and it will continue in importance as more people learn how to use it effectively. Arbitration will increase in popularity as parties better appreciate that it is quite flexible, and that it doesn't have to resemble litigation in every case. Parties will realize the importance of drafting arbitration clauses appropriate for the circumstances of the particular agreement.

So, in spite of the success of ADR over the past ten years, there is still more to do. In the end, we'll probably define success as when we realize that “to win without fighting is best” - and when litigation truly becomes the **last** resort.

# **How the Rules Work**

## **Administered ADR in Canada**

The introduction of new National Arbitration Rules by the Institute provides one consistent and predictable framework for administered arbitration on a National scale.

With the introduction of the new National Arbitration Rules, there is now an informed recognition that the Institute provides a sound base for administered arbitration procedure in Canada. The provision of administration services under the National Arbitration Rules creates a unique situation which enables users to access a consistent and efficient arbitration process, regardless of their local or regional jurisdiction. This is particularly important in the drafting of commercial contracts where sophisticated parties and their lawyers can opt to modify the National Arbitration Rules in ways that are particularly suited to the type of contract, the location of the contract, the parties and the nature of the disputes which are likely to arise.

In this regard, the new rules have modernized the arbitration process and made a clear departure from more complicated rules of court in force across Canada. This is particularly evident in the following rules:

1. Rules 11 to 17 deal with the commencement of the arbitration and the appointment of arbitrator(s) by the Institute. The Rules set a fixed and convenient process designed to avoid obstacles which could delay the commencement of the arbitration.
2. Rule 22 provides for pre-arbitration meeting, convened by the Tribunal which is designed to provide early identification of the issues in dispute and set the procedure for the arbitration. This codifies a long standing practice of experienced arbitrators which has proven effective in eliminating unnecessary procedural hurdles.



3. Rule 29 provides for production of documents but also provides for directions by the Tribunal to limit the scope of disclosure where appropriate in order to achieve an efficient but effective pre-arbitration process.
4. Rules 32 to 37 govern the conduct of a hearing. These rules include confidentiality provisions, somewhat relaxed rules of evidence, the provision of Tribunal experts and new default provisions.
5. Rules 38 and 39 promote settlement discussion by providing not only for without prejudice offers of settlement, but also for with prejudice offers which may be put in evidence at the arbitration hearing.
6. Rule 44 provides considerable flexibility to the tribunal to make partial final awards, interim awards, and final awards, and provides a specific mechanism for extensions of time for an Award by the parties or a court.
7. Rule 45 provides for discretionary awards of interest which attempts to limit the potential interest issues which have arisen in recent cases.
8. Rule 46 provides for apportionment of costs.
9. Rule 49 provides for simplified arbitration procedure with shorter time periods, a single arbitrator, no discovery, no transcript and an expedited process. This option is attractive for less complicated cases where time is important.
10. Rules 6 and 8 provide for electronic transmission of communications between the parties and the tribunal.
11. Rule 20 provides that part or all of the arbitration may be conducted by telephone, e-mail, internet or electronic communication, if agreed by the parties.
12. The fee structure set out in Schedule A to the Rules provides for a sliding scale of administrative party fees from \$300.00 to \$4,000.00 depending on the amount of the claim. These fees are very cost effective when compared to those of other providers.

The National Arbitration Rules set a new standard for modern, convenient administered arbitration. For more information, or a copy of the Rules, please call the Institute offices at 416-487-4733

## The ADR Institute of Canada's Response to a Uniquely Canadian Problem: National Arbitration Rules

### Introduction

The United Nations Model Law for International Commercial Arbitration is a product of harmonization. Harmonization is a process that seeks to make less significant or to eliminate the significance of the choice of forum.

Even as it embraced the Model Law, with its commitment to party autonomy and minimal court intervention, in a new Commercial Arbitration Act for domestic or local disputes British Columbia<sup>1</sup> clung to traditional norms.

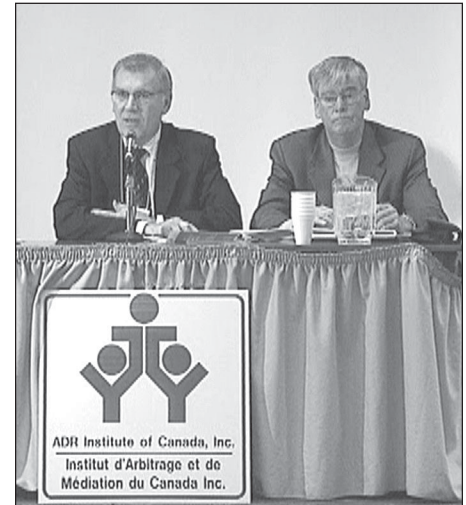
That was in 1986 and now, 16 years later, although all of the Canadian jurisdictions have adopted the Model Law for international disputes, the domestic regime is a quilt of many colours, shapes and forms that reluctantly stays litigation in favour of arbitration, provides for appeals and continues the much-criticized process of the "stated case".

Harmonization of legislation is a task for legislators. Users of the arbitration process and practitioners recently came together in an initiative to attempt to mold some of the rough corners of the Canadian domestic arbitration mosaic; not harmonization, but a step in that direction.

The ADR Institute of Canada is developing National Arbitration Rules.

The ADR Institute of Canada is an amalgamation of Canadian arbitration groups. The Institute was born from a desire to develop a national organization that embraced a number of regional groups and out of a concern of users of ADR with the absence of a Canadian institution that reflected their interests.

The recent initiative followed the track of the *raison d'être* of the organization: rules for use anywhere in Canada, by Canadians, for Canadian disputes, with a limitation as much as possible of the effect of the differences in Canadian domestic arbitration legislation. To put it another way: parties are assisted to avoid worrying about the nuances of each province's domestic arbitration legislation by agreeing to



Gerald W. Ghikas, Q.C. and  
Edward C. Chiasson, Q.C.

Gerry Ghikas (left) and Ed Chiasson (right) are partners in the firm of Borden Ladner Gervais and are Co-Chairs of the firm's ADR Practice Group.

rules that promote as level a playing field as we can get in Canada.

The focus of the Institute and of the Rules is on Canadian domestic disputes.

### The Rules

Two preamble sections of the Rules illustrate the approach of the Institute.

#### Arbitration Clause

A suggested arbitration clause is provided in section I.

*All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall be arbitrated and finally resolved, pursuant to the National Arbitration Rules of the ADR Institute of Canada, Inc. [the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.] The place of arbitration shall be [specify City and Province of Canada] The language of the arbitration shall be English or French [specify language].*

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<sup>1</sup> The Province enacted both international and domestic arbitration laws and was one of the first Canadian jurisdictions to adopt the Model Law. The Canadian jurisdictions were the first in the world to do so.

The provision has much of the scope of the Model Law and embraces non-contractual disputes. Key components of the process are included: place and language. Parties also should specify the number of arbitrators and the governing substantive law of the arbitration.

Related to this suggested arbitration clause are several provisions of the Rules.

An example is Article 20. It provides that hearings may take place at various locales and by various means notwithstanding the designation of an official place of arbitration. This allows parties to select a jurisdiction which offers what they want, for example a limited right of appeal or no appeal, while maintaining the flexibility to organize the case to fit the logistical requirements of the participants.

### **Party Autonomy**

While cautioning parties to ensure that the Rules fit the legal regime that governs their dispute, Section II provides that with limited exceptions, parties are free to develop their own process by varying the Rules.

The exceptions are: Rules 1, 3, 5, 7(a), 10, 11, 12, 16(b), 23(b), 40, 41, 46, 48 and Schedule A – the purpose of the rules; the relationship between the Rules and local mandatory laws; fees; communications with the Institute; waiver of right to object to irregularities; content of the initiating document; impartiality of arbitrators; right to be treated fairly; deposits; fixing of costs; Institute and arbitrator immunity. None of the exceptions are unusual or derogate from party autonomy.

### **Harmonization**

Article 3 provides for harmonization to the extent that it can be achieved in a country with disparate arbitration regimes mandated by a constitutional division of powers. Insofar as the Rules and local arbitration laws conflict, the Rules prevail except to the extent that parties cannot contract out of provisions of local law.

### **Flexibility**

Although the place of arbitration is very important because its mandatory arbitration law generally applies, equally important is the capacity of the parties to have hearings elsewhere or by means other than a formal hearing at the place of arbitration. Rule 20 provides this flexibility.

### **Procedure**

Too often parties and rules make the mistake of attempting to micro-manage the arbitration. Often what they fail to say is as important as what is expressed. Rules of an association that are silent on oral discovery are contrasted with rules that address the topic and arguments are made concerning the power of the arbitrators to order such discovery or whether a party has a right to it.

The corollary of party autonomy is a commitment to the arbitral process and the right of the parties and the arbitrators to manage the process. Prescribing rigid, detailed rules or failing to grant broad administrative powers to the arbitral tribunal converts usual procedural squabbles into issue of authority and jurisdiction.

Rule 23 gives broad powers to an arbitral tribunal to conduct the proceedings as does rule 26. The powers are must be exercised consonant with the rules that deal specifically with procedural issues, but the operation of these rules is governed by the discretion of the arbitral tribunal. This should obviate arguments that seek to circumscribe the authority of the arbitral tribunal and should force the parties to deal with the merits of their procedural requests.

### **Confidentiality**

One of the most misunderstood and overstated “advantages” of arbitration is confidentiality. Few jurisdictions mandate substantively a requirement of confidentiality in arbitrations. Most rules deal only superficially with it. It is a sensitive area which often goes to the tactical heart of the dispute between the parties: one strongly need confidentiality; the other wants public exposure as a lever for settlement.

The Rules, in article 33, opt for a strong confidentiality regime.

### **Experts**

In Canadian domestic practice, the appointment by tribunals of their own experts is uncommon and, to some extent, viewed with suspicion. There is a concern that the parties are delivering to another third-party the decision in their case. Seldom does the appointment simplify the case because each side likely will have an expert to challenge all or part of the tribunal expert’s positions. That being said, the modern trend in arbitration rules is to adopt the inquisitorial approach and to provide for

the appointment by arbitral tribunals of their own experts.

Rule 36 is a happy compromise. It recognizes the modern trend and provides for appointments, but only with the agreement of the parties. The amalgamation of interests makes good sense because often parties will see the wisdom of a tribunal appointed expert to deal with relatively rote issues, for example, auditing accounts where issues of principle are not involved.

### **Offers**

The effect of without prejudice offers on costs is dealt with in article 38. It follows usual practice, but removes doubt that the arbitrators can take such offers into account.

Article 39 is an innovative provision that allows parties to introduce at the merits stage “with prejudice” offers. The relevance and weight of such offers remains to be determined, but the Rules clear the path for their consideration. The more important aspect of the provision is the influence it may have on parties to settle.

### **General**

The Rules specify the authority of the arbitrators to make interim and partial awards, to award interest and to deal with costs. Although these are matters which today generally are understood to be within the authority of arbitral tribunals, clarity is a welcome discouragement to those who may wish to create an issue.

There are expedited rules to fit the need for speed over detailed procedures.

### **Summary**

The ADR Institute of Canada’s National Arbitration Rules are a welcome and most important initiative. The need for harmonization in the country is crucial. Although each province properly retains control of its arbitration legislation, the ability to arbitrate on a relatively, uniform level playing field is a most important step forward. Parties can feel more confident that they can opt for the alternative of arbitration without being overly at risk in another province, whose arbitration law differs significantly from the home regime.

The Rules are not a complete answer. In the absence of uniform legislation there always are likely to be differences between provinces. That is Canada. The Rules seek to strike a balance between the Canadian constitutional reality and the needs of national commerce.

# We Ain't Seen Nothing Yet

by Richard J. Weiler, LL.B., C.Med., F.I.A.Med.

Rick Weiler, an internationally recognized commercial mediator, serves on the Chartered Mediator selection committee of the ADR Institute of Ontario, the national executive of the Canadian Bar Association ADR Section and is a Governor and Vice-President of the International Academy of Mediators

Although mediation enjoys wide acceptance in North America and beyond for its effectiveness in the resolution of commercial disputes, “surface scratching” best describes this acceptance when compared to the potential applications for this powerful process (some of which are suggested at the end of this article). Providers, users and regulators of commercial mediation should reflect on the recent history of the process and commit to the expanded principled use of mediation for their mutual benefit.

Mediation begins with a simple idea: an impartial and mutually acceptable third party can guide disputing parties through the tangled thicket of their conflict to a resolution of their own crafting – a resolution they would not have been able to find unassisted. This simple idea, surely as old as human interaction, found new legs in the 1980's and 90's thanks to clogged court systems and prohibitive costs associated with traditional litigation. Technology, it seemed, was leaping forward in every avenue of human endeavours with the notable exception of commercial dispute resolution where the technologies (i.e. the Court system) seemed intractably rooted in the 19<sup>th</sup> century rather than the 21<sup>st</sup>. This environment combined with post-modern social developments most closely associated with the increased liberalism of the 1960's, proved fertile ground for the growth of commercial mediation.

In the early days it was often the insurance industry most effectively promoting the use of mediation. Anecdotally we understand that early mediation pilot projects undertaken by casualty insurers invariably demonstrated significant savings in transaction (and perhaps claim) costs through the use of mediation. But plaintiffs, and ultimately the plaintiff bar found their interests satisfied in mediation as well. For mediation addressed the “common interests” of defendants and plaintiffs, offering

the opportunity to foreclose risk, delay, cost and stress in a procedurally fair setting.

Once the commercial mediation ball got rolling there was no stopping it. The favourable experience in the insurance setting caught the attention of policy makers and it wasn't long before experiments with “court-connected” mediation led to the mediation process being brought into the tent as an accepted feature of modern courts. Other structural changes fueled the growth of mediation such as Codes of Professional Conduct requiring lawyers to consider mediation when advising clients, ADR “pledge” programs such as that instituted by CPR Institute for Dispute Resolution in New York and the Canadian Foundation for Dispute Resolution in this country and the growth of multi-step dispute resolution clauses (requiring mediation and then arbitration) in domestic and international commercial agreements.

Of course, while all this was happening the cadre of experienced and proficient commercial mediators continued to grow to the point where their “professionalization” is a reality or at least on the radar screen in many locales. Lawyers, too, naturally increased their effectiveness in the mediation process, understanding that in the future it would be traditional trials that would truly become the “*alternative*” process for resolving commercial disputes.

The foretold abridged history of modern commercial mediation primarily reflects developments in North America where the double whammy of cost and delay lit the fuse (the United States leading the way and Canada not far behind). The resultant explosion on this continent triggered a chain reaction that has now reached around the world. The integration of mediation into the British court system is now well established while the European Commission issued a “Green Paper” on its use earlier this year. Africa, Asia and Australia all have multiple commercial mediation initiatives. Also, pointing the way, the United Nations Commission on International Trade Law (UNCITRAL) adopted a new Model International Conciliation Law

in June and it is the rare World Bank justice reform project these days that does not include an ADR component.

With the trend clearly discerned and the continued growth of commercial mediation beyond question the infancy stage gives way to adolescence and the constellation of challenges that stage always implies. Chief among those challenges: housing the flame of enthusiasm for commercial mediation in a lamp of wisdom so as to cast an ever-brightening light down the path of its development. That lamp, fashioned principally by three groups (mediators, users and regulators), can best protect the flame, while letting it shine, if the following principles are observed:

**Commercial Mediators** must strive for personal and collective continuous improvement in the ethical conduct of a mediation process characterized by integrity, procedural fairness and acceptable results.

**Users** – parties to commercial disputes and their counsel – must deepen their commitment to a collaborative approach to dispute resolution; understanding that, yes, humans are a competitive species, but that the best resolutions often come when there is a striving to find outcomes that acceptably address the needs of all involved.

**Regulators** must assist in expanding the opportunities for the appropriate use of commercial mediation while, at the same time, resisting the temptation to restrain the creative potential of the mediation process through well-intentioned but ultimately self-defeating attempts to legislate its conduct.

The opening paragraph suggested that commercial mediation is just scratching the surface of its potential applications. What are some of those “below the surface” applications?

- Pre-litigation mediation sessions in which disputants search for a mutually acceptable solution to the problem prior to the exchange of often incendiary pleadings.
- Mock mediations when litigation is under way. Sophisticated litigators have routinely prepared for hearings using

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# ADR: What is the Real Alternative?

by Michael Fogel, LLB, J.D., M.Ed., C.Med.

Michael Fogel, LLB, J.D., M.Ed., C.Med., mediates public policy, commercial and family business disputes. He works with private and public sector organizations designing DR systems and building interest-based organizations. Michael teaches advanced mediation and negotiation courses for several universities and organizations worldwide and teaches settlement conference skills to superior and appellate court judges in Canada, the U.S. and New Zealand. He is currently working with Israeli and Arab mediators and negotiators who remain dedicated to bringing peace to the Middle East.

## ADR as a System

In many circles, ADR still means *alternative dispute resolution*. Many of us in the business of conflict resolution have been working for years to redefine the familiar ADR acronym to represent *appropriate dispute resolution*. This definitional shift has slowly begun to occur. But for it to really mean something will require us to re-examine the conceptual nature of dispute resolution, as a whole, and the systems that are driven by disputes and their resolution; for example, our court system and the practices of law, mediation, and arbitration.

Presently litigation is seen as the primary course of action to pursue when a dispute arises. Regardless of how committed we are to changing the acronym's meaning, the majority of dispute resolution users still perceive other dispute resolution processes to be alternatives to court. Mediation, settlement conferences, arbitration, and all other forms of *alternative dispute resolution* processes are, for the most part, seen as separate and distinct from the litigation stream, as well as from one another. Changing *alternative* to *appropriate* is a step in the right direction; we need to follow through by working to create a dispute resolution (DR) *system* that encompasses all DR mechanisms and even creates new ones as the need arises. This systemic approach would provide the public with more responsive, efficient and timely processes. With the creation of this more organic and "holistic" approach, those parties involved in disputes, as well as their advocates and representatives, would be able to choose the *appropriate* process, or combination of processes, from the selections offered on the "menu". The

choice would depend upon the nature of the dispute and what would prove most beneficial and cost-effective at the point in time in the dispute. Professionals in DR would become process designers as well as service providers.

In the past those professionals (judges, lawyers, mediators, arbitrators, negotiators, consultant/experts) involved in dispute resolution have pursued DR processes from an "either/or" perspective. By engaging in this "systems" approach to the resolution of disputes, DR practitioners can provide, to the clients and the communities they serve, a more comprehensive and responsive range of services which can be implemented anywhere along the progression of the dispute. ADR (*appropriate dispute resolution*) would be viewed as a continuum within which one could move from one process to another until the matter is efficiently and effectively resolved.

Substantive issues, which are negotiable, can be negotiated. Issues that are seen as negotiable, with the assistance of an objective third party, can be mediated. Issues that could benefit most from an arbitrated decision can be resolved by an arbitrator or by mini-trial. Any issues that require the procedures, protections, and other elements that the court system provides can be litigated. Other aspects of disputes could also be dealt with more creatively as parties begin to look at dispute resolution as a system of strategic interventions.

Rather than argue each and every procedural conflict that may occur throughout the course of a dispute, parties could take advantage of the same systems approach as opposed to pursuing the most costly, time consuming route each time. This integrated strategy would also serve as a foundation for creating more collaboration among those involved in the DR professions. Dispute resolution professionals would likely form strategic partnerships, short or long term, that would serve clients most effectively.

## The Changing Role of Lawyers and Judges

A few years ago mediators, working in areas other than labour-management, found that one of the biggest challenges was finding ways to inform the public that there were alternatives to going "full steam ahead" into litigation. It made sense at the time to distinguish among the various processes that one could choose in order to inform the public as well as promote the advantages of one over the other.

The public is now becoming better informed. Litigants and their lawyers who, in the past, would inevitably wind up in litigation, are now more actively involved in seeking more effective, efficient ways of reaching resolution. Parties in dispute are asking lawyers questions about mediation or arbitration and, in some cases, are making decisions about representation based on whether or not a lawyer pursues a wider range of DR processes. Lawyers are beginning to re-assess the practice of law as clients become less inclined to follow the route to the courthouse steps. As it becomes more evident that other approaches to resolving disputes are proving successful and cost effective, partners and associates are faced with some difficult questions.

When litigation was assumed to be the first course of action to be taken, there was little or no question with respect to whether it was appropriate or not. Now lawyers are struggling with the knowledge that there are other processes that could serve their clients more effectively that, in turn, will result in reduced litigation time and reduced litigation fees.

In principle most would say that this should not be a problem, much less an ethical conundrum. Lawyers are retained to provide the best overall legal services for their clients. Most would also agree that those services would include exploring the most effective options for reaching fair and reasonable settlements. The process or processes chosen would seek to minimize litigation costs and, in some cases, preserve and even enhance valuable business relationships. In reality the concern expressed behind some closed law office doors is "How will this effect revenue?" This is a practical consideration for most busi-



nesses. It presents a particularly difficult situation for the business of practicing law. Faced with more increasingly viable settlement processes, lawyers are beginning to ask themselves (more privately and increasingly publicly) if their own financial interests might be in direct conflict with the interests of their clients.

This potentially explosive question of ethics could be significantly defused if lawyers and judges began to look at extending and expanding the dispute resolution system to encompass all of the ADR processes that could be implemented. While judges are pursuing the integration of more settlement oriented procedures into the court system, lawyers can follow suit by engaging more proactively in the development of a more creative multi-option approach to the resolution of disputes. This multi-faceted model will serve as the foundation for law firms becoming more full service dispute resolution organizations. These lawyers will be providing a wider range of services to clients, who are seeking more creative and efficient ways to resolve disputes. This kind of service defines the term “value added”.

Many law firms throughout North America are successfully moving in this direction. They are de-emphasizing litigation and marketing themselves as problem-solvers. The more lawyers approach the practice of law from a problem-solving perspective and participate in the building of the most effective systems of dispute resolution for their clients, the more marketable their services become. All successful business, including the practice of law, needs to respond to changing markets with changing needs.

More recently, our legal systems have come under harsh scrutiny and have been found wanting in the court of public opinion. Many sociologists and legal academicians are convinced that public confidence in the legal system (along with lots of other “systems”) is progressively eroding. At the same time, there are objectively diminishing resources to support the accelerating rate of justice-related needs. Lawyers, and often judges, are seen as more a part of the problem than as part of the solution. It is time for all of us engaged in the business of DR to step back and assess the “big picture” and find new and dynamic ways to

work together as partners. It is incumbent upon us to provide better service to those who are seeking our assistance, often at some of the most difficult times in their lives. It is time to shift from distinguishing and separating the various methods for resolution to an integration of the resources into a synergistic alliance of *appropriate dispute resolution* processes and professionals. This would be the beginning of transforming the system to a System of Settlement.

## The myth of litigation

In the last few years, arising out of the principle of *appropriate dispute resolution*, I have discovered a concept that seems to resonate for a number of lawyers, judges and mediators. I refer to this as the “myth of litigation”.

The fact is that 98% of all civil lawsuits in North America are resolved, one way or another, prior to trial. That leaves approximately 2 per cent that are actually tried. Many litigants simply “give up” due to the costs associated with continuing. Most are eventually settled, *later than sooner*. Yet we continue to create settlement processes that are alternatives to litigation. This is the “myth of litigation”. It’s as if we are all in some kind of societal trance in which we continue to agree that we are involved a System of Litigation. The objective reality is that we are engaged in a settlement system in which settlement occurs too late and, more often than not, ineffectually and inefficiently. Historically ADR was defined as *alternative* dispute resolution – meaning alternative to litigation. The truth is litigation is the alternative to settlement, and we continue to engage in the world “as if” it is the opposite. How much sense does that make?

This “myth” mentality has led me on a mission, and I’m usually very wary of missions. I am challenging all of us in the business of conflict and dispute management and resolution (mediators, judges, arbitrators, lawyers, court administrators, and others) to step back and look at the bigger picture – the system in which we are all operating. We continue to evolve and develop processes (including mediation in all of its forms) that get tacked onto the system as it presently exists rather than look-

ing at transforming this System of Justice. This system, made up of the sub-systems of the law firm and the courthouse, continues to operate on the principle that a lawsuit filed is a lawsuit tried. This System has not changed (much) to reflect the “two per cent” reality.

Law offices have software that give each file a “life of its own” with brief detours from the litigation path for brief settlement discussions (sometimes) and various litigation events that cause the file to pop up on the lawyer’s radar screen (discovery, motions, etc.). The only other occasions that bring the file to the forefront are various “aggravating events” such as Notices to Mediate (B.C), mandatory settlement conferences, mediation or some other process intended to promote settlement. At present, these events are merely minor exits off of the main litigation highway and are rarely given much attention or real preparation. In fact, they are considered by some to be little more than additional “hoops” through which to jump.

There is no blame to place in this situation. We all find ourselves doing business in various ways; for the most part, we all conduct ourselves in the most efficient, productive and successful ways that we can. I believe that judges, lawyers and others associated with our justice system are doing the best they can within a structure that has deep and strong roots. It is certainly not the time to be pointing fingers at any one segment of this system in which we all have contributed and continue to contribute and participate. As we persist in adjusting and “tacking on” and “fiddling” with our system of justice, we all know deep down that that is how systems stay intact. Systems seem to sustain themselves through their capacity to consume and digest the various add-ons that we feed them.

## Transforming the System

I offer the following “food for thought and consideration”:

- that judges and lawyers consider settlement the main highway and litigation as an exit;
- that litigation be treated as the alternative to settlement thereby reflecting the reality;

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- that, instead of case management, the courts consider instituting settlement management wherein litigation remains only a possibility: let's build a system of justice that reflects the reality that litigation is really the alternative to settlement;
- that lawyers create parallel streams within their practices, a litigation stream and a settlement stream; neither will interfere with the other and will, in fact, complement and support the other: litigation and settlement do not have to be *either/or* propositions or processes; and
- that we re-consider the premise that ardent, passionate advocacy means engaging in an adversarial process: productive and effective settlement requires first-rate advocacy.

## Questions About Cases

These are some of the questions counsel may wish to ask as they consider mediating a particular file.

1. What are some of the various formats used to mediate/settle these disputes, e.g., all of the parties negotiating in a large group session, meeting with small groups that represent similar interests or are negotiating similar issues?
2. What role do/can outside experts play in the successful settlement of these disputes?
3. How important is it for the settlement facilitator to be expert or experienced in the content area in which the dispute arises, e.g., experienced in construction matters in order to mediate a complex construction dispute?
4. How should parties prepare for the process?
5. What are the various measures of a successful process?
6. What are the advantages of mediating this lawsuit vs. using some other kind of process?
7. Who should participate in this process or who should be at the table? Why? To contribute what? or To contribute how?
8. When is the best time in the "life" of a dispute/lawsuit to use mediation or settlement conference? Why?
9. How do the parties choose a mediator or judge? On what basis? Based on what criteria?

10. How important is it for the mediator to be a lawyer or trained in law? Why?
11. What credentials should parties be looking for in choosing a mediator?
12. What are some of the special factors that a mediator or judge needs to consider with respect to this lawsuit that he/she would not necessarily have considered for other commercial mediations? or What are some of the elements/factors, if any, that set this lawsuit apart from others?
13. What role does/can caucusing play in the mediation of this lawsuit? How do I feel about the use of caucusing?

## Becoming more Effective Counsel in Mediation

### I. Shift in Attitude

Effective and productive participation in mediation requires a suspension of an adversarial frame of mind to one of a settlement orientation. You remain your client's advocate while, at the same time, you and the others at the table will be working with the mediator to create a joint problem-solving environment.

Your preparation with your client will begin laying the groundwork for this shift. Your preparation needs to be focused on what criteria you are using as a basis for your negotiations and what *interests* of your client's need to be advanced at the mediation table. This preparation is key to the success of the mediation because your client has, in all likelihood, formed strong opinions about his/her case. These opinions may be based on early discussions with you (their interpretation of what you said or what you actually did say in the heat of gaining client confidence). They are also just as likely to have been reinforced by members of your client's family, friends and business associates. You will want to emphasize the need to suspend these opinions long enough to pursue a fair and reasonable settlement.

You will work with your client in agreeing on the kind of non-adversarial attitude you both need to convey to the other parties at the table and what kind of language and demeanor will convey that attitude.

Consider what exchange of information with the other lawyers might pave the way for more productive negotiations. If you have any questions about disclosure of

certain information, contact the mediator or the service provider to discuss those questions.

### II. At the Table

Be aware of the language you use from the very beginning and the demeanor you convey. The other lawyers and clients will react accordingly. The more you engage in the use of litigation and courtroom language and behaviours, the more adversarial the mediation will feel.

If you make an opening statement (depending upon how the mediator and the parties have decided to proceed), try to make it less an expression of a position and more a description of your client's perspective on the situation. Make it more expressive of the issues that need to be discussed, negotiated and problem-solved and less finger-pointing, fault-finding and judgmental (which will inevitably generate defensiveness from those at the table that feel targeted).

Take cues from the mediator with respect to what changes might be helpful. These changes may focus on process (the "how" of the negotiations) or the substantive elements (the "what" of the negotiations). The mediator will intervene when he/she believes that something is happening that is getting in the way of what you are there to accomplish.

Be self-monitoring with respect to how and what you are saying and the impact it is having on the other parties. The idea is not to "get their goat" and "trigger" them but, to the contrary. The idea is to create the most effective and productive negotiation environment that you can.

Also be aware of how your client is responding to the mediation. You will have agreed, ahead of time, how and under what circumstances your client will participate, but your client's experience of the mediation may change how he/she feels about participating. Be sensitive to her level of anxiety, anger, frustration etc. and, if necessary, meet with her separately (caucus), with or without the mediator, to see what changes might be prove helpful.

### III. As the Mediation Develops

Be aware of the negotiations as they develop. You will notice that there will be a movement from issue identification to interest and criteria exploration to settlement agreements. These elements do not necessarily develop in a linear, sequential man-

ner but will be handled separately as the mediation progresses. The mediator will manage your negotiations in a way that makes the most efficient use of your time and will often “refocus” the conversations to make certain that you and the others at the table are not mixing “apples and oranges”.

If you are not certain why the mediator is managing matters in a particular way and/or intervening or refocusing at a particular point, inquire. Your participation will be enhanced by your understanding or your client’s understanding with respect to why something is being done. If you keep your questions to yourself, you will likely let those questions get in the way of your most effective participation in the negotiations.

The mediator is there as the negotiation manager and strategist for the “table”, and the process still belongs to the negotiators at the table. Be forthcoming with respect to what you believe needs to happen or needs to be changed in order for the mediation to progress. The mediation, itself, is always on the table for negotiated modifications.

Do not wait for the mediator to suggest a caucus. If you believe you and your client would benefit from a caucus, either with or without the mediator, say so.

If you believe that consultation with someone else would benefit you and/or your client, suggest that possibility. If you thought that might be a possibility from the beginning, give notice to everyone of that possibility.

Overall, consider the fact that this mediation process is different from, yet complements the litigation track. You have temporarily suspended the litigation of the matter, a time out so to speak, in order to pursue meaningful settlement negotiations. At all times, consider the factors that will support “meaningful settlement negotiations” and make any and all necessary adjustments to what you and your client are doing and saying to support that process. Those considerations apply before the mediation, during the mediation, in between mediation sessions (if there is more than one joint session) and after the mediation during any implementation of the settlement agreement.

# Annual General Meeting

The 28th Annual General Meeting of the ADR Institute of Canada, Inc. was held Saturday, March 9th at the Delta Pinnacle in Vancouver, B.C. in conjunction with “Practical Approaches to Appropriate Dispute Resolution”. The conference was sponsored jointly by the Institute and the Continuing Legal Education Committee and Alternative Dispute Resolution Section of the Canadian Bar Association.

The Institute is pleased to announce the election of the following directors for 2002: Barry Effler (President), Ken Gamble (1<sup>st</sup> Vice President), Gerry Ghikas (2<sup>nd</sup> Vice President), Cheri Eklund, Christine Fagan, Rhonda Reich, Dave McCutcheon, Bernie McMullan, Jack Marshall, Keith Perrett, Noel Rea, Chris Robinson, Don Short, and Michel Sylvestre. Other officers are Frank Wolman (Treasurer) and Judy Ballantyne (Executive Director and Secretary).

Kent Woodruff, outgoing President of the Institute, outlined successes and challenges. He described the last Directors’ meeting, at which representatives of five of the Regional Affiliates agreed to work with the national organization to develop a truly national strategic plan, as historic. He noted the growth in numbers of Chartered Mediators and Chartered Arbitrators, and presented certificates for Arlene Henry and Bobbi Noble, two of the most recent chartered Mediators. He mentioned the increased profile generated by the June 2001 conference in Ottawa. He invited Members to contribute to the growth and success of the Institute; to help us build better ADR services across Canada; and to help people educate themselves about ADR by encouraging membership, getting involved, promoting the ADR Institute at the national and regional levels, seeking out and serving corporate members, promoting the use of our rules for the conduct of arbitrations and mediations and making copies available, and encouraging the use of the Institute’s administration/facilitation services.



*Presentation of the National Award of Excellence for Contributions to the Field of Dispute Resolution in Canada to Barry Effler by past-president Kent Woodruff.*

## Lionel J. McGowan Awards

This year’s recipients of the Lionel J. McGowan Awards of Excellence in Dispute Resolution were Manitobans. Barry C. Effler, a chartered arbitrator and lawyer, won the National Award of Excellence for Contributions to the Field of Dispute Resolution in Canada. Bernard F. McMullan, a chartered arbitrator, won the Regional Award of Excellence for his contributions to Dispute Resolution in Manitoba. The awards are named in recognition and honour of Lionel J. McGowan, the first Executive Director of the Arbitration Institute of Canada, one of the founding organizations of the ADR Institute of Canada.



*Cheri Eklund, B.C. Director with Kent Woodruff, Past-President.*



# Albania Commercial ADR Centre Project

by Rob Nelson



## International Report

To most of the West, Albania is a remote, isolated country shrouded in Stalinist and Maoist ideology, hence the challenge of introducing ADR into this country that is determined to build a free market economy.

ADR is critical to investors worldwide, as investors are determined to be able to resolve disputes expeditiously.

Building on its success in introducing ADR to Russia, Gowlings felt qualified to enter the international competition for this project which it did win. The program had four major components: drafting modern mediation and arbitration legislation; creating an effective ADR Centre; training arbitrators and mediators; and preparing a business and marketing plan to introduce ADR to Albania.

Once we won the competition and the contract, a major element of beginning a large scale project such as this is personnel. Our team of professionals and support personnel are exemplary. The team members are: Rob Nelson, Hugh Wilkinson, Rick Weiler, David Cruickshank, Andrew Berkeley, Professor Julie Macfarlane and Përparim Kalo. With the exceptions of Professor Macfarlane and Mr. Kalo, this was the team that introduced ADR to Russia in 1999 for the World Bank. As a former Executive Director of the ADR Institute of Canada, I was determined to include the ADR Institute in our team in Albania. To

this end, we relied heavily on the ADR Institute Handbook as reading/reference material in our training courses.

In order to accomplish the above, the team engaged in extensive preparation both in North America and Europe as well as directly in Albania.

Our client is the Ministry of Justice (Albania) who is ably represented by Ms. Bendis Kripa. The entire project is under the sponsorship of the World Bank.

A key element to pulling together a project of this magnitude is developing local contacts. We identified and involved key stakeholders in the academic and legal communities in our project.

Our first task was to create and establish a framework for the development of draft arbitration and mediation laws, as well as developing a business plan for the ADR Centre and to locate potential candidates for training as arbitrators and mediators. Our Albanian team member was very successful in helping to generate interest in the project and in June 2002 we established a Board of Directors for the ADR Centre. The Board of Directors is a diverse group from various legal and academic backgrounds who bring great interest and enthusiasm to the project. The Board members are: Ms. Ariana Fullani, Ms. Tefta Zaka, Mr. Dashamir Koré, Mr. Vangjel Kosta, and Mr. Artan Hoxha.

Also in June 2002, we held a one day training and information session on the planned arbitration and mediation training. This was well attended by over twenty interested candidates. At the one day training and information session we outlined the training program to be presented in the fall, emphasizing the time requirements and commitment required from the candidates. They were all exceptionally enthusiastic and committed.



Over July and August 2002, the project team developed draft arbitration and mediation laws and consultations with the Board and the Ministry of Justice were undertaken. Also, over the summer intensive work was done on training materials for the fall training sessions by the team members.

Applications for an Executive Director for the Commercial ADR Centre were reviewed by the team and the Board of Directors. In early September, interviews were conducted with myself (Project Director) and the Board for the position of Executive Director of the Centre. All of the short listed candidates were outstanding and the decision was very difficult. The successful candidate was Mr. Fatbardh Ademi. Mr. Ademi is the former head of the National Petroleum Agency of Albania. This was a successful start to our September mission which then proceeded with the Basic Arbitration and Mediation Training.

The Basic Arbitration and Mediation Training was very successful. The materials prepared by the team were excellent and the participants, essentially lawyers, enthusiastic and committed. They enjoyed working intensively with the teaching materials supplied which were designed to engender arbitration and mediation skills. This involved intensive role plays and simulations. The basic course was a two week session with some joint lesson plans but with the majority of lessons on split tracks of arbitration or mediation.



In October 2002, the Advanced Arbitration and Mediation Training was held. This was a ten day intensive training course involving complicated simulations, both in arbitration and in mediation. Each simulation incorporated the materials previously learned in the earlier course in addition to more advanced theories and materials. Many of the problems and issues encountered in these advanced simulations were included as a direct response to issues and questions raised by the participants in the first training session. It was very successful and the participants enjoyed the role playing enormously.

On October 30, 2002 we held a graduation ceremony which was well attended with the Deputy Minister of Justice, officials from the World Bank and officials from the Canadian Embassy present. All in all, we were very pleased with the training and with the commitment of the participants and their enthusiasm for learning.

The next stage is to open the ADR Centre. We anticipate that the ADR Centre will be ready to open for business sometime early in 2003. The draft laws are in the process of being reviewed by the Ministry of Justice in order to present them to the Albanian Parliament.

We have found the challenge of working in Albania exhilarating as well as challenging at times. The economy in Albania has undergone drastic changes in the last decade with the introduction of a free market and democracy to a country that was under the yoke of communist rule for so long. The fragile economic atmosphere is one continuing challenge for us as we anticipate the opening of the Commercial ADR Centre. It creates some interesting challenges for us to combat, and hopefully triumph over, while trying to open the Centre and set it on a path of viable financial sustainability. The next 14 months should prove interesting and exciting as we set out to develop the Centre and create an awareness in the business community in Albania for the use of the services offered by the Centre. We hope that by the time the contract has concluded Albania will have a working, successful Commercial ADR Centre to provide a much needed alternative to the costly and time consuming court processes for commercial disputes in Albania.

... commercial mediation continued ...

mock trial processes. Mock mediations ensure that parties and counsel are fully prepared to engage in commercial mediation.

- Mediated business negotiations in which a commercial mediator facilitates collaborative solutions and helps parties avoid derailing the deal-making due to the traditional stumbling blocks of game-playing, reactive devaluation and psychological factors.
- Mediated Board Meetings - as part of a necessary trend toward better governance models and in recognition of the potential value-added, business engages commercial mediators to facilitate meetings of boards of directors.

- Mediated caucus and cabinet meetings (and beyond). Commercial mediators facilitate decision making and problem solving in the political environment. And taking what may seem the next logical step, a public governance model in which mediation play a vital role.

Some express concern that the bloom is off the rose of commercial mediation; that the fad has come and gone (or at least is going); that the process is already tired and has run its course. It is simply not true. Increasingly the workhorse of commercial dispute resolution, the untapped value of the mediation process is bounded only by the imagination of mediators, users and regulators. A principled collaborative dialogue among these three groups is also an essential element in realizing the potential of commercial mediation.

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# Regional Reports

## Alberta

- AAMS Board of Directors spent 3 days in a Retreat with a facilitator to develop a Business plan over the next 3 years. It is now in the first stage of implementation.
- Approximately 2000 students will go through the Certificate program in Conflict Management (210 hrs) Certificate in Arbitration (59 hrs) in any given year. This year a summer institute was held for the first time in Calgary and Edmonton and proved very successful.
- AAMS has acquired additional Boardroom space in their new offices (2<sup>nd</sup> year), and intends to use it for several purposes. So far the camvap program, alternative classroom space, and renting it to members, has been identified as potential usage
- A new display booth has been acquired by AAMS and has made several appearances at trade shows and conferences promoting ADR and AAMS.
- AAMS continues to be a resource for organizations in the ADR field. As part of the qualifications for Mediators and Arbitrators to be included in their rosters, is, membership and training from AAMS
- The AAMS training programs employ 130 Instructors and Coaches who are all members of AAMS.

## British Columbia

2002 has been an eventful year for The British Columbia Arbitration and Mediation Institute (BCAMI). We were pleased to provide support for the National Institute's AGM and McGowan luncheon in March. In June, we held our own AGM featuring Bill King as keynote speaker. Mr. King's presentation, "Champions of Change", challenged the status quo and jolted our minds out of the box into new perspectives on personal and organizational growth.

Also at the AGM, we recognized the long and dedicated service of Reva Lander, who served for 13 years as our Administrator. Other changes at the institute in-

cluded an office move and a new Administrator. Please join us in welcoming Rosemary Mohr to BCAMI. You can telephone her at BCAMI at (604) 736-6614, fax her at (604) 736-9233, or e-mail her at [info@amibc.org](mailto:info@amibc.org).

During 2002, The British Columbia Arbitration and Mediation Institute (BCAMI) explored, with other ADR organizations in British Columbia, opportunities for closer alliance. While the discussions did not result in a hoped for consolidation of services, they did serve to focus the Institute's resolve to be a leader in ADR services in British Columbia.

BCAMI will be establishing strategic directions to support this leadership role. We will be establishing new education courses for the coming year, and continuing negotiations with prominent ADR clients, such as ICBC, to effect more equitable terms for the delivery of ADR services.

We look forward to a challenging and exciting 2003.

## Ontario

This has been a landmark year for the Institute in Ontario. Once again, our AGM brought members together to recognize achievements, learn about - and set - new directions, and hear presentations by leaders in the field. We were pleased to contribute to the development of the new national rules for administered arbitrations and mediations and to help the National Institute launch them in Toronto in October. We recognized thirty-three new Chartered Mediators and Chartered Arbitrators at a Meet 'N' Greet in December that featured a stimulating presentation by Michael Fogel. We are looking forward to working with the National Institute and other Regional Affiliates next year to reaffirm our commitment to leadership in ADR in Canada and to build a strategic plan that recognizes National and Regional strengths and opportunities and takes us, smoothly and effectively, into the future together.

## Atlantic

In January 2002 the ADR Atlantic Institute established a committee with the Nova Scotia Department of Justice to commence the Nova Scotia Small Claims Court Mediation Pilot Project, the first Small Claims Court Mediation Program in Atlantic Canada. The mentors who have volunteered for this program are all practicing mediators. Both the mentors and the student mediators are members of the Institute.

The program started in January 2002 and is progressing very well. For student mediators, this program is a great opportunity to the necessary experience for the Civil Mediation Roster established in Nova Scotia to ensure the availability of qualified mediators to assist in the resolution of civil disputes. To the claimants who availed of this program, it is an easier and quick means to resolving their issues than adjudication before a Small Claims Court.

The Institute has been working together with Family Mediation Nova Scotia in many ways as it recognizes that joint efforts by both organizations are of mutual benefit to both organizations. Towards this end, in March the Institute, jointly hosted a presentation by an outside speaker. In April, the Institute assisted the Family Mediation Nova Scotia in the planning and organizing a Panel Presentation & Discussion on mediation and ADR after their Annual General meeting. These events have all been a great success. Family Mediation Nova Scotia has once again approached the Institute for another joint - a presentation and discussion about mediation in Nova Scotia with focus on large mediation issues or large-scale mediations in Nova Scotia. This event is to be organized to take place in conjunction with the Institute's Annual General meeting in November. The Institute is very interested in this idea and its Planning Committee has already commenced its preparatory initiatives towards organizing this joint program.

Organizing education programs or seminars for the Institute's members is not easy in view of the different geographic locations of its members. However the Institute is very keen to pursue the possibility of offering both arbitration and mediation courses useful to both its present and prospective members and are exploring the possibilities of this initiative.

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## Benefits of Membership with the Institute

### For Individual Members

- Chartered Designations (C.Med. and C.Arb)
- Competency and Ethical Standards
- Eligibility for listing in ADR Connect
- Preferred Liability Insurance Coverage

### For Corporate Members

- In-house presentations in local offices
- Arbitration and mediation practice handbooks
- Profile in our materials and a link on our website
- Involvement at the national and local levels
- Identification as a leader in ADR

### For All Members

- Journal, handbooks, rules for administered ADR
- Learning and networking opportunities
- Exchange of knowledge and experience
- Member reductions on some products and services
- Annual conference and annual general meeting
- Advocacy and promotion of ADR
- A say in governance of the Institute



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