

Vol. 30, No. 2
Fall 2021

Canadian Arbitration and Mediation Journal

A publication of the ADR Institute of Canada, Inc.

Learn about ADRIC's
Conference Webinar Series

"Culture, Conflict & Confluence"

page 6



LEADING DISPUTE RESOLUTION IN CANADA
SINCE 1974



CONTENTS

- 03** Message from the Editor
..... Genevieve A. Chornenki, LL.M.(ADR), C.Med, C.Arb
- 04** Executive Director's Message
..... Janet McKay, Executive Director
- 07** Conflict Management Coaching: The Back Story
..... Cinnie Noble, LL.B., LL.M. (DR), C.Med
- 10** Listen In: A Conversation with Rohan Bansie & Editor Genevieve Chornenki
..... Genevieve A. Chornenki, LL.M.(ADR), C.Med, C.Arb
- 14** Technical Subject Matter Expertise in Arbitration — Whose Bias is it?
..... Gerald R. Genge, B.A.Sc., P.Eng., C.Eng., BDS, BSS, Q.Med, C.Arb (ODACC Adjudicator)
- 15** Investor State Dispute Settlement and Climate Change—Who Protects the Public Interest?
..... Paul Fauteux, LL.M., Méd.Acc
- 20** Evolving Attitudes Towards Authority in ADR: From Ecclesiastical Visitors to Contemporary Arbitrators
..... Adam Strömbergsson-DeNora, MA
- 24** When ADR Means “Avoiding Dispute Resolution”
..... Kenneth Wm. Thornicroft, LL.B./J.D., Ph.D.
- 28** The Effectiveness of Community Mediation—Narrowing the Literature Gap with Research
..... Rachelle Paquet, JD and Kiana Blake, JD, BA Hons
- 33** A Chance at Recovery: Is Medical Malpractice Mediation a More Successful Avenue for Plaintiff Patients?
..... Madison Laval, BA, JD
- 40** The Alternative Dispute Resolution Processes in Canada's New CCDC 2-2020 Construction Contract
..... Harvey Kirsh, B.A., LL.B., LL.M., C.S., C.Arb
- 44** Role Plays: Do They Really Prepare New Graduates for Workplace Conflict?
..... Shelagh Campbell, PhD
- 47** Diversity in Mediation? Bring It On!
..... Reiny Ortega Cubas, LL.L, MCR, Q.Med, Q.Arb
- 50** ADRI is Grateful for the Support of its Corporate Members
- 51** Congratulations to our New Designation Recipients!

ONLINE BOOK REVIEWS:

- [Mediating High Conflict Disputes](#) Heather Swartz, C.Med, M.S.W.
[Comparative Dispute Resolution](#)..Colm Brannigan, LL.M (ADR), C.Med, C.Arb, IMI Cert, FCI Arb
[International Arbitration and EU Law](#) Joel Richler

ADR Institute of Canada Inc.
LEADING DISPUTE RESOLUTION IN CANADA

234 Eglinton Avenue East, Suite 407
Toronto, ON (Canada) M4P 1K5

416-487-4733 | 1-877-475-4353
journal@adric.ca | www.adric.ca

Editor-in-Chief: Genevieve A. Chornenki,
LL.M. (ADR), C.Arb,
C.Med, Toronto

Editorial Board: Shelagh Campbell, PhD,
CHRP, CHRL, University of
Regina
Eva Malisius, MA, PhD,
Q.Arb,
Royal Roads University,
Victoria
Rick Russell, BA, LL.B,
C.Med, C.Arb, Agree
Dispute Resolution,
Dundas, Ontario
Jennifer L. Schulz, S.J.D.,
C.Med, Winnipeg
Jennifer Webster, BA,
LL.B, Jennifer Webster
Mediation Arbitration
Facilitation, Toronto

Editorial Board Biographies:
<https://adric.ca/useful-links/journal-articles/editorial-board/>

Executive Director: Janet McKay
Journal Coordinator: Brenda Lesperance

Back Issues:
<http://adric.ca/resources/journal-articles/>



Également disponible en français :
adric.ca/fr

Message from the Editor

Welcome to the fall 2021 issue of the *Canadian Arbitration and Mediation Journal* which offers a kind of diversity not readily discerned by the eye—diversity of thought. The contributors in this issue offer new or different ways of thinking about dispute resolution. They take us beyond bromides and clichés like *cheaper, better, faster* and introduce us to less obvious aspects of dispute resolution, some of which have been submerged in time, some of which are emerging, some of which have simply been overlooked. **Cinnie Noble** reveals the back story to conflict management coaching, a specialized form of coaching now taught and used throughout the world. **Rohan Bansie**, an athlete and sports coach, sees the relevance of sports through the lens of individual effort as opposed to collaboration. Engineer **Gerry Genge** questions why engineers tend to be excluded as arbitrators in technical cases in favour of lawyers. **Paul Fauteux** criticizes the impact of Investor State Dispute Settlement on public interest initiatives designed to address climate change. **Adam Strömbergsson-Denora** explores a medieval form of dispute resolution that modern med-arb could learn from. **Kenneth Wm. Thornicroft** explains how compulsory arbitration clauses can make rights unenforceable and effectively deprive a weaker party of any dispute resolution. **Rachelle Paquet** and **Antonnia Kiana Blake** detail the findings from recent research intended to assess the professed benefits of community mediation. **Madison Laval** wonders about the suitability of mediation for medical malpractice claims and examines some of the relevant research. **Harvey**

Kirsh outlines what has changed since the Canadian Construction Documents Committee introduced a revised standardized construction contract. **Shelagh Campbell**, who teaches conflict resolution skills to undergraduates, raises questions about the efficacy of such training and argues the need for research. **Reiny Ortega Cubas** advocates for a new category of mediators that she calls Culturally and Linguistically Diverse. And last but by no means least, as the table of contents indicates, the journal now offers links to [reviews of books](#) that will interest dispute resolution practitioners. **Heather Swartz** not only reviews [Mediating High Conflict Disputes](#) but tests the book's principles out in her work. **Colm Brannigan** takes on a review of [Comparative Dispute Resolution](#), a 600-page compendium of process options but regrets that important Canadian initiatives are left out. And regular journal contributor **Joel Richler** reviews [International Arbitration and EU Law](#). Visit our new [book reviews webpage here](#).

We hope readers will enjoy and benefit from these submissions, and we urge everyone to share this issue with colleagues, clients, and friends. Past issues of the journal can also be found on CanLII at <https://www.canlii.org/en/commetary/journals/43/>.

Over the last year there have been changes to the journal's volunteer editorial board. Former editor-in-chief Bill Horton, assistant editor Nasser Chahbar,



**GENEVIEVE A. CHORNENKI,
LL.M.(ADR), C.MED, C.ARB**

Genevieve is the author of *Don't Lose Sight* (2021) and co-author of *Bypass Court* (2015). She holds a Certificate in Creative Writing from the University of Toronto and a Publishing Certificate from Ryerson University. She was inaugural chair of the Ontario Bar Association's ADR section and serves on ADRIO's C.Med accreditation committee. www.genevievechornenki.com

and editor Olivier Després have taken on new professional challenges elsewhere, and I thank them heartily for their dedicated service. New editors Rick Russell, Shelagh Campbell, and Jennifer Webster have stepped up, and I welcome them to the board. Please read the bios of the full editorial board [here](#).

Thank you to all who made this issue possible: our contributors, the helpful staff at the ADRIQ office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome.

Genevieve A. Chornenki
Editor-in-Chief



Executive Director's Message

Thank you for everything. I will miss you.

ADRIC is in an excellent position and time has come for me to move on; my last day will be October 29th

In 2009, I joined a staff of three shared employees of ADRIC and ADRIQ on a six-month contract as business development manager. It seems the organisations liked me as much as I liked the work. I was very interested in learning about a

field I had not known before and was eager to support its many benefits. ADRIC and ADRIQ grew rapidly; it was exciting to see their advancements. In 2014, I was honoured and excited to be asked to become ADRIC's first full-time Executive Director and will always remain grateful for the opportunity.



Janet provided this image from the 2015 conference as she feels it "best represents her absolute delight in being a part of ADRIC."

Over these years I have learned a great deal and have enjoyed meeting so many directors, members, affiliate colleagues and supporters of ADR.

– Janet

TOGETHER WITH COMMITTEES, DIRECTORS AND STAFF, WE HAVE ACHIEVED A GREAT DEAL OVER THESE YEARS; WE:

- **Became Qualifying Assessment Program (QAP)** for International Mediation Institute, and have recently been reapproved;
- **Developed a new brand, logo** and formally adopted our acronym;
- **Developed new designations** including the Q.Arb, Q.Med, Q.Med(Fam) and Q.Adj(Construction);
- **Held highly successful annual conferences**, some in partnership (with the Federal ICMS and ICC Canada) and hosted the Global Pound Conference;
- **Developed ADRIC's first Strategic Plan** and its second iteration;
- **Launched** ADR Perspectives newsletter; new ADRIC Arbitration Rules; the National Introductory Arbitration and Mediation Courses; the Med-Arb Rules;
- **Worked through two member management platforms** and now investigating a third (hopefully last) that will be ideal for ADRIC and affiliates!
- **Grew and moved to new independent office** with independent staff, most are fully bilingual;
- **Published the Disability Accessibility Guidebook for Mediators**;
- **Developed and signed a new MoU** with affiliates as a federation;
- **Began the ADRIC-RICS Construction Adjudication initiative**;

- **Struck an Indigenous Perspectives Working Group**, now the Diversity & Inclusion standing Committee; and developed a dedicated webpage for D&I including free webinars for 2021;
- **Made it through the first year of the pandemic** and supported members with free information sessions; cancelled the annual in-person conference replacing it with highly successful webinars. We are well through the second (and hopefully last) year of the pandemic and are doing the same for the conference this year - ADRIK 2021: Culture, Conflict and Confluence Webinar Series ([see page 6](#)).
- **We have grown exponentially in membership** numbers and in those holding designations: we had 1,413 members in 2009 and now have almost 2,500; we had 491 members with designations in 2009 and now have 1,039! This growth is a sure sign that ADR practitioners in Canada are investing in themselves as professionals and governments are recognizing our designations more and more. We are a self-regulating body at the moment, but what does the future hold?

LOOKING FORWARD, WE CONTINUE TO WORK ON THE ADRIK-RICS CONSTRUCTION ADJUDICATION

initiative as regulations develop with a goal of becoming, with our affiliates, the nominating authority federally and provincially. This is an excellent initiative to provide our members with work opportunities while also promoting ADR.

WE PLANNED OUR CONTRIBUTION TO CANARBWEEK FOR A SECOND YEAR IN A ROW:

a full week of arbitration sessions from numerous organizations September 20-24. ADRIK's presentation was September 21, 2-5pm, addressing The Arbitration Landscape in Canada. Learn more and find recordings at <http://canarbweek.org>.

WE ARE REVISING THE NATIONAL INTRODUCTORY ARBITRATION (NIAC) AND MEDIATION (NIMC) COURSES:

the NIMC should be ready for delivery in the fall providing a stronger foundation for potential mediators who take the course; the NIAC is being revised by a renowned arbitrator and we hope the new course will be ready by year end.

THE ODR TASK FORCE HAS BEEN DEVELOPED INTO A COMMITTEE

to continue their excellent work, allowing ADRIK to be recognised as a leader in the field. If you have

not yet read their blog or accessed their resources, please have a look: <https://adric.ca/online-dispute-resolution/>.

MEMBERS ARE ADAPTING WELL TO THE REVISED PROCESS OF REPORTING CONTINUING EDUCATION & ENGAGEMENT annually instead of every third year. The new software we are investigating has built-in capabilities to collect points and make reporting even simpler.

ADRIK IS THE PREMIER SPONSOR FOR A SPECIAL EVENT TO NATIONALLY RECOGNIZE CONFLICT RESOLUTION DAY.

AAMS will present a series of talks and webinars on October 20th and on the 21st following ADRIK's AGM, many of which are for the public, to educate them about the processes and potential of Dispute Resolution. See the website for more information:

<http://aams.ab.ca/adr-conference/>

AND THERE IS MUCH OTHER ADVANCEMENT UNDERWAY.

We have hired two new staff members; have developed more resources for arbitration clients and arbitrators, surveyed members and are planning marketing initiatives, have revised the Government Relations Committee terms of reference...

ADRIK is in an excellent position and time has come for me to move on; my last day will be October 29th.

Over these years I have learned a great deal and have enjoyed meeting so many directors, members, affiliate colleagues and supporters of ADR. It has been exceptionally satisfying to work with many directors who made up the ADRIK Board all these years – an accomplished group of dedicated volunteers with whom it is actually fun to work!

We have had great employees, and the current team is remarkable! I want to especially recognise the longest-standing next to me: Brenda Lesperance, who joined ADRIK as its first bilingual employee in 2011. ADRIK would not be where it is today without Brenda's dedication.

I have a keen appreciation for all of you - staff, directors, volunteers, members, who made my work even more enjoyable, who mentored and supported me, assisted me on projects, inspired ideas, provided advice and worked alongside me. I am so fortunate to have fallen into the ADR world! 🏠

I wish all of you, all the best,
— Janet McKay
Executive Director

"We have had great employees, and the current team is remarkable! I have a deep appreciation for all of you - staff, directors, volunteers, members - who made my work even more enjoyable, thank you for everything, I will miss you."

ADRIC 2021: A Webinar Series

CULTURE, CONFLICT & CONFLUENCE

Sept. 29 - Dec. 2, 2021

Dispute resolution professionals recognize the importance of specialized training to understand and become sensitive to cultural differences during mediation, arbitration and other dispute resolution processes. Without this understanding and respect, the process and outcome can be negatively impacted and lead to further conflict, tension or trauma.

Come with us to explore the benefits of these cultural differences, whether faith, race, gender, ability, or even opinion; and how we can learn from each other to improve our practices.

Culture: Wikipedia defines culture as “an umbrella term which encompasses the social behaviour and norms found in human societies, as well as the knowledge, beliefs, arts, laws, customs, capabilities, and habits of the individuals in these groups.”

Conflict: “is a clash of interest... The basis of conflict may be personal, racial, class, caste, political and international.”

Confluence: is defined as flowing together, meeting, or gathering at one point.

SESSIONS ARE ORGANIZED IN 3 CATEGORIES:

- 📍 **COMMERCIAL SERIES** – Domestic and International Arbitration and Mediation
- 📍 **DIVERSITY & INCLUSION SERIES** – Sessions of interest to everyone, practicing Dispute Resolution Professionals and the Public
- 📍 **SPECIALTIES SERIES** – Sessions on Workplace, Family, Community, etc.

REGISTER NOW! 📍

Participate in live sessions or purchase access for **on-demand viewing!**

Registration is by session at an exceptionally economical rate:

Members: \$35;

Non-members: \$50;

applicable taxes extra

SPONSORSHIP OPPORTUNITIES AVAILABLE! 📍

This delivery method provides a unique opportunity for our sponsors to participate and reach a highly targeted audience for very reasonable rates. [Learn more about sponsorship here.](#) You will note that each category of sponsorship includes “gift” registrations to the live session and more for on-demand recording: a wonderful way to recognize your clients and provide networking opportunities.



We offer specialized focused content that develops your knowledge and skills, and as always, we have CPD accreditation from law societies to support your learning objectives.

Conflict Management Coaching: The Back Story

Conflict management coaching is a distinct, one-on-one dispute resolution process that works with individuals who want to more effectively engage in interpersonal disputes. With the support of an ally (the coach), clients identify and work towards their own particular goals in relation to conflicts that are most relevant to them—issues in workplaces, family business, marriages, and other contexts. The process may be used proactively or remedially—before, during, or after an overt dispute arises—and can also prepare people to participate in mediation.

Today, many dispute resolution practitioners associate conflict management coaching with a Canadian named Cinnie Noble. In 1999, Cinnie, who has a background in both social work, law and mediation, independently developed this specialized type of coaching. Hers is a seven-stage model that moves clients along a continuum from where they are to where they want to be in handling conflict. Cinnie has taught and applied her model in the workplaces of public, private and non-profit organizations around the world, and in other contexts.

How did Cinnie Noble develop conflict management coaching as a specialty and turn it into a viable dispute resolution practice? What prompted her to do so? At the journal's request, Cinnie provided us with the backstory.

—the Editors



**CINNIE NOBLE, LL.B., LL.M. (DR),
C.MED**

Cinnie Noble is a Chartered Mediator and Professional Certified Coach, and pioneer of conflict management coaching. She and her international team train mediators and others worldwide in her unique CINERGY® Model. Cinnie is the author of [*Conflict Mastery: Questions to Guide You*](#) and [*Conflict Management Coaching: The CINERGY™ Model*](#) www.cinergycoaching.com.

In the 1990s when I was providing family mediation, I decided to broaden my focus to include workplace conflict and began to generate more work in that area. As a candidate for a Master of Laws in Dispute Resolution, I also did my practicum and some papers on workplace-related conflict. Over time, I noticed that ADR was missing a process for working with people one-on-one to strengthen their conflict competence. Many incidents led me to this insight.

One day, for instance, when I attended a workplace to conduct a mediation, I ran into a person who had taken part in mediation on a previous occasion. We stopped for a brief chat, and he said that while he was happy with the outcome of the process, he sensed that the other participant was now a bit “cool” and had questioned why he had gone to the manager and HR instead of speaking to her directly. “I had wanted to talk to her directly,” he said to

me, “but, frankly, I don’t like conflict. I thought my manager might help. When it went to HR, it felt like a bigger deal than it needed to be.” Then he added, “I really don’t have the tools to manage conflict!” That stuck with me.

On another occasion, I conducted a workplace investigation where three employees had filed a complaint about their boss with HR, yet when I interviewed all twelve employees in the unit, everyone praised that boss. The problem seemed to be around the fact that the boss avoided conflict and, when questioned, would get defensive, put things off, or made quick decisions without hearing people out—even though he had attended conflict management training a year earlier when this situation first came to light. So, again, I observed that a workplace could be disrupted by someone’s inability to manage conflict effectively.

These were but two of the many

incidents that showed me that one-on-one work was missing and that training, whether it related to conflict management, difficult conversations, or communications, wasn’t sufficient to transform peoples’ idiosyncratic ways of being in conflict to the extent necessary to actually shift their habits, attitudes, and behaviours.

Hearing about and researching executive coaching was a pivotal turning point for me. I ultimately became certified in accordance with the accreditation requirements of the International Coaching Federation. But there was no speciality related to conflict management at that time, so I began to research how to develop a model that was specific to supporting individuals in their efforts to become conflict competent or to specifically improve how they manage certain types of people and situations that were challenges for them. I really wasn’t sure what to do or how to create an effective

model, but I began the journey nevertheless.

I started with the basic framework for coaching models which is sometimes referred to as “coaching the gap.” That is, the client has objectives about what they want to be, achieve, or change, and the gap from where they are to where they want to be is where coaching work is focused. The wisdom is that clients need to gain increased awareness that shifts their thinking and opens up different perspectives before being able to consider options and actions that might take them where they want to go. I aimed to incorporate this thinking into a conflict-specific form of coaching.

Ultimately, I developed a seven-stage model, but I did not intend to prescribe a linear process, as coaching is generally fluid. However, I discovered that a staged approach that incrementally moves people along step by step works well to gradually shift from their initial mindset to one in which they are able to approach their conflicts in a more methodical way.

Acting on my intuition—without a specific idea of how this would unfold—I went to a number of organizations where I had been working as a mediator. I explained that I wanted to develop a coaching process to work with people

on a one-on-one basis in order to strengthen their skills and abilities to engage in and better handle conflict. I wanted to start with seven to ten people of various backgrounds (ethnic, cultural, age, gender status etc.). I asked the organizations whether, at no cost to them or the individuals, I could work with some of their staff for one hour a week over a six-week period, and then meet with everyone for a day to examine the results. Well! I had no trouble assembling my study groups and could easily have had 50 candidates.

The organizations I approached had plenty of conflict (as I knew) and were more than eager to find proactive ways to stop the problems in any way they could. A lot of money had gone in all to mediation and litigation.

The biggest initial challenge, and what seemed to me to be the central questions, was to figure out a way for people to gain different perspectives on their conflicts. I started by trying out my initial framework, and with everyone’s permission, took extensive notes and tapes.

When I analyzed my material, I discovered some consistencies about how people related their conflict stories and what eventually moved them to problem-solving mindsets. I learned a great deal here about what I hadn’t real-

ized till later had to do with what was needed to shift from the emotional part of the brain to the reflective part in order to move from reaction to response. It was fascinating, and the framework was beginning to develop about ways to formulate the coaching process. This first “study group” helped me form the basis for the model I ultimately created.

Full of hope, I went back to those same organizations and others to see about working with more people on a no-cost basis to test what I was finding. The willingness to participate was amazing.

Eventually, this research—working with individuals and trying experientially different ways of coaching based on what I was learning—proceeded such that after a little over a year I evolved a seven-stage model that I chose to call “CINERGY,” a composite and riff on “energy,” “synergy,” and my first name. The model has seven steps, and the entire process can take six to seven hours, an hour at a time, less for some, more for others.

As a result of my research and my work I have learned so many things that distinguished the coaching process from mediation. Many practitioners say they already coach in preparing people for mediation and in caucus, and while that is likely a form of coaching, coach-

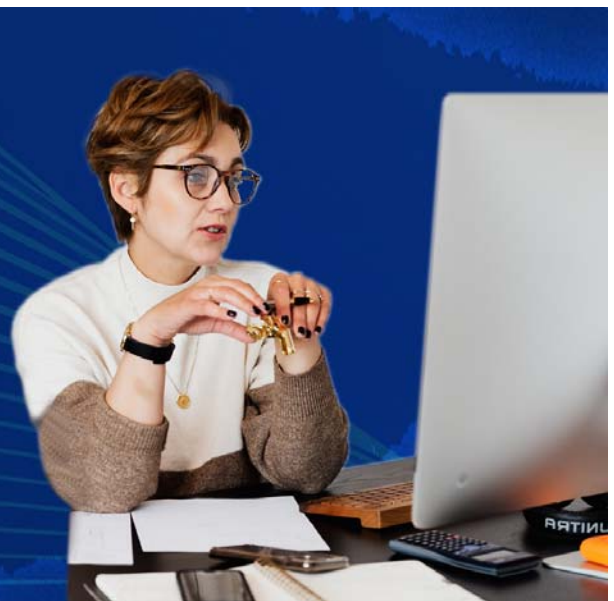
ADRIC's Two-Part

Correspondence Course in Arbitration

Covers concepts and procedures of contract and tort law, arbitration acts and procedures, evidence and court control of arbitration.

Fulfills the educational requirements for ADR Institute of Canada's national designations of Qualified Arbitrator (Q.Arb) and Chartered Arbitrator (C.Arb).

[More information](#)



ing principles and practices extend beyond that and are their own field of study and practice.

Over the years I have determined how to integrate conflict coaching into the mediation process. My mediation practice (mostly interpersonal workplace, estates, and family business disputes) has evolved such that I meet with each participant at least three times before they engage in mediation so that their ability to engage in the forum and “be” in conflict is more effective. That said, it took a while for me to convince clients in workplaces that each participant required up to three sessions before mediation! Now, it’s a given, but it wasn’t an easy sell. I think the DR field could do some work together too about what creative processes might be developed and in what areas so that the DR field, not the legal one, has more say.

I have come to see that different processes work for people differently, that not everyone wants to go to mediation anyway, and that being coached to be able to “be” in conflict with confidence and competence can provide durable skills for clients in contexts when they need them on an ongoing basis. Of course, not everyone is “coachable” or committed to being coached, and for them success and progress is limited. That said, most of my clients—even those referred to coaching—are committed to being a better version of themselves when it comes to engaging and managing conflict.

Twenty-five years ago, I ex-

pected to add conflict management coaching to my mediation practice. I hired a business coach to develop my goals and dreams and was able to concretely develop a plan of action that has ultimately evolved beyond my expectations. I didn’t dream about how it would develop until I realized that I offered a unique model that had wide application and that it interested coaches, mediators, and others. To date, I have accredited thirty people in total as trainers and coach-mentors who offer my training around the world.

My luckiest break was getting a contract as part of an integrated conflict management system for the Transportation Security Administration (a Division of Homeland Security) to develop a peer conflict management coaching program early on in my coaching career. It was an amazing experience. I travelled to Washington, DC and other parts of the United States over a five-year period (starting shortly after 9/11). I worked with an incredible team as we trained many people to provide conflict coaching to front-line staff at airports across the country.

Most of my international clients are ex-pats (from Canada and the USA) moving to parts of the world where they have challenges adapting and communicating with people in their workplaces in the countries they moved to resulting in conflict. These folks look for coaches to help, and a Google search has resulted in many engagements. Then, once I started training outside Toronto, I

was often asked to speak to local business leaders and others (by whomever retained me to do the training). That has also resulted in a surge of clients over time. For years, I have been leading webinars or been asked to be part of panels, speak at conferences, or (now) participate in on-line events. Posting on LinkedIn and Twitter have resulted in some, but not many, clients and some, but not many, people for the workshops.

I have to admit that I find my coaching practice rewarding in so many ways. I have seen clients shift their conflict habits, gain confidence to “be” in conflict, embrace the positive possibilities... I could go on!

One case that comes to mind is of a man who was named a leader in an organization. He struggled to manage conflict among his staff of eight, and they rebuffed many of his attempts to communicate with them individually and as a group. The organization wanted to support him, and I was retained to work with him. His goal was to gain insights into what and how he manages himself in conflict situations (that lead to the complaints) and to gain confidence to address the concerns brought to him. Over a three-month period, he gained considerable insights on what he did and didn’t do in his interactions and worked on conversations with each staff member to speak to each individually. In the end he was successful in reaching his goals and when I checked in three months later, he was thriving! A wonderful conclusion! 🏠

ADR Perspectives

Perspectives on alternative dispute resolution for ADR parties and their lawyers.

- Cross-Canada Editorial Board: some of the foremost mediators and arbitrators in the country
- Short, practical articles
- Relevant to ADR end users
- Four issues annually



NO FEE SUBSCRIPTION



[Subscribe Now](#)



[Read Past Issues](#)

Listen In:

A Conversation with Rohan Bansie and Editor Genevieve Chornenki

Rohan, thank you for this conversation and for telling readers about your commitment to ADR. Your public profile describes you as performing a variety of roles—mediator, arbitrator, investigator, motivational speaker, and life coach. Which of these do you like most and why?

I absolutely love serving as a mediator. People tend to be emotionally involved in their cases whether those cases are about their business, reputation, or health, and my ability to help them get results comes from carefully and properly reading their emotional state. From the very first moments of a mediation, I work to create a non-judgmental environment where emotions can be acknowledged and respected. From there I can drill down—how much of that informs their interests and where they want to go? That's where the creativity starts and where mediation really gets to be fun for me.

But it all begins with me listening. Even when cases don't settle or settle on less than favourable terms, participants have told me how important it was to be heard and understood. In one commercial case that I mediated, a corporate investor who ended up having to pay money emailed me afterwards. He wrote, "Thank you for understanding the issues and calming my nerves."

From time to time you conduct settlement conferences as deputy Small Claims Court judge. Does that public role of authority make things different for you?

No, sitting as a judge makes no difference to how I behave when helping people resolve a dispute. My attitude is

this: life is not about me; it's about what I can do for others. Any process that's about me or my opinions is the wrong process. I presided over a settlement conference in a defamation case between two colleagues who had worked together for over 30 years as university professors. What I thought about the alleged defamatory words was unimportant. I deduced that the two individuals needed to heal, whatever that meant to them, so I began by addressing the plaintiff, "You sued for a specific sum of money. What do you *really* want?" As I suspected, the plaintiff was not looking for money but wanted the defendant to acknowledge the inaccuracy of the published words and the harm those words had done. I won't go into the details, but the defendant apologized, the matter settled and the two shook hands and patted each other on the back as they left the room.

What role does instinct and intuition play in your dispute resolution work?

By nature, I am an emotional person, and I rely strongly on my intuition when I work, paying attention to the cues and clues that people send out. I'm not afraid of feelings because so often they are the key to unlocking a dispute. In a personal injury case, for instance, I will directly ask the plaintiff how he or she is doing. The individual can answer however they like but the others in the room need to pay attention and take the answer seriously. People quickly learn that like most Jamaicans, I'm a balance between being intense but laid-back. I convey a sense of *easy* or *no problem* yet am focused and tireless in paying attention to people.

That said, I have on occasion



ROHAN BANSIE, B.A., M.ED.,
L.L.B./J.D.

Rohan Bansie is a lawyer, mediator, arbitrator and Deputy Judge. Along with his experience as a teacher and management and training/development consultant, Rohan is an experienced businessperson. In 2014 Rohan's book, *Eloquence: Public Speaking Skills for Lawyers and Other Professionals* was published. www.bdrs.ca

misread the room by assuming that there was not going to be a resolution on a particular day and thus allowing the mediation to fail. Understand this, assuming that a matter won't settle goes totally against my own instinct of trying to broker peace in every situation.

There have also been times when, upon reviewing the parties' material, I (wrongly) assumed there would be a settlement, only to learn during the course of the mediation that very strong personality conflicts and divergent underlying interests stood in the way of what, to me, was an obvious and accessible settlement.

So, the lessons that I have taken away from those situations is to first of all assume nothing, let the process unfold organically, and remember to trust myself, trust the process, and patiently try to exhaust all possible options. Do the job.

You are an athlete and coach who has had much success in sports.

Does your experience in sport inform your ADR practice?

Contrary to what some might think, my sports experience does not directly inform my ADR practice. I see it as separate and distinct.

I've been involved in high levels of athletic competition since I was 11 years old and have had the opportunity to compete in boxing and track nationally and internationally. Additionally, my involvement in the sport of football has spanned several decades which includes playing to high levels and coaching age groups from age eight up to professionals in the Canadian Football League. But sports are not about brokering peace.

Let me explain this way: On June 22, 1966 at the age of six, I arrived as an immigrant at Montreal's Dorval Airport on AC Flight 861. I grew up poor. My father never worked fewer than three jobs, and when I was nine I was sent out to sell cleaning supplies from door to door in Montreal. But my parents were givers. They taught me that when there's a dollar everyone shares, and they taught me to make the most of what I have in the service of others.

I was eleven years old when my football team won a championship. Excited at the win, I came home and told my parents the news. My mother said, "Good for you," and my father asked, "Is your homework done?" From their reaction and attitude, I concluded that football or any other sport was a matter of cause and effect: you put in the effort, you get the results.

For some, sports might be about teamwork and collaboration, and to a great degree that is true, but for me they are about competition, winning or losing. That's not a frame of reference I want to bring into my work as an ADR neutral.

Some ADR practitioners with a background in law, consider

practising law and practising as a neutral to be distinct and separate businesses. What is your view on that, and where do other professional groups such as social workers, accountants, or engineers, fit into the business of ADR?

Practising law and working as an ADR neutral are distinct and separate businesses. At this time, I work only as a neutral. I've been resolving conflicts as a management consultant since about 1988 and have been a mediator since 2006. Having been a lawyer, representing both plaintiffs and defendants for almost 25 years has certainly helped me to be an effective neutral. Simply, that experience assists in my understanding of the legal issues and possible interests that may be at play, and obviously that understanding helps me to guide the parties toward a resolution.

There absolutely is a place for every professional group in ADR. However, being a neutral is not for everyone. In my opinion an effective mediator has unique and distinct personality and psychological traits. S/he must be naturally curious, extremely patient, creative, and knowl-

edgeable, be empathetic without being patronizing and generally display a comportment that instills calm, sagacious confidence and trust. Oh yeah, they can't take themselves too seriously. I find it troubling when I hear that certain mediators are either pro-plaintiff or pro-defence, or are excessively controlling. As a purist, I find that as a neutral, those types of descriptors should never come up. I repeat, it is not for everyone.

Tell us about yourself as a motivational speaker. To whom do you speak and to what end? How do speaking opportunities come about? Does motivational speaking play any role in your practice as an ADR neutral?

I have been called upon to speak to and with students of all ages and all types of professionals. Here's the thing, in the Bible Romans 12:8 basically says that if one has the gift to inspire, then they must do so. Based on how my life has evolved since childhood, I feel very strongly that I was blessed with the gift of exhortation. It has always come naturally. As I said earlier, we have a responsibility to help others to maximize their potential. In fact, last summer I recorded a five-



BLG | CANADA'S LAW FIRM

Canadian-Based Expertise with International Reach

When you require the services of a dedicated team of arbitration counsel, you need to be confident in your decision.

BLG's Arbitration Group has a winning reputation as lead dispute resolution counsel. Our team members have extensive experience appearing for clients involved in a wide array of industries, from construction, mining, energy, and to aviation and beyond, and under all sets of major institutional rules.

Canada's Law Firm
Borden Ladner Gervais LLP
is an Ontario Limited
Liability Partnership.

blg.com/InternationalArbitration

part mini-series of videos entitled Iron Sharpening Iron.¹

A lot of the motivational activity arises from coaching individuals, or as I prefer to refer to it, redesigning their lifestyles. Basically guiding them on a course whereby they uncover, identify, accept what it is they really and truly want, and then take ownership of the process and project manage the hell out of their lives in order to achieve their goals and dreams. In doing this I candidly draw upon my extensive sports background, my knowledge of psychology, and my own, much varied, multi-layered and chequered life experiences. That said, I don't see an obvious connection with the motivational work that I do and being an ADR neutral.

On a very pragmatic note, how have you adapted to operating your ADR practice online, and

how has your experience been during the past year? Do you think ODR is here to stay?

I have totally embraced practising ADR online. In my opinion it has proven to be beneficial on many levels such as, no travel time, no parking costs, and not having to pay for a venue (if needed). Interestingly, I get the sense that litigation lawyers are generally a bit less ambivalent and more open to the process because of the uncertainty about when courts will reopen fully. Also, I really don't feel that anything is lost by proceeding online. In fact I generally feel as though parties are less intimidated by the process. I sure hope that it's here to stay. Why not?

What question do you wish I'd asked you but didn't?

Ask me what I would be doing profes-

sionally if I weren't an ADR neutral.

First of all, I feel as though I was born to help people resolve disputes as an ADR neutral. It's important to me to use what I've been given in life to influence others to be the best that they can be mentally, physically, emotionally, or spiritually, and that's what I try to do in any mandate that I'm given. That said, I've always wanted to be either a lawyer or a teacher, and I've been fortunate to have done both on different levels. Talk about being blessed!

Alternatively, I think that I could find a great deal of satisfaction and add value to lives of many people by being a counselling psychologist, a family physician, or— wait for it— a preacher. All that to say, there can be nothing better than traveling the world brokering peace. 🏠

1 <https://www.youtube.com/channel/UChV5UXXvW0suczYiheUSA5w>

ACCREDITED ONLINE TRAINING

Mediation & Arbitration

Online courses accredited by ADRIIC, ADRIIO and OFAM for those wishing to achieve their designations.

kompasstraining.ca

info@kompasstraining.ca

KOMPASS
PROFESSIONAL DEVELOPMENT



Introducing an Innovative Approach to Building Relationships and Managing Conflict

The **Canadian Collaborative for Engagement & Conflict Management (CECM)** was created in 2020 to provide practical and pragmatic conflict management training and skills building for those who are seeking a clearer path to professional development and accreditation, and access to specialized professional services.

- Stakeholder & Community Engagement
- Effective Aboriginal Engagement & Relationship Building
- Foundational Conflict Management & Mediation
- Advanced & Multi-Party Mediation
- ODR: A Practical Program for Practitioners
- Police Foundational Conflict Management & Mediation
- Foundational Med-Arb
- Arbitration



c4ecm.ca/calendar

We offer exceptional training and skills development in relationship building and effective conflict management. Visit our website today to find the right course(s) for you. Then get ready to join a unique community and prepare to see the spectrum of engagement and conflict management from a different lens!

www.c4ecm.ca

email: core@c4ecm.ca



CANADIAN
COLLABORATIVE
FOR ENGAGEMENT
& CONFLICT MANAGEMENT

Technical Subject Matter Expertise in Arbitration — Whose Bias is it?

ADR, as introduced to me more than twenty-five years ago, welcomed persons with subject matter expertise as decision makers because that expertise cut the time, expense, and anxiety of teaching the subject matter to the trier of fact.

Unfortunately, such welcomeness has not been my experience as an engineer who is also a trained arbitrator. I would be so bold as to say that subject matter expertise is very low on the decision hierarchy for parties and lawyers who are in a position to choose an arbitrator for construction and professional negligence claims. I have some thoughts as to why that is. I think it has a lot to do with the lawyers who are in a position to recommend to their clients the names of potential arbitrators.

Presumed technical bias could affect the decision

Based on my exposure as an expert witness to some fifty law firms and seventy-five lawyers, I think there is a presumption that, if allowed to be arbitrators, engineers—even Chartered Arbitrators like me—would insert their own evidence into the decision, which evidence cannot be cross-examined. The presumption by some legal counsel that engineer-arbitrators may bias their decision and incorporate unchallenged evidence into that decision should really be managed by engineer-arbitrators themselves. It is not a very good reason to exclude engineers who are qualified arbitrators. Besides, engineer-arbitrators who substitute their own evidence for that of a party would be sifted out fairly quickly.

Pigeonholing

Since many lawyers' experience with

engineers may come from university days, they may continue to think of engineers in the way they portrayed themselves in school: number-crunching, beer-swilling loogans in scuffed boots and dirty hardhats. Hardly the image of a person capable of the type of analytical reasoning needed to sort through evidence and weigh credibility and reliability. But the image of a grunting, gearhead lurching from class to class is a false one. Actually, some engineers spend most of their time writing well-reasoned, thoroughly-referenced reports with a logical progression from obligations through evidence of damages to valuation of damages. Such is the foundation of a sound decision on liability—no?

Language skills

Writing right requires more than a command of the language, and certainly a lot of engineers could polish up their writing skills to produce clear, concise, and defensible output. More than forty years of editing engineering reports forces me to agree that, let's say, *some* work is needed there. But I have also seen some pleadings that are nothing short of befuddling. So, if lawyers are honest about it, poor language skills are not the sole domain of engineers.

The thread through each of the above is that engineers tend to be excluded as arbitrators because they are thought to lack the objectivity, analytical



**GERALD R. (JERRY) GENGE,
B.A.SC., P.ENG., C.ENG., BDS,
BSS, Q.MED, C.ARB (ODACC
ADJUDICATOR)**

Jerry is the Principal of Genge Construction Adjudications, providing ADR, and neutral evaluation services for construction claims at reduced time, cost, and anxiety to the parties in dispute. More info is available at www.gengeadjudicator.com.

and communication skills needed to do the job. So, time and time again, the same gang of lawyers and retired judges who don't have the depth of engineering knowledge needed to understand the nuances and normal irregularities in construction and design are chosen to arbitrate or mediate construction and professional negligence claims. That results in a slowed process, likely less correct results, and greater expense overall. Isn't that contrary to what ADR was supposed to be all about?

So, if you are an arbitrator asked to decide a dispute that involves engineering principles or professional negligence and you are provided with conflicting engineering opinion reports that are key to your decision, perhaps you might wish to consider if you are the best qualified to understand what went wrong, who was responsible, and what it should cost to remedy. Maybe your parties should be looking for an "engineered" solution. 🏠

Investor State Dispute Settlement and Climate Change—Who Protects the Public Interest?

On May 21, 2021, G7 Climate and Environment Ministers acknowledged “with grave concern that the unprecedented and interdependent crises of climate change and biodiversity loss pose an existential threat to nature, people, prosperity and security.”

Most members of the ADR community in Canada accept the reality of climate change and its various manifestations. Few, however, are aware of the way in which arbitral tribunals are being used to frustrate efforts to address it. As a mediator and arbitrator with expertise and experience in public international law and climate matters, I would like to help my ADR colleagues understand the impact investor-State dispute settlement (ISDS) is having on climate action worldwide

ISDS allows foreign investors to bypass domestic courts and sue governments before private international arbitration tribunals over public policy measures that affect the profitability of their investments, including potential loss of future profits.

ISDS clauses are typically an enforcement mechanism in international investment agreements (IIAs) or free trade agreements (FTAs). They do not grant states the reciprocal right of access to arbitration to sue corporations. Approximately 3,000 such agreements are currently in force.

This article will recall the relationship between climate change and fossil fuels, before discussing what I consider to be the moral hazards of ISDS and how it stands in the way of climate action. I will examine the arguments in favour of ISDS, the international movement to stop it, and the efforts to reform it, and propose a way forward. Finally, I will examine Canada's ISDS policy and its incompatibility with climate protection.

1. Climate change and fossil fuels

The goal of the 2015 Paris Agreement on Climate Change is to limit global warming to well below 2 degrees Celsius and preferably 1.5, compared to pre-industrial levels. To meet this goal, in 2018 the Intergovernmental Panel on Climate Change (IPCC) called for urgent action to phase out fossil fuels.

Yet, most governments, including Canada's, are failing to implement an energy transition. A recent UN report warns that “governments are planning to produce about 50% more fossil fuels in 2030 than would be consistent with limiting warming to 2°C and 120% more than would be consistent with limiting warming to 1.5°C”.

2. The moral hazards of ISDS

There have so far been over 1,000 known ISDS lawsuits. These

cases are decided by three lawyers acting as arbitrators. Most of these arbitrators tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias.

Arbitrators are chosen by the investor and the state it chooses to sue. Unlike judges, arbitrators are paid a fee by the parties to each dispute. In a one-sided system in which only investors can bring claims, this creates a strong incentive for arbitrators to side with them rather than states, because investor-friendly rulings pave the way for being named as an arbitrator again in future lawsuits, thus generating more income.

Nearly all of the most prominent and repeatedly appointed arbitrators in ISDS cases are men from the Global

PAUL FAUTEUX, LL.M., MÉD.ACC

Paul Fauteux practices international trade and business law, mediation and arbitration with Colas Moreira Kazandjian Zikovsky. He is one of six Canadians to hold the Diploma of The Hague Academy of International Law and headed the Canadian delegation in the international negotiations on the implementation of the Kyoto Protocol <https://cmkz.ca/en/equipe/paul-fauteux-2/>.



North. Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investor-state disputes.

Another problem is double-hatting, whereby the same individual acts simultaneously as an arbitrator in one ISDS proceeding and counsel in another, raising questions about independence, impartiality and conflict of interest.

In a highly publicized 2014 award (issued 9 years after the arbitration was initiated), the arbitrator's fees were as follows: €103,537 for Daniel Price, initially appointed by the claimants; €1,513,880 for Charles Poncet, who replaced him; €2,011,092 for Stephen Schwebel, appointed by Russia;

€1,732,937 for L. Yves Fortier, the Chairman; and €970,562 for Martin J. Valasek, the Assistant to the Tribunal.

ISDS is not only lucrative for arbitrators. Lawyers are also making a killing. Legal and arbitration costs average over US\$8 million per dispute, exceeding US\$30 million in some cases. Elite law firms charge as much as US\$1,000 per hour, per lawyer – with whole teams handling cases.

There is a revolving door between investment lawyers and government policy-makers in developed countries. Several prominent investment lawyers today were once chief negotiators of IIAs or FTAs with investment protection chapters, and defended their governments in ISDS cases.

The damages awarded to investors by arbitral tribunals can be so high that ISDS is increasingly integrated with the financial world through third-party funding, where speculators invest in disputes in exchange for a share of the award or settlement.

ISDS decisions are binding and not subject to appeal. They usually ignore the public interest concerns motivating the government's intervention, or the fact that the companies may well have been fully aware of the risks when they invested.

3. How ISDS blocks climate action

There is increasing concern about ISDS obstructing measures taken by states to address climate change. IIAs and FTAs enable fossil fuel corporations to attack any measure that could reduce their profits. Governments attempting to prevent projects that further lock-in fossil fuel dependence and accelerate climate change can thus be held liable for billions of dollars in damages. For example, in the previously mentioned award the tribunal ordered the Russian Federation to pay Russian oil company Yukos and others claimants over US\$50 billion in damages, €156,476 for the cost of the arbitration and over US\$2.2 million for a portion of their legal fees.

In an attempt to implement the 2015 Paris Agreement on climate change, renowned French environmentalist Nicolas Hulot, then Emmanuel Macron's Environment Minister, introduced a bill in 2017 that would have phased out fossil fuel extraction in France. Canadian oil and gas company Vermilion threatened an ISDS lawsuit. The bill was shelved and replaced by a watered-down law that continues to allow it. Hulot resigned soon after.

This is one of many instances in which fossil fuel companies use ISDS and the threat of arbitral awards so devastating for states that, just like France, many respond to a case, or even just the threat of one, by offering vast concessions, such as rolling back their laws.

By the end of 2018, states worldwide had been ordered or agreed to pay investors USD\$88 billion due to ISDS cases. To put this in perspective, the Adaptation Fund, one of the main multilateral climate funds, has committed to USD\$720 million for different projects since 2010.

This is less than 1% of what governments had to pay foreign investors because of ISDS.

4. The arguments in favour of ISDS

IIAs and investment chapters in FTAs were largely signed, with ISDS clauses included in them, because governments believed they would help attract foreign direct investment (FDI). Yet research has shown these agreements are not a determining factor in attracting FDI.

Even if they were, one might legitimately ask: at what cost? Most arbitral awards in ISDS cases provide a clear answer: at the cost of the surrender by the state of its capacity to adopt laws in the collective interests of its citizens that restrict the profit-making ability of foreign investors.

Some say states win more ISDS cases than they lose and, on this basis, deny that the system is biased against states. These assertions call for two observations.

First, whether a state wins or loses depends on who's counting and what's being counted. Even when the state is favoured by the tribunal's award, it has to cover its own costs (subject to any cost award) and those of the arbitration. For example, as of May 2015, Ecuador had spent US\$118 million for outside counsel to defend 24 ISDS claims, for an average of US\$4.9 million per claim. That does not count the costs of those arbitrations or the time and money spent on them by Ecuador's in-house counsel and other officials. Therefore, it is



Mediation Services

Our team helps people, businesses and organizations resolve conflict themselves, making for better outcomes, saving time, money and relationships, and avoiding the risks and costs of litigation.

If you are looking for a different path to dispute resolution, contact:

Isabelle Keeler
Workplace Investigator
Charlottetown | 902.629.3906
ikeeler@coxandpalmer.com

Jim Musgrave, QC
Chartered Mediator
Qualified Arbitrator
Workplace Investigator
Halifax | 902.491.4118
jmusgrave@coxandpalmer.com

COX & PALMER

hard to say that the state, who in this one-sided system is always a defendant, ever wins. The best that can be said is that sometimes it does not lose.

Second, the evidence shows states lose more often than they win. The 2019 Review of ISDS Decisions by the United Nations Conference on Trade and Development found that 61% of decisions on the merits from 1987 to 2019 were decided in favour of the investor.

Some say that people who want to go to court can do so and that people who go to international arbitration do not want to go to court. This is not a convincing rationale for allowing oil, gas, and coal companies to use ISDS to thwart climate action by states. It overlooks the distinction between commercial arbitration, a private law form of adjudication, and investment arbitration, a public law form.

This distinction has important legal consequences. For a commercial arbitration award to be enforced in one of the 168 states that are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the award must be submitted to a national judge who can deny enforcement if the award is contrary to the public policy of the country in question.¹ However, this does not apply to ISDS because the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) obliges each contracting state to recognize and enforce an award as if it were a final judgment of a court in that state.²

Who determines if an ISDS award is contrary to public policy? The ISDS arbitral panel itself, and if the panel is oblivious to public policy and preoccupied with commercial interests, public policy simply gets ignored.

5. The international movement to stop ISDS

For decades, an international movement has opposed ISDS. This movement, made up of state and court decisions and citizens' initiatives around the world, has contributed to the fact that, by the end of 2018, 173 IIAs had been terminated.

In January 2019, 200 civil society organizations from across Europe came together to call for an end to ISDS, through a petition that eventually garnered 847,000 signatures. As a result, in the runup to the 2019 European Parliament elections, hundreds of candidates pledged to vote against all forms of ISDS and for binding corporate accountability rules. The European Union subsequently ended ISDS in relations between its member states.

6. ISDS reform efforts

As a result of this movement, various efforts have been made to reform ISDS. None of them will prevent big oil, gas and coal companies from continuing to use ISDS to sue and threaten to sue governments who advance legislation and other measures to address the climate emergency.

These “mind-bogglingly complex proposals for reform,” as professor Armand de Mestral has aptly described them, are moving far slower than glaciers are melting. Yet, the unprecedented crisis of climate change demands an urgent response.

7. A way forward

In 2019, Nobel Prize-winning economist Joseph Stiglitz expressed concern that ISDS cases, which he called “litigation terrorism,” risk having a chilling effect on implementing the stringent regulations required to fulfill the Paris Agreement. He said reform should include lifting the secrecy that clouds ISDS cases, limiting grounds for filing a case, making compulsory the use of domestic courts before ISDS and excluding from damages the loss of expected profits. “Until you resolve all these issues, there should be a total moratorium,” he said.

The state of necessity under international law supports Stiglitz's proposal. This is an international customary rule according to which a factual situation of grave and imminent peril for the essential interests of a state legally justifies a breach of an international obligation by that state as the only means to safeguard those interests.

The state of necessity created by the unprecedented crisis of climate change legally justifies the breach by a state of the international obligations it has contracted, by becoming party to treaties containing ISDS clauses, to submit to international arbitration claims by fossil fuel companies arising out of measures to combat climate change, as a legitimate means to safeguard its essential interests from this grave and imminent peril. Given this state of necessity, a state would also be legally justified in withdrawing from its nationals, including corporations, the right granted to them, under ISDS clauses in IIAs and FTAs, to sue other state parties to those agreements for climate change measures.

While this is a prescription for unilateral action, the United Nations Framework Convention on Climate Change (UNFCCC) says “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response”. Ideally, the state of necessity created by the climate crisis should therefore be invoked by states in a coordinated fashion.

The UNFCCC recognizes that this cooperation and participation by all countries should take place “in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions”.

The consequence of common but differentiated responsibilities in the UNFCCC is that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof.” Once they have done so, developing countries will join the effort.

Among developed countries, the G7 is an informal

grouping of seven of the world's advanced economies: Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and the European Union. Created in 1976 to "discuss coordinated responses to global crises", according to Global Affairs Canada it "provides global leadership and plays a powerful catalyst role on issues that are later taken up by other fora with broader global and regional membership. The G7 brings together the world's advanced economies to influence global trends and tackle pervasive and crosscutting issues [...] including climate change".

It would therefore make sense for G7 leaders to collectively announce they are withdrawing both their consent to ISDS claims by fossil fuel companies arising out of measures to combat climate change and the right of their nationals to lodge such claims against state parties to IIAs and FTAs to which they are themselves parties. In so doing, the G7 could take the lead and set an example to be followed by other states, with a view to no longer allowing fossil fuel companies to use ISDS to prevent climate action on a worldwide basis.

8. Canada's role in ISDS and climate change

When the Canada-U.S.-Mexico Agreement was signed in 2018, Canadian Foreign Minister Chrystia Freeland echoed the long-standing concerns of ISDS critics when she said: "ISDS elevates the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment".


Yet Canada continues to promote this system outside North America, where Canadian investors had initiated at least 43 ISDS claims by the end of 2018. These

follow a common pattern: a Canadian firm in the mining or energy sector operating in a foreign country brings a claim disputing a resource management or environmental policy measure of that country.

Six years after the Paris Agreement, the commitments formalized by countries could lead the planet on a path of 3 to 4°C warming by the end of the century. In this scenario, the IPCC warns that the world as we know it would become "unrecognizable," with "declining life expectancy" and "declining quality of life" in many parts of the world. The "state of health and well-being" of the population would be "substantially reduced" and would continue to deteriorate over the following decades. The IPCC also warns of "major" increases in food prices, conflict and climate migration.

It is too late to stop climate change. The best we can hope for is to avoid its most catastrophic and irreversible effects.

The international investment regime is not compatible with an energy transition. Keeping it in place will only extend the fossil fuel era and hasten catastrophic climate change.

Instead of protecting profits, law should be put in the service of human dignity. No longer allowing oil, gas and coal companies to use ISDS to prevent states from taking climate action would be a good place to start. 

¹ See article V 2. (b) of the New York Convention.

² See article 54 (1) ICSID Convention.

*Dive further into this topic by
attending the ADRIC Conference webinar debate
September 29, 2021.*

ADR Outsourcing Services

Our case administration services include everything from the assignment of Arbitrators and Mediators, to final billing.

- Neutral Selection Services
- Rosters
- Systems Development
- Arbitration Administration
- Training Programs
- Referrals
- In-House Designations

More information



Photo 14467108 © Wavebreakmedia Ltd

Marc Bhalla, LLM (DR), C.Med, Q.Arb, MCI Arb
Mediator & Arbitrator, Elia Associates Professional
Corporation, Barristers and Solicitors

OSGOODE'S PART-TIME PROFESSIONAL MASTER OF LAWS (LLM) IN DISPUTE RESOLUTION

MASTER NEW APPROACHES TO DISPUTE RESOLUTION

Courses Include:

- Dispute Resolution in the Digital Age
- Mediation Advocacy
- Creativity and Collaboration
- Culture, Diversity and Power in Dispute Resolution

Go beyond your day-to-day. Step outside the existing limitations of traditional conflict resolution processes and explore new ways of resolving disputes. Led by leading lawyers and experts in ADR, join this celebrated program that balances theory and practice to elevate your expertise.

Program starts: Fall 2022

Apply by: May 1, 2022

Find out more about
the program at:

osgoodepd.ca/adr

Canada's leading Professional LLM
degree program for lawyers, mediators, arbitrators and
professionals involved in conflict resolution.

OSGOODE
OSGOODE HALL LAW SCHOOL
PROFESSIONAL DEVELOPMENT

YORK 

Evolving Attitudes Towards Authority in ADR: From Ecclesiastical Visitors to Contemporary Arbitrators

The University of Ottawa was beset by internal strife during the first half of the 1960s because the University's Catholic owners were unable to continue funding a rapidly expanding university. Politics characterized by a sharp division between religious and non-denominational administrators, professors, and students created a tense atmosphere that burrowed into the university's owner's, the Oblates of Mary Immaculate's house and rent the religious community that, up to 1965, was the University's brain if not its heart.

The Missionary Oblates of Mary Immaculate remain a French religious order under the Roman Catholic rite. They were composed of priests and brothers working with a view to doing good works, missionary works, and they thus hold a firm place in Canada's colonial past. The University was a jewel in the Oblate crown. It was testament to the Oblates' long history in the Ottawa Valley, where the first Bishop of Ottawa in 1848, Joseph-Bruno Guigues, was a senior Oblate and founded the University.¹

The struggle between members of the Oblate house mirrored those of the University community: would the University of Ottawa remain a religious institution without access to government funds or would the Oblates pass the institution on to a non-denominational board of governors? This question divided the priests, some of whom espoused a progressive integration into the

broader community; others took a hard-line conservative stance against ceding control.²

No ready answer obtained, but the Oblates were due for a visit from a former colleague, Stanislas-A. LaRochelle, whose presence calmed the community and restored a semblance of hierarchical order.

The term "visit" in this context denotes more than a mere appearance for old times' sake. The former Rector was the Oblate Superior-General's legate. His presence comprised a care for souls even as he symbolized his order's central authority. The visitor ministered to the House, listened to the priests, convened debates on questions of the day, and (if necessary) carried with him the authority to decide all issues within the community.

The visitor was, in short, the law-giver and the justice.³ A plenipotentiary, his authority was enough to create policy, force the execution of any action, and decide any dispute.

A plenipotentiary is anathema to our current adversarial legal system, if only because the rule of law promotes dividing heads of power so that they may be balanced. Practitioners of alternative dispute resolution are divided on the efficacy and ethics of a mediator-arbitrator, whose role slips between confidant and advisor—an executive or legislative role—to that of the adjudicator.

The institution of visitors challenges these positions; it also serves as a means of better under-



ADAM STRÖMBERGSSON-DENORA, MA

Author, researcher, and licensing candidate with the Law Society of Ontario. Adam's interest in ADR and, more particularly, arbitration is academic and practical. He is keen to develop an ADR practise while working on his Ph.D, which will examine arbitration and judging. <https://apstrom.ca/about/>

standing the role of *amiable compositeur*, where that phrase empowers an authority to settle a matter not just by deciding parties' rights, but by composing the parties' interests to obtain a peaceable outcome. The visitor occupied such a role throughout its history, for it is, in an ideal scenario, a friendly face familiar with the disputants' case.⁴

This note aims to draw those diverse strands together by showing that visitors are arbitrators appointed by common law to resolve the disputes of a particular corporation. The office limits internal strife, and it does so as *amiable compositeur*—a friend of the corporators with a creative power.⁵ The visitor's role is, of course, disciplinary, but it adopts the view that dirty laundry ought to be aired in an inner courtyard rather than at the local marketplace.

A systematic refusal to air one's dirty laundry is under-appreciated in an adversarial legal system. Opposite points of view promote

inefficiency through strife, but not because conflict destabilizes societies. That's a tired argument anyway. Bitter disagreement festers and litigants ruminate, all of which limits creative solutions as parties retrench themselves.

We could use less of such squabbles, and practitioners of alternative dispute resolution have inherited much of visitors' powers to promote idiosyncratic dispute resolution. The present writing only draws attention to this point.

Visitors are an old form of dispute resolution dating to medieval religious institutions. Bishops used visitation to control priests and congregations in their diocese. The Roman Church more generally applied the concept to control corporations of religious orders within the church. In either case, the visitor appeared to control the foundation over which it was steward for the original founder. The jurisdiction continues in some cases, such as Bishop's University in Lennoxville, where the Anglican bishops of Montreal and Quebec share the right to visit and correct errors at the university.⁶

Given their positions of authority, visitors stood in the same position as arbitrators, yet they possessed further power to re-write policy or by-laws and to order any action.⁷ These powers go beyond a traditional understanding of arbitral authority in an oppositional system. They serve, however, to underscore arbitrators' origins and, perhaps, an aspect of their future.

The means of visitation were symbolic as much as they were efficient. Bishops and other church officials could appear in person to visit themselves upon their subjects. Such visits were multi-day affairs and were conducted like a royal court. Parish

ADRIC-RICS Construction Adjudication Program

Training

ALL ABOUT CONSTRUCTION ADJUDICATION COURSE-

Online, October 26, 2021 10:00am – 6:00pm ET

A one-day overview of how adjudication works and how to get the best out of it – illustrated with a practical case study presented by one of the UK's most experienced adjudicators on the RICS President's Panel.

ADVISING AND REPRESENTING PARTIES IN ADJUDICATIONS – THE ADJUDICATION ADVOCATE COURSE

Online, November 2 & 3, 2021 10:00am – 5:00pm ET each day

This two-day program provides delegates with a solid understanding of the procedure and law of adjudication to assist in advising clients. Learn how to collate evidence and prepare written submissions for an adjudication, how to present oral evidence should a hearing be needed, how to manage clients' expectations, what to do with a decision once delivered, how to get the decision enforced, and what to do if the decision is challenged. It also provides a specific focus on conflicts of interest, ethics, and jurisdictional points that might be needed on behalf of their clients.

MODULE 3: THE ADJUDICATOR COURSE

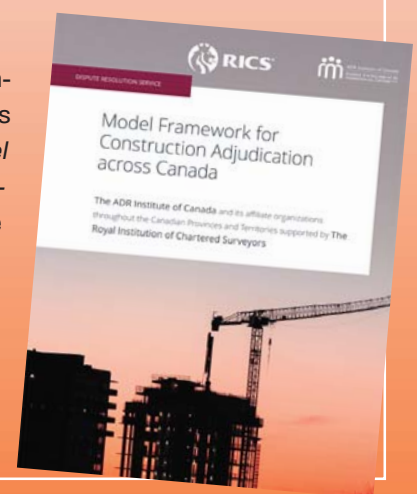
will be offered early in the new year.

Model Framework

ADRIC and its partner, the Royal Institute of Chartered Surveyors (RICS), have developed a new *Model Framework for Construction Adjudication across Canada* to set the standard for the management and administration of this new field of ADR.

See it here:

<https://adric.ca/construction-adjudication/>



Two-day program provides a solid understanding of the law of adjudication.

priests would present their accounts and disputes, for example, to the bishop. Religious orders would submit to their superiors.

Visitation eventually translated to English government via the Lord Chancellor, who was no stranger to the concept: Chancellors were, until Sir Thomas More in the sixteenth century, priests at the King's service.⁸ The start of Thomas More's chancellorship begins an ongoing confluence of religious practice with legal principles. The fountain of the visitor's legal power derived from a gift or bequest that permitted the foundation of a charity in whatever form charities could take.⁹ Hospitals, colleges, and prisons are examples of charities benefitting from visitation of one form or another.¹⁰ Private individuals whose donations established charities passed the right to visit as inheritance.

By the fourteenth century, the keeper of the King's conscience was also the keeper of his charity. The Chancellor visited all royal eleemosynary corporations on behalf of the Crown.¹¹

The legal inheritance wrought by this marriage of religion and royal power endured for the better part of English legal history. We have cases up to the nineteenth century where courts decline jurisdiction to review a visitor's decision: these were sacrosanct, if rendered within the visitor's jurisdiction.¹² They were acknowledged as final arbiters because settling disputes between members of a charity better preserved charities' missions, which aligned with religion's putative focus on good works. Every member of a charity pulled together toward a common goal. The discipline imposed by a visitor kept that little community's mission in view.

A growing administrative state dashed this concept in the measure that public conscience

separated public and private acts.

Visitors lost the legal protection borne out of property rights. Courts began to review visitors' decisions in growing frequency during the nineteenth and twentieth centuries; legislatures moved against the office so that administrative structures better aligned with government priorities.

These changes are endemic to a centralized legal system. Clear definitions create justiciable outcomes. These definitions, however, efface local circumstance. A judge will not know the form of peace that best suits a small community. The idiosyncrasies of such communities are not captured by the laws of evidence and the judge's experience.



Arbitration has run alongside the law of visitation, for private dispute resolution was popular in medieval England.¹³ The reason for this popularity is, perhaps, the same as that for visitors' popularity: royal justice was far from most litigants' homes. Preserving local peace in medieval England meant finding friendly settlements, for disputants could and did resort to violent self-help.

This comparatively lawless world was characterized, as is current arbitration, by mercantile concerns. Civil disputes came before arbitrators, but their precedential value is less important because of the scope of the interests under adjudication and parties' typical means. Until John Locke and England Board of Trade established the *Arbitration Act* in 1698, arbitration was solely regulated, in a formal sense, when the courts recognized an award.¹⁴ Parties were otherwise free to do what they could. The *Act* inverted the judicial analysis by presuming awards valid unless they fell afoul the *Act*.

Modern arbitration, of course, descends from Locke's legislative efforts. The present Canadian regime operates much like it did in 1698. The various arbitration acts authorize contracts of arbitration and provide for their judicial enforcement.¹⁵ Arbitrators are appointed on mutual consent when a dispute arises, but contracts may also anticipate disputes by submitting all future issues regarding the contract to arbitration. Labour relations arbitration is a widespread example of this practice: arbitration is required to

Dentons. A leader in appropriate dispute resolution (ADR)

Disputes are a part of doing business; at Dentons, resolving them is our business. ADR is one of Dentons' core practices, and as a globally recognized leader, we are here to help you.

To learn more about our practice, please contact our team in Canada.

Dentons, the law firm of the future is here.

大成 DENTONS

[dentons.com](https://www.dentons.com)

© 2021 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. Please see [dentons.com](https://www.dentons.com) for Legal Notices.

prevent raging industrial disputes.

Labour relations carries with it some of the characteristic elements of the visitor's jurisdiction. Members of a unionized workplace submit to the collective agreement and the arbitrator's authority. These mandatory submissions are analogous to a visitor's jurisdiction: a college's students and professors, by virtue of their admission to membership, subject to the visitor's rule.

The labour arbitrator that decides an issue is rarely reviewed if their decision falls within their jurisdiction. Arbitrators must, of course, craft reasoned (and, one hopes, reasonable) decisions; the classic law of visitation does not hold visitors to such a standard. This distinction aside, courts grant both kinds of adjudicators deference. They may decide the best resolution to a dispute.

III

A signal difference between arbitration and visitation—one noted above—is the nature of the power accorded to each. Arbitrators, though they draw power from parties' submission, are constrained by their enabling legislation. Visitors are, to some extent, similarly restricted by the founder's laws. They are, however, supreme within their domain. They may legislate, execute, and decide.

One might reply that arbitrators have a latent jurisdiction, and it is one recognized by some arbitration acts. Ontario's, for example, allows parties to dispense with any part of the Act save the requirement of arbitral fairness, and the courts' powers to extend time limits, declaring an arbitration invalid, and enforcing the award.¹⁶ Parties to arbitration may derogate from the oppositional model to authorize an *amiable compositeur*, who would be able to exercise powers resembling a visitor's.

The visitor serves as a holograph of this very fluid concept,

which is recognized in international arbitration by the concept of *amiable compositeur*. This difference between the oppositional model and amiable composition is slight, for modern litigants may expect to find a winner and a loser. Arbitration already moderates these extremes. The economics of arbitration demand parties' respect for the arbitrator's style and decision. This force pushes the arbitrator toward more moderate awards. It does not remove the oppositional structure. Nor, to be fair, does amiable composition which moderates those extremes by valorizing parties' immediate interests and the context of those interests above legal principles. Law is not done away with; the parties instead submit to a jurisdiction designed to grant them law under which they may live.

IV

Stanislas-A. LaRoche understood the jurisdiction of an *amiable compositeur*, even if he wasn't familiar with Canadian arbitral conventions. The powers that he exercised as Oblate visitor to the University and its

religious house were, essentially, those of an *amiable compositeur*. LaRoche's religious definition of the visitor's role may thus apply with equal force to a definition of amiable composition:

*La Visite n'est pas une simple formalité extérieure, ni une pure enquête. Elle devrait plutôt se présenter comme une étude importante, soignée, à faire en commun, sur les réalisations et les possibilités d'un groupe et d'une oeuvre; mais après une révision objective, honnête et franche, de notre vocation oblate, et de l'obligation du devoir d'état actuel. L'ambiguïté occasionne le malaise ou l'indifférence, tandis que la vérité acceptée, assimilée, devient notre propre vie, dans la paix et la confiance.*¹⁷

Arbitration captures so many similar elements in the term *amiable compositeur*; its greatest strength remains the ability to conduct the honest and frank assessments carried out by visitors in another life and other contexts. 🏠

- 1 I give a potted history of Bishop Guigues' activities in the Ottawa Valley in *Warring Sovereignities: Church Control and State Pressure at the University of Ottawa* (Ottawa: University of Ottawa Press, 2020) c 1; see also Donat Levasseur, OMI, *A History of the Missionary Oblates of Mary Immaculate: 1815-1898* (Rome: General House, 1985); and Donat Levasseur, OMI, *A History of the Missionary Oblates of Mary Immaculate: 1898-1985* (Rome: General House, 1989).
- 2 Full details on this visit appear in Strömbergsson-DeNora, *supra* note 1 c 4.
- 3 A full review of visitors' powers is found in Adam P Strömbergsson-DeNora, "Caught by Private Law: A Review of Visitors' Jurisdiction in Canada" (2019) 36 Windsor Yearbook of Access to Justice 284–304.
- 4 *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch. 5, Sched. 2, art. 28(3).
- 5 viz Mauro Rubino-Sammartano, "Amiable Compositeur (Joint Mandate to Settle) and Ex Bono et Aequo (Discretionary Authority to Mitigate Strict Law)" (1992) 9:1 Journal of International Arbitration 5–16 at 14–16.
- 6 *Royal Charter of the University of Bishop's College*, 16 Vict 1853.
- 7 *Philips v Bury*, [1694] Holt, KB 715, 90 Eng Rep 1294 [*Philips*] at 1299.
- 8 Gwilym Dodd, "Reason, Conscience and Equity: Bishops as the King's Judges in Later Medieval England" (2014) 99:2 (335) *History* 213–240 at 238–40.
- 9 e.g. *Philips v Bury*, [1694] 90 English Reports 1294 at 1299.
- 10 John Selden, ed, *Fleta*, EEBO Wing / F1290A (London: M.F., 1647) bk II.23 (sig. M2r).
- 11 For a modern example, see *Isaac v University of New Brunswick*, [1992] 130 NBR (2d) 382 at para 38.
- 12 *Saint John's College, Cambridge v Todington*, [1757] 1 Burr 158 (KB), 97 Eng Rep 245 [*Saint John's College*] at 199–200.
- 13 Edward Powell, "Arbitration and the Law in England in the Late Middle Ages" (1983) 33 *Transactions of the Royal Historical Society* 49–67 at 50–3.
- 14 *An Act for determining differences by Arbitration*, 9 Gul III c 15 1698; Henry Horwitz & James Oldham, "John Locke, Lord Mansfield, and Arbitration during the Eighteenth Century" (1993) 36:1 *The Historical Journal* 137–159.
- 15 I use Ontario's *Arbitration Act*, 1991, SO 1991, c 17 for reference, but other provinces have unique regimes.
- 16 *Ibid*, s 3.
- 17 *Études Oblates* (Montreal: Maison Provinciale, 1964) at 190–1, "Visitation is not a mere external formality, nor purely an inquiry. It should be presented rather as an important, careful study, to be done in common, on the achievements and possibilities of a group and a work after an objective, honest and frank review of our Oblate vocation, and of the obligations arising from the present state of our affairs. Ambiguity causes discomfort or indifference, while the accepted truth, assimilated, becomes our own life, in peace and confidence" [my translation].

When ADR Means “Avoiding Dispute Resolution”

– *Uber Technologies Inc. v. Heller*

Introduction

Arbitration has many benefits, including the parties' right to select a subject matter expert as their arbitrator, confidentiality, flexibility, and—depending on the parties' approach to the process—cost and efficiency. But if there is a pronounced asymmetry in the parties' relative bargaining power, the benefits of arbitration are illusory because a non-negotiable arbitration provision can effectively *avoid* dispute resolution and render the weaker party's rights unenforceable. Such was the conclusion of the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*¹.

Uber Technologies, Inc. (Uber), a “ridesharing” or “ride-hailing” company, connects—through a software application—a potential passenger with a driver from its roster, and charges the customer directly for the cost of the trip. Drivers provide their own vehicles (subject to Uber's approval as to year, manufacturer, and model), and are paid directly by Uber. Uber drivers sign agreements acknowledging that they are “independent third party contractors who are not employed by Uber or any of its affiliates.” Whether Uber drivers are, in law, employees rather than independent contractors, is an issue that has dogged the company since its inception, and that is the central issue in the *Uber* class action, which issue Uber had wanted to arbitrate.

According to its 2019 Annual Report, Uber operates in 69 countries and its 2019 total revenues exceeded \$14 billion, but it suffered an \$8.6 billion operating loss. Uber's drive toward profitability is predicated, in no small measure, on its drivers being characterized as contractors rather than employees. If Uber's drivers are actually employees, as is asserted in the *Uber* class action, its overall labour costs would dramatically increase, likely by at least 30%.

The *Uber* driver's agreement expressly ousts the courts' jurisdiction to hear and decide any dispute that arises under it (including whether the drivers are contractors or employees). The legality of this provision was before the Supreme Court of Canada in *Uber*.

Factual Background

David Heller's proposed \$400 million class action (which the Ontario Superior Court of Justice certified on August 12, 2021) is predicated on the assertion that Uber drivers, notwithstanding the express terms of their contracts, are employees under Ontario's *Employment Standards Act, 2000* (*Ont. ESA*). Mr. Heller, a man in his mid-30s with a high school education, earned approximately \$400 to \$600 per week for a 40- to 50-hour workweek as an “Uber Eats” driver in Toronto. Mr. Heller drove his own vehicle and was responsible for its operating costs includ-

ing fuel, maintenance, and insurance. His annual gross income (before taxes and expenses) ranged from about \$21,000 to \$31,000. Although Mr. Heller could have filed an individual complaint under the *Ont. ESA* (and the Director of Employment Standards is empowered to conduct larger employer-wide investigations), he filed a class action in the Ontario Supreme Court.

The contract between the driver and Uber B.V. (a Netherlands corporation headquartered in Amsterdam) is a 13-page online contract of adhesion (a “take it or leave it” type of agreement



**KENNETH WM. THORNICROFT,
LL.B./J.D., PH.D.**

Kenneth Wm. Thornicroft is a Professor of Law & Employment Relations with the University of Victoria's Gustavson School of Business. Prior to joining academia, Dr. Thornicroft spent ten years as a trial lawyer. He is the author of approximately 160 journal articles, conference papers, book reviews and book chapters. Bio: <https://www.uvic.ca/gustavson/faculty/faculty/faculty/current/thornicroftk.php>

where there is no scope for negotiation) and contains a dispute resolution provision (the ADR Provision). The ADR Provision combines a law of the contract clause (the Netherlands), a forum selection clause (in Amsterdam), a mandatory dispute resolution procedure (including both mandatory mediation and arbitration), and a non-disclosure agreement into a single omnibus provision.

The costs of the mandatory mediation/arbitration processes are not spelled out in the driver's contract but, as noted by the motions judge, they are significant:

There is a \$2,000 USD filing fee for the mediation and an administrative fee that, for a dispute under \$200,000 USD, can amount to up to \$5,000 USD. There is a \$5,000 USD filing fee for the arbitration and an administrative fee that, for a dispute under \$200,000 USD, is at least \$2,500 USD. The fees do not include the charges of the mediator or

arbitrator, which would be approximately \$3,000 USD for a dispute worth less than \$200,000 USD. The fees do not include the Driver's personal expenses in Amsterdam or legal expenses including counsel fee and disbursements. Arbitrators can award costs which cover expenses.²

Uber responded to Mr. Heller's proposed class action by applying to have it stayed in favour of arbitration in the Netherlands. The motion judge granted the stay, but the Ontario Court of Appeal set aside this decision. The Supreme Court of Canada dismissed Uber's further appeal.

Heller v. Uber Technologies Inc., 2018 ONSC 718

Uber applied to have the class action stayed under either Ontario's domestic or international arbitration statute. Under both statutes, the court can refuse a stay if the arbitration provision is invalid. Mr. Heller argued that the arbitration provision was invalid, first, because it was "unconscionable" and, second, because the arbitration provision was an illegal "contracting out" of the *Ont. ESA*, given that section 5(1) invalidates contractual provisions purporting to waive employment standards. (Similar provisions are contained in all provincial employment standards statutes.) The motion judge held that the arbitration provision was not unconscionable and granted Uber's motion to stay the action.

Heller v. Uber Technologies Inc., 2019 ONCA 1

The Ontario Court of Appeal set aside the stay, ruling that the ADR Provision was an illegal "contracting out" of the *Ont. ESA*, and also unconscionable. In rendering its decision, the court presumed, but did not find, that Mr. Heller was an employee. That being the case, since the arbitration agreement, on its face, "eliminates [Mr. Heller's right] to make a complaint [under the *Ont. ESA*] regarding the actions of Uber and their possible violation of the requirements of the *Ont. ESA*" (para. 41), it constituted an unlawful at-

tempt to contract out of an employment standard (namely, the complaint investigative process).

The appeal court also concluded that the ADR Provision was unconscionable because it was a substantially improvident or unfair bargain (especially given the up-front costs a driver must incur irrespective of the amount of their claim), concluded without independent legal advice, and in the face of a significant inequality of bargaining power.

The Supreme Court of Canada's Decision

The seven-justice majority decision, co-authored by Justices Abella and Rowe, dismissed Uber's appeal solely on the basis that the arbitration provision was unconscionable. The majority side-stepped the question of whether the arbitration provision was an unlawful contracting out of the *Ont. ESA*. Justice Brown concurred in dismissing the appeal, holding that the ADR Provision was not unconscionable but, rather, was contrary to public policy. Justice Côté, in dissent, would have stayed the class action conditional on Uber advancing the arbitration filing fees to Mr. Heller.

The majority concluded (at para. 4): "This is an arbitration agreement that makes it impossible for one party to arbitrate. It is a classic case of unconscionability." The majority ruled that the court, not the arbitrator, should determine if the ADR Provision was invalid because Mr. Heller had advanced a *bona fide* challenge to it, and if a stay were not granted, the validity of the provision might never be determined due to the practical cost barrier Mr. Heller faced. The majority observed (at para. 47):

...there is a real prospect that if a stay is granted and the question of the validity of the Uber arbitration agreement is left to arbitration, then Mr. Heller's genuine challenge may never be resolved. The fees impose a brick wall between Mr. Heller and the resolution of any of the claims he has levelled against Uber. An

arbitrator cannot decide the merits of Mr. Heller's contention without those – possibly unconscionable – fees first being paid. Ultimately, this would mean that the question of whether Mr. Heller is an employee may never be decided. The way to cut this Gordian Knot is for the court to decide the question of unconscionability.

Unconscionability must be assessed on two criteria. First, there must be an inequality of bargaining power such that the weaker party "cannot adequately protect their interests in the contracting process" (para. 66), although there is no requirement to prove duress or undue influence. Second, there must be an "improvident bargain," such that the agreement "unduly advantages the stronger party or unduly disadvantages the more vulnerable [party]" (para. 74), which should be assessed as of the date of the agreement. The weaker party is not required to prove that the stronger party knowingly or deliberately pressed their advantage. While recognizing the inherent value of contracts of adhesion, the majority nonetheless cautioned that these types of agreements can readily be used to impose unfair bargains on a weaker party.

The majority noted that the driver's contract—a contract of adhesion—reflected "a significant gulf in sophistication" between the parties and did not provide any readily accessible information about the costs associated with the dispute resolution process. The agreement was clearly improvident for Mr. Heller since the requisite up-front costs were "disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into" (para. 94) and "effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber" (para. 95). In effect, the ADR Provision "amount[ed] to no dispute resolution mechanism at all" (para. 97).

Concluding Remarks

The U.S. Economic Policy Institute esti-

mates that 60 million workers are now subject to mandatory arbitration provisions. Typically, these provisions prohibit class actions or any other judicial recourse; include confidentiality and non-disclosure obligations; require employees to pay an equal portion of the total arbitration costs (even if they prevail), and limit or eliminate appeal rights. The employer often selects the arbitrator and, in virtually all cases, dictates the procedural rules that will govern the arbitration process. In 2018, the U.S. Supreme Court held, 5–4, that unilaterally imposed mandatory arbitration provisions were lawful.³

It is unclear whether the U.S. trend toward mandatory arbitration will extend into Canada, although mandatory non-union employment arbitration provisions have been enforced by Canadian courts.⁴ Uber’s ADR Provision was struck down because it constituted a practical barrier for those drivers wanting to assert their rights under their driver’s contracts. The Supreme Court of Canada did *not* hold, unlike the Ontario Court of Appeal, that the ADR Provision was an unlawful contracting out of Ontario’s employment standards statute. This is a worrisome but, ultimately, perhaps not particularly significant result, since employment standards laws across the country prohibit contractual provisions purporting to prevent employees from accessing the dispute resolution procedures set out in these statutes. However, these same statutes also exclude many employees from their provisions (for example, licensed professional employees). Even if an employee is covered, they may have claims that are not enforceable under the statute (for example, a claim for severance pay in lieu of reasonable notice or for pension benefits), thus forcing the employee to seek redress in the courts (unless court action is prohibited by a mandatory arbitration provision).

The high court did not provide specific guidelines regarding what sort of less draconian provision might be enforceable. If an arbitration clause is not

“unconscionable,” or an attempt to contract out of employment standards legislation, it will presumably be enforced. “Unconscionability” is a high bar for employees to clear, and employers may be motivated to impose one-sided arbitration provisions on their non-union employees. Following *Uber*, the courts might enforce those arbitration agreements provided they are not *too* one-sided.

In determining whether a particular ADR provision crosses the “unconscionability” line, some principles may be gleaned from *Uber*. First, an unlawful provision will almost certainly be found in a contract of adhesion. Second, there must be an inequality of bargaining power as between the employer and a vulnerable employee. It is highly doubtful that an ADR provision, negotiated in good faith between two parties with roughly equal bargaining power, will be struck down as “unconscionable.” Third, the costs of invoking the ADR process must not be disproportionate relative to the monetary amounts that are likely to be in dispute. Fourth, the geographic seat of the arbitration must be readily accessible to both parties—a foreign jurisdiction could be designated, provided there is an option for an electronic hearing. Finally, the arbitrator must be a truly *neutral* third party.

To summarize, the ADR provision must be a *bona fide* provision designed to fairly and efficiently resolve the parties’ dispute, and not a provision designed to avoid dispute resolution altogether.

Arbitrators, as a matter of fundamental professional ethics, should decline to participate in an unreasonably imbalanced arbitration process. A balanced and lawful arbitration provision should include, at a minimum: the employee’s right to participate in the arbitrator selection process (which, in turn, must ensure that the arbitrator is a neutral third party); a local (or otherwise readily accessible) hearing; reasonable up-front costs; the right to engage legal counsel; and the right to opt-out in favour of the courts or an employment standards dispute resolution process if the arbitration provision purports to eliminate or restrict remedies that would otherwise be available in another forum (for example, punitive damages or damages in lieu of reinstatement). Since relatively small dollar value claims become economically unfeasible to pursue in many instances, it is critical that class action claims be allowed to proceed, where appropriate, rather than forcing employees to pursue individual dispute resolution through mandatory arbitration. 🏠

1 2020 SCC 16 [*Uber*].

2 *Heller v. Uber Technologies Inc.*, 2018 ONSC 718 at para. 25.

3 *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

4 See, e.g., *Ferrari v. University of British Columbia*, 2014 BCCA 18 and *Morrison v. Ericsson Canada*, 2016 ONSC 3908. Arbitration is mandated, by statute, in all Canadian unionized workplaces.

ADR CONNECT

Find a Mediator, Arbitrator,
Trainer or other ADR Specialist
with our unique Search Engine

Learn More

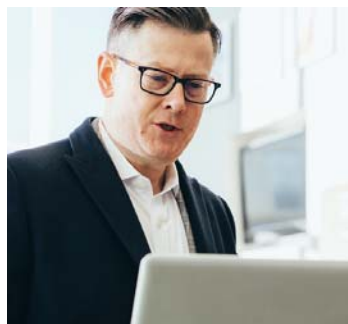


Submit Your Articles

2,500 words for Canadian Arbitration and Mediation Journal, *OR* 950 words to be published in ADR Perspectives.

"Authors who submit articles to ADRI's publications enjoy the recognition received by being in Canada's premier ADR formats. Your ideas and opinions reach the finest, most influential audiences across Canada: ADR professionals in the JOURNAL and parties and their lawyers in ADR Perspectives."

— Janet McKay
Executive Director, ADRI



Enjoy the recognition received for your ideas and opinions

CANADIAN ARBITRATION AND MEDIATION JOURNAL
For ADR Professionals; 2,500 words



EDITOR:
Genevieve A. Chornenki, LL.M. (ADR),
C.Med, C.Arb

ADR PERSPECTIVES
For ADR Parties and Counsel; Up to 950 words



CO-EDITORS:
Bryan C. Duguid, QC, FCI Arb
Paul Denis Godin, B.A., B.Sc.,
LL.B., C.Med

[Learn more...](#)



Visit ADRI.ca for important guidelines, submissions, and advertising opportunities.



The Effectiveness of Community Mediation—Narrowing the Literature Gap with Research ¹



RACHELLE PAQUET, JD

Rachelle obtained her law degree from Osgoode Hall where she completed its Mediation Intensive program. She received conflict resolution training and conducted mediations in the community and Small Claims Court. She was a Research Assistant for the Winkler Institute for Dispute Resolution and spread her enthusiasm for ADR as President of the Osgoode Advocacy Society.



KIANA BLAKE, JD, BA HONS

Kiana will be entering her third year at Osgoode Hall Law School. Prior to law school, she obtained an Honours Bachelors at York University. She graduated at the top of her class with the Governor General Silver Medal and was her class valedictorian in 2018. Bio: <https://www.osler.com/en/team/kiana-blake>

Background

Community mediation aims to help community members resolve current conflicts, build conflict resolution competency among participants and, ultimately, contribute to more peaceful communities. To what extent is it achieving those aims? Recent Canadian research offers some answers.

Community mediation and conflict coaching services are delivered in North America through community mediation centres (CMCs). At twelve such centres in Ontario, volunteer mediators support individuals to resolve conflict through constructive dialogue. How effective are they? To date, there is no clear picture of the effectiveness of volunteer-led community mediation, and few studies have focused on measuring outcomes.

The literature that does exist tends to focus on the development of CMCs in various communities, the personalities behind their founding and operation, funding sources and administrative structures, mediator training, quality control, best practices in mediation and the philosophies that guide them, and the various challenges faced by CMCs such as evaluation. But there is scant literature on whether community mediation leads to more peaceful communities.

Between September 2019 and March 2020, however, with support from The Law Foundation of Ontario and expert guidance from the Winkler Institute for Dispute Resolution, a research project was conducted to assess the effectiveness of community mediation in improving the future capacity for communications and conflict resolution between and among clients who have used these services.² The survey included only clients who attended mediation, conflict coaching, or both, voluntarily and for free, in order to resolve a dispute with a neighbour, room-mate, family member, or others. Primary data was collected from past program participants identified by each CMC. The secondary data was gathered from a review of background documents and a scan of literature.

The survey results came from seven of twelve members of the Ontario Community Mediation Coalition (OCMC), an umbrella organization representing community mediation services in Ontario that share a common definition of community mediation and agree on a standard of excellence and training for their volunteers. Results, therefore, can only be interpreted as relevant to the mediation and conflict coaching practices of OCMC members or centres offering similar services.

Finding #1: Results from Community Mediation in Private, Interpersonal Conflicts

Community mediation and/or conflict coaching participants who took part in the research reported that they experienced some change to the conflict situation as a result of mediation or conflict coaching:

- 39.7% felt that the situation had actually improved, and
- 49.2% felt better as a result of having had the opportunity to have their experiences heard and validated.

When asked *why* they were feeling better after mediation or coaching

- 43.5% reported living with less stress
- 32.3% reported having fewer conflicts
- 24.2% reported improved relationships

- 21% reported improved living situation, and
- 21% reported feeling safe.

In some cases, participants did not recognize their situation as having changed; the parties in the relationship had become distant or one party was now avoiding or ignoring the other as a way of dealing with the situation (which for some people is a more peaceful coexistence.)

Finding #2: Community Mediation Contributes to Confidence in Resolving Future Conflict

Through the community mediation and conflict coaching process, 63.5% of participants reported gaining confidence to deal with other conflict situations that emerge in their daily and professional lives. They attributed their increased confidence to the skills they observed or learned in the process such as active listening, thinking before speaking, and remaining calm.

As discussed earlier, there is very little research into the impact of community mediation in building conflict resolution capacity and confidence in participants. In this research, however, not only did a majority of participants report feeling more confident in resolving conflict, in one-on-one interviews, some were able to describe exactly how they use their new skills in their daily lives.

Survey participants reported gaining new skills as a result of participating in mediation and/or conflict coaching, specifically being able to

- 44.3% communicate differently
- 42.6% better listen
- 39.3% peacefully discuss difficult issues
- 34.4% control their emotions;
- 31.1% manage their stress;
- 27.9% be empathetic;
- 21.3% connect their feelings; and
- 9.8% respect diversity.

64.5% of participants reported that they were able to use the skills they gained in other conflict situations, in some cases transferring those skills to their workplace or professional settings.

Although participants reported gaining new skills, it is hard to extrapolate those gains into long term behavioural change given the many influencing factors and the short-term nature of the relationship between the participant and the community mediation or conflict coaching process.

Finding #3: The Importance of Voluntary Participation

Voluntary participation is a basic tenet embraced by community mediation as a whole and, specifically, by OCMC members. Voluntariness distinguishes community mediation from court-mandated mediation because participants to community mediation have agency to determine their own

participation in the process. How significant is that agency?

Secondary research was reviewed in relation to the OCMC model, a grassroots form of mediation where volunteer mediators work with participants who voluntarily attend mediation or conflict coaching in order to get help with their conflict. That research can be interpreted as validating the OCMC's insistence on voluntary participation in that it indicated that comments from participants forced into mediation are overwhelmingly negative. Most participants who felt community mediation was involuntary reported feeling worse after mediation, that they did not learn anything about themselves or gain any new skills in the process.³

OCMCs also rely on and value volunteer mediators. Studies have shown that when people volunteer they are motivated primarily for altruistic reasons, that they have a personal belief in the cause and a desire to help others. (Independent Sector, 1999, 2001; Safrit, King, Burcsu, 1993; Guseh & Winders, 2002).

Harrington (Merry et al. eds. 1993) suggests that CM's grassroots community organizing is challenged by more professionalized mediation approaches that are more closely associated with courthouses. The trend towards court-connected mediation leads to less-than-voluntary participation. In discussing the place of community mediation in a society, Gazley, Chung, and Bingham (2006) note that CMCs strive to embody the democratic and participative decision-making principles they hope to encourage in their communities.

Finding #4: The Need to Set Participants' Expectations

Setting participants' expectations for community mediation and/or conflict coaching is important to the success of these processes. Some survey participants described a divergence between their expectations and what actually happened in the process.

The divergence was noted throughout the community mediation process. At the outset some participants were surprised that the mediators were volunteers and did not necessarily have a lot of experience in mediation. During the processes, the emotional labour of the mediation seemed unexpected. Finally, the outcomes of mediation were not always as positive they had hoped.

The divergence between expectations and the actual experience of mediation was particularly evident from the comments and the one-on-one interviews, where participants offered their insights into what they learned about community mediation that they did not know going in.

The research report concluded that setting expectations for before, during and after mediation would help participants to better understand the journey they are embarking on. Additionally, OCMC could establish a process

to set expectations that can be used consistently among all members. With a consistent mediation process and better understanding of the whole process, from beginning to end, expectations could align with outcomes and contribute to the overall success of the community mediation process.

Finding #5: The Perception and Role of Peacebuilding

"Preventing 'Wars' in Our Neighbourhoods with Community Mediation" Janz (2001) considers how the personal traits and characteristics of a participant may influence the outcome of a conflict. While Janz does not include the perception of oneself as a peacemaker, she does say, "...conflict outcomes are more likely to be constructive when the disputant has a cooperative orientation to conflict."

The fact that some participants to mediation identify as peacebuilders going into the process may be something to consider in relation to the success of community mediation from intake through to follow up (Janz, 2001).

While CMCs are widespread and well established in many jurisdictions and have been in use since the 1970s in their current forms, there exists relatively little published peer-reviewed research substantiating their claim to building peaceful communities. Current available research focuses on best practices for mediators that create both short-term and long-term effectiveness, the extent of impacts following community mediation, and the economic benefits of community mediation. Nevertheless, the study found that the majority of people say that they contribute to building peace on an ongoing basis among their family, friends, neighbours or in their community. Participants attracted to OCMC community mediation and conflict coaching likely hold peacebuilding as a common value.⁴

Finding #6: Implementing CM Values Consistently

The literature investigating the effectiveness of community mediation in the long- and short-term tends to focus on mediator training, strategies, and techniques. Pruitt et al (1993)¹ used the results of a community mediation program in Buffalo, New York, to investigate the impacts of a mediator's style on long-term and short-term success of mediation, as well as the antecedents of the mediation, the overall behavior of participants during mediation, the level of motivation to settle, and the resources available following the mediation. In terms of long-term success, compliance with the agreement reached during mediation was the only indicator studied, and it was considered in comparison to cases that underwent adjudication.

Harrison's (2002) comparative study of a similar nature but focusing on community mediation for restorative justice found similar results. In their conclusions, these

authors offer possible explanations for diminished adherence to agreements as being less related to community mediation itself and more related to difficult relationships that community mediation may be ill-equipped to effectively address. Likewise, Schultz (1996) describes the steps taken to establish a community mediation centre in North Carolina and notes that within just a few years of operation, this program underwent a series of periodic evaluations including client satisfaction and compliance with agreements. The program saw substantial success on both counts but noted a possibility for improved intake procedures.

The literature routinely notes that while community mediation centres subscribe to the same values and foundational beliefs, there can be inconsistencies in how they implement those values and beliefs in their training and programs. Training and performance can vary as between CMCs as well as between individual mediators. Some of these inconsistencies may be attributed to differing funding and referral sources, volunteer human resource capacities, and the needs that may or may not be identified in a given community. An example of such inconsistency may be found in the introduction of conflict coaching to some CMCs and its role in supporting mediation processes.

Finding #7: Opportunities to Improve Community Mediation

Ongoing research and evaluation are key to continually assessing and improving programs. Through this research project OCMC members have started to work together to use data and feedback to assess and improve their work.

The following considerations were offered by the report's researchers and accepted by OCMC members:

- Evaluation and feedback forms should be consistent across the OCMC and stored centrally, so that there can be a province-wide snapshot of the impact and effectiveness of the work being done.
- Consistent, safe data collection across OCMC members would increase access to a specific group for future research. Documentation of participants should include their names and contact information and which conflict resolution process(es) they participated in.
- The process of entering into and experiencing community mediation or conflict coaching should be consistent across OCMC. Preparing clients for mediation, including setting expectations, supporting difficult experiences and debriefing participants at the end of the process could be uniform as a result of best practices.
- More specific questions in follow ups with participants may offer more insight into whether the situation with the other party has, in fact,

changed; people filling out the survey for this research sometimes indicated no improvement in the dispute, but then went on to describe positive changes. A possible approach might be to ask;

- *How has your interaction changed with the other person since mediation?*
- *What impact has your change in behaviour (if any) had on interactions with the other?*
- Other areas worth considering for consistency or improvement across OCMC include evaluation of mediator training and onboarding a greater number of diverse mediators.
- Conflict coaching alone (without mediation) appears to have notable benefits for participants. The participants' responses indicated that in coaching they learned something about themselves and how they could find ways to improve the situation.

The study found that once the OCMC community mediation or conflict coaching process was over, 63.5% of participants expressed an interest in learning more about conflict resolution skills. This presents a good opportunity for OCMCs to capture an attentive audience for continued learning and growing a cohort of peacebuilders, mediators, and mediation advocates in the community.

Conclusion

With this research The Law Foundation of Ontario, the OCMC, St. Stephen's Community House, and the Winkler Institute for Dispute Resolution have laid the foundation to better understand the effectiveness of community mediation in resolving private interpersonal conflicts, improving the future capacity to resolve other conflicts and ultimately, contribute to building a more peaceful communities.

Thanks to the participating clients, we understand that clients experience some change to the conflict situation as a result of community mediation or conflict coaching. The change in the conflict situation could include that the relationship has become distant, avoiding or ignoring as a way of dealing with the conflict situation. While some participants may not have reported that their situation was better after mediation, many felt better for having had the opportunity to say what they needed to say and from having been heard. Participants also reported feeling better because they found they were now living with less stress, having fewer conflicts and better relationships.

Whatever the outcome of the conflict situation, many community mediation participants find that they gain a greater self-awareness and new skills from the experience. The self-awareness includes better understanding the experience of the other party, not speaking without thinking first, not making assumptions about others, and increased awareness that they too had some responsibility for the conflict situation.


Greater self-awareness is one outcome of community mediation for many as well as gaining new skills such as communicating differently, listening, being able to peacefully discuss, controlling emotions, and managing stress. These new skills not only helped to increase confidence around other conflict situations but also were transferable into other areas of life such as the workplace. As discussed earlier, due to many variables it is difficult to prove that those skills translate into new behaviours. 🏠

- 1 The authors write on behalf of The Neighbourhood Group, St. Stephen's Community House, Community Mediation & Training and the Winkler Institute for Dispute Resolution.
- 2 This article and all other results of the research are the sole responsibility of The Neighbourhood Group, St. Stephen's Community House.
- 3 See the [full report](#).
- 4 See page 25 of the report.


Subscribe to our YouTube Channel

▶
Subscribe


👉




Thinking Outside the Litigation Box to Realize ALL
64 views • 1 year ago




ADRIC 2015 Keynote - The Honourable N. C. Wittmann,
64 views • 2 years ago



ADRIC 2015 Keynote - The Honourable Robert E Wanner,
62 views • 2 years ago



ADRIC 2015 - Dispute Resolution Boards DRB in
71 views • 2 years ago



ADRIC Talks - "Parenting by Text" by Mike Lund, C.Med,
103 views • 2 years ago

ADRIC Benefits of Membership

Recognized as Canada's preeminent Alternative Dispute Resolution (ADR) organization, the ADR Institute of Canada sets best practice standards in Canada, while providing leadership, value and support to our clients and individual and corporate members.



ADRIC provides education and accreditation (recognized internationally), promotes ethical standards and competency, and advocates for all forms of ADR for public and private disputes.

MEMBERSHIP HAS SPECIAL BENEFITS, INCLUDING:

visibility & marketability with our online directory; access to member logos; work and roster opportunities; publications and resources; professional development including ADRIC conference & events, affiliate events; negotiated member discounts on useful programs and services including specially-negotiated group plans.

ADRIC Group Plans

ZOOM ENTERPRISE VIDEOCONFERENCING

Do you need to conduct your meetings online more and more in these busy times? ADRIC has an outstanding plan which includes: the Enterprise Plan; breakout rooms; screen sharing; unlimited recording; unlimited cloud storage; webinar capability (up to 500 participants per meeting); training videos & 24/7 tech support.



PROFESSIONAL LIABILITY INSURANCE PROGRAM

ADRIC's Group Professional Liability Insurance program covers liability damages arising from rendering of, or failure to, render any type of ADR service. Enjoy special enhanced coverage with dramatic discounts for ADRIC members. *Members comment this insurance program alone is worth the cost of membership!*

Additional optional coverages are available: commercial general liability; personal legal expense insurance; cyber coverage; property; mobile office loss; and ID restoration services.



ENHANCED PERSONAL HOME & AUTO PROGRAM

ADRIC members have access to the TD Insurance Meloche Monnex program - preferred insurance rates and expanded coverage on a wide range of home, car and travel coverage that can be customized for your needs. Feel confident your home, condo, renter's or car insurance coverage fits your needs.



A Chance at Recovery: Is Medical Malpractice Mediation a More Successful Avenue for Plaintiff Patients?

Compared to litigation, the benefits of mediation seem obvious. In theory, mediation allows disputants to resolve their disputes privately, more efficiently, and for less money than if they were to litigate. Why, then, would a plaintiff opt to litigate a malpractice claim other than as a last resort? This article examines whether mediation in medical malpractice in fact yields more beneficial results for plaintiff patients than does litigation.

The “pros” of mediation are particularly relevant in a health law context, especially given the fact that it can be incredibly difficult to sue doctors and given the declining number of cases proceeding to litigation overall¹. However, there are potential downsides to mediating medical malpractice claims. For example, it would not be beneficial to settle a medical malpractice dispute through mediation where the complainant patient wants vindication from a court. There is also a possibility that a dispute will ultimately be litigated if a settlement cannot be reached in mediation, resulting in the prolonged re-traumatization of the patient who has to go through multiple resolution processes.

What is Medical Malpractice?

In Canada, physicians can be found civilly liable for medical malpractice in an action for negligence, as well as in battery and assault. A successful negligence action requires the plaintiff to show that

- the defendant owed the plaintiff a duty of care
- the defendant breached the standard of care established by law

- the plaintiff suffered injury or loss, and
- the defendant’s conduct was the actual and legal cause of the plaintiff’s injury.²

A plaintiff can bring an action in battery where they have undergone a medical treatment to which they did not consent or where the treatment provided goes beyond that for which they did give consent³. Patients can bring such an action whether or not they suffered harm and even if they benefitted from the unconsented-to treatment⁴.

Medical malpractice cases have also provided the backdrop for many foundational tort law cases in Canada, particularly in the areas of informed consent⁵ and inferring causation⁶ in the medical context.⁷

Canadian Medical Malpractice Claims

Many people seem to understand that it is becoming increasingly difficult to sue doctors, but why exactly is this the case? One contributing factor is the Canadian Medical Protective Association (CMPA).

Medical malpractice cases in Canada must be evaluated in light of the role played by the CMPA, a non-profit organization that provides insurance coverage and legal assistance to medical practitioners for medical liability and which seeks to provide “timely and appropriate compensation to patients harmed by negligent medical care”⁸.

In its 2019 Annual Report, the CMPA noted that out of 775 “resolved” legal actions,

- settlements for patients were entered



MADISON LAVAL, BA, JD

Madison graduated with her J.D. from the University of Manitoba in 2021, where she was actively involved in student governance and moot court competitions. She is currently articling at Pitblado LLP. Madison’s practice areas of interest include litigation and dispute resolution.

into in 285 cases

- judgment was rendered for the defendant physician in 47 cases
- judgement was rendered for plaintiff patients in only 5 cases, and
- 438 actions had been dismissed, discontinued or abandoned⁹.

The CMPA spent \$223.4 million in 2019 to compensate plaintiffs who proved that they had been injured as a result of negligent medical care, down \$37 million from 2018¹⁰.

These statistics show that recovery for patients who opt to pursue medical malpractice litigation is especially low when they come up against the CMPA. One explanation for the disparity between the number of cases won by plaintiffs and the number of abandoned cases is that some patients may pursue claims which are later revealed not to have a reasonable chance of success or are potentially frivolous. Just how much such cases account for the disparity is not discussed in the CMPA report. Another possible explanation for a portion of the 438 discontinued and

abandoned cases is that the parties entered private mediation or— perhaps more likely—the plaintiff patient was not aware of private mediation as an available option and so chose to go without recourse.

The low rate of patient success suggests that private mediation, when discussed, is a good option for plaintiffs facing the CMPA. The CMPA is clearly aware of the use and potential benefit of mediation, as its glossary defines mediation as “part of the legal case resolution process, whereby a mediator assists the opposing parties to negotiate a resolution”¹¹. Further, the CMPA’s Medical Legal Handbook notes that mediation is often part of the litigation process¹², and counsel often “simply agree to voluntarily participate in mediation.”¹³ However, the 2019 Annual Report does not specify whether its members engaged in private mediation sessions with plaintiff patients.

A recent CBC news article about the process of litigating a claim against defendant doctors is also revealing. In the interview, a medical malpractice lawyer from Ontario¹⁴ told CBC that most lawyers will not take on a plaintiff patient’s claim unless the potential recovery of the patient exceeds \$250,000¹⁵. He also explained that, in his experience, the “CMPA’s deep pockets allow it to drag out cases for years, causing many frustrated patients to give up.”¹⁶

Whether or not the CMPA intentionally delays the litigation of claims against its members in situations where a plaintiff patient has made a claim against a physician under the CMPA, private mediation could be used to speed up the process of reaching resolution.

If the Forum Fits—Deciding Between Medical Malpractice Mediation and Litigation

Medical malpractice claims “often arise where the doctor-patient relationship has broken down.”¹⁷

There are, of course, different

models of mediation, and mediators tend to have their own style. Facilitative mediation, where the mediator leads disputants through a constructive conversation, is likely best for patients who are seeking to tell their story and who are comfortable with facing the defendant doctor in a mediation session, whereas evaluative mediation, where the mediator expresses views on the merits of the case, may be a good option where vindication is an important aspect of the dispute resolution process to either or both parties.

In the context of medical malpractice disputes, the particular style of the mediator may be less important than the fact of engaging in mediation itself, as it has been suggested that “mediators’ styles are not fixed but are driven by the context of a dispute...[and] fall along a sliding scale or continuum, with facilitation at one end and evaluation at the other.”¹⁸ Mediators need not be either strictly facilitative or evaluative; a hybrid approach leaves room within the mediation for the parties to voice their concerns, either by themselves or with the aid of counsel, and allows the defendant doctor to offer an apology to

the patient.

Mediation might not be the best option for a plaintiff patient for whom an important aspect of recovering from medical negligence is *judicial* vindication. Likewise, where a defendant physician “has an emotional investment in being vindicated from wrongdoing in the eyes of the public or colleagues, then the process of mediation may not be appropriate for it will not allow scrutiny of the merit of the defence.”¹⁹

The Role of Apology

Apologies have an especially important role to play in medical malpractice mediation. A recent movement has “[called] for greater transparency and more effective communication after an adverse outcome [for a patient]—often called ‘open disclosure’ or ‘open communication’.”²⁰

Research concerning doctor-patient relationships and adverse medical events suggests that it is “ineffective communication with patients—not negligence—[that] puts physicians at greater risk of malpractice lawsuits”²¹ because health care practitioners “often make assumptions about a patient’s concern instead of listening, or take a patient’s

Fairway

Attention ADR pros!
OWN A FRANCHISE
Access a National Support Team

Join Fairway, Canada’s leader in divorce mediation and alternative dispute resolution. As a Franchise Partner, you belong to a **network of experienced owners** who will provide the support you need to succeed. If you are interested in building a successful business in your area of expertise, then this may be a great fit for you.

Learn more about franchise opportunities in your market.

FairwayFranchise.com



Professional Designations for Mediators and Arbitrators

ADRIC's professional designations in mediation and arbitration identify and differentiate those who hold them. They demonstrate to potential clients that you have achieved prescribed training and experience levels recognized by your peers and based on objective third party assessment by a committee of senior and highly respected practitioners.



C.Med, Q.Med, C.Arb, Q.Arb, C.Med-Arb and now, Family Designations, such as Q.Med(Fam)!

These credentials¹ after your name enhance your credibility and marketability. These national designations communicate your membership in a national organization dedicated to promoting ADR and your commitment to continuing education and engagement in the practice.

The C.Med (Chartered Mediator) and C.Arb (Chartered Arbitrator) are Canada's preeminent generalist designations for high-level practising mediators and arbitrators and the most senior designations offered by ADRIC.

The Qualified Mediator (Q.Med) and Qualified Arbitrator (Q.Arb) are entry-level designations. They provide recognition of training and moderate experience and offer a solid foundation as you progress to the next designation.

The new Chartered Med-Arb Designation (C.Med-Arb) is available to members who hold both a C.Med and C.Arb designation and have taken special ADRIC training. Med-Arb is unique in the ADR world, and is a distinct process designed to meet the needs of the parties as a customized dispute resolution process. It requires a high level of practitioner competence to do successfully.

These designations are recognized and respected across Canada and internationally. They are often accepted as the minimum criteria for membership on rosters including those with the Federal Government.



For more information and criteria, visit [**ADRIC.ca**](https://www.adric.ca)



¹ All designations are TM ADR Institute of Canada, Inc.

words at face value instead of trying to determine the patient's true meaning."²²

The privacy offered by mediation fits particularly well in situations where previous doctor-patient communication has been less than ideal; it increases the chance of defendant doctors offering genuine apologies to their patients, since "shame, fear of a lawsuit and isolation from colleagues are all reasons why doctors avoid apologizing to their patients after adverse events."²³ I presume that an early apology—ideally one immediately following discovery of the initial injury—obviates the need for medical malpractice dispute resolution altogether. However, even where an apology is not given within a reasonable time after the incident, an apology can still be useful when and if the forum shifts from the physician's office to the mediation room.

Canadian apology legislation

provides protection for defendant doctors where they choose to provide an apology.²⁴ In Manitoba, for example, *The Apology Act*²⁵ ensures that an apology cannot later be used as proof of an admission of liability²⁶ and cannot be used as evidence of wrongdoing in court²⁷. The Manitoba *Apology Act* was specifically brought into being with the medical malpractice context in mind, its purpose being to "make it much easier for those who are health-care providers to say they are sorry when a medical error or a medical mishap occurs."²⁸ Having the mediator set out the benefits and potential uses of an apology at the outset of the mediation session may help the physician feel that they can safely provide an apology to the patient.

Psychological Impacts of Litigation on Disputants

A summary of health and psychology lit-

erature looking at the psychological impacts of litigation on both disputants and counsel²⁹ indicates that clients experience significant litigation stress that extends beyond the immediate costs and risks associated with the litigation process.

"Some personality types are more vulnerable to litigation stress than others, and the pressure of litigation can activate certain personality predispositions."³⁰ For example, clients who "have been involved in pre-litigation trauma...or who have PTSD may experience more intense physical manifestations of anxiety."³¹ Clients suffering from PTSD, perhaps after an adverse medical experience, are "often already embroiled in the psychological defence of avoidance. For PTSD patients involved in litigation, this defence becomes thwarted as they become obligated to revisit the trauma through interviews,

Disability Accessibility Guidebook for Mediators

Authors:
Martha E. Simmons and
David Lepofsky

**THERE IS NO CHARGE
FOR THE BOOK***

Providing concrete information on the importance of, and how to, increase accessibility in the mediation process.

- The importance of ensuring participants with disabilities fully participate in your mediations;
- What, when and how to ask: Inquiring about disability-related accommodation in mediation;
- How it works: The mediation process and accommodation;
- Accommodating the needs of people with hearing loss, vision loss, intellectual disabilities, mental health conditions, physical and mobility disabilities, communication disabilities, autism, and learning disabilities.



A Very Popular
Resource

Order a Hard Copy by email admin@adric.ca

*Postage & handling charges may apply.

examinations and testimony.”³²

Just as the “thin skull” rule in tort law requires the defendant to “take his victim as he finds him,”³³ so too must lawyers take their clients as they find them. That is, lawyers should be attuned to whether or not their clients have a particular predisposition making them ill-suited to withstand litigation.

When Mediation is Not Appropriate – Prolonged Traumatization and Ulterior Motives

Unlike a judicial decision, mediation is not binding on the parties, but for some disputants, this might be a pitfall in disguise. Because the parties do not have to reach agreement, there is a possibility that they will ultimately proceed to litigation. Depending on the nature and type of injury sustained by the patient, there is a risk of prolonged traumatization and re-traumatization as a result of going through

multiple ADR and court processes while re-hashing the details of the experience before their own counsel, opposing counsel, the defendant doctor, a mediator, and a judge. During litigation, “many litigants are frustrated at having to answer questions on demand while not being able to ask their own,”³⁴ and the type of question being asked might further exacerbate the vulnerability of plaintiff patients, as the questions can “range from being vague and general to specific and probing.”³⁵ Going from mediation where the parties are largely in control of the conversation to a courtroom may be a jarring and unpleasant transition for plaintiff plaintiffs.

Another element of private mediation that may cause a plaintiff patient to experience heightened stress is where a specialized mediator is selected, such that both the defendant doctor and the mediator know and under-

stand medicine and technical medical terms, leaving the patient in the dark or feeling “ganged-up on.” As one commentator remarked, “the freedom to fashion tailor-made processes and outcomes in private, unobserved proceedings also means that there is potential for exploitation by parties with greater expertise, resources, and social power.”³⁶ In such cases of asymmetrical resources, it may be best to select another forum.

Where mediation has been used in medical malpractice cases, research indicates that participants, including clients and their lawyers, have different motivations and expectations. In a 2009 interpretive theory-based study by Tamara Relis “derived from 131 interviews, questionnaires, and observations of parties, lawyers, and mediators involved in 64 mediated fatality and injury cases in medical disputes,”³⁷ Relis flagged an attendance issue at the mediation sessions, whereby “physician defendants did not attend most litigation-linked mediations within the present study, be they voluntary or mandatory,”³⁸ despite rules of court requiring their attendance. Instead, defendants’ counsel attended alone, and “prior agreement between the “parties” generally provided a way out of the court rule.”³⁹ Relis’s study also revealed that the reasons for participation by disputants, their counsel, and even the mediator were often radically different. Both patients and doctors had “extralegal” goals motivating their desire to participate in the mediation. Most patients wanted apologies, fault admissions, and explanations by defendant physicians of the medical incident.⁴⁰ Where defendant physicians did attend, they felt that they “benefitted personally by attending mediation...and most (64%) were of the view that it could assist in resolving disputes.”⁴¹ Defendants also thought that the “whole point” of mediation is to allow the disputants to communicate and put forward their side and that “the process could not have taken place without [them] being there.”⁴²

**ADRIC
Course Accreditation
Service**

ADRIC is a primary source of information about ADR training and courses across Canada;

we direct these inquiries to the Course Accreditation page on our website. Having your course successfully accredited by ADRIC will allow you a spot on our website and the right to claim that your course meets some or all of the criteria for ADRIC designations.

LEARN MORE

**2021
ADRIC
ACCREDITED
COURSE**

**ADRI INSTITUTE OF CANADA
INCORPORATED 1974**

**Meets Criteria For
ADRIC Professional
Designations**

Sample

Both plaintiff and defendant lawyers, however, perceived mediation as a means to highlight the risks and weaknesses of their clients' position, and to deflate the monetary settlement expectations of their own clients."⁴³ Relis's study also revealed that lawyers dominated the mediation process, deciding who would be present, what issues would be discussed, and who the mediators would be.⁴⁴


Relis's study explained that even though plaintiffs were generally satisfied with the process, the source of satisfaction differed from that of their lawyers. Plaintiffs were pleased to have had the opportunity to express their feelings and obtain some sense of emotional relief, while their lawyers were content to

gather information for legal claims and to assess the participants as potential trial witnesses.⁴⁵ The mediators themselves were not necessarily disinterested; Relis noted that there is a "competitive reality...between mediators, each pressured to perform and obtain the same or better settlement rates than their colleagues."⁴⁶ Relis suggested that this led to mediators "performing" for lawyers, "as there was an unspoken awareness of the possibility of mediators precipitating future work from lawyers."⁴⁷

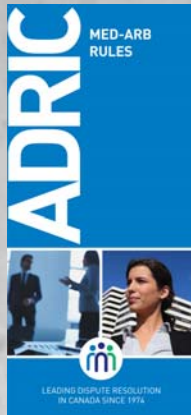
Conclusion

The benefits of mediation do not always correspond to the downsides of litigation, but mediation can be a useful starting point, even when claimants and their

counsel are dubious about reaching settlement. If a patient is open to sitting down and having a discussion with the defendant physician, mediation should be encouraged; it may result in a quicker resolution of the dispute with less damage to the doctor-patient relationship than would be the case with an adversarial process.

Of course, proper training for physicians in the area of giving swift, thorough, and genuine apologies, accompanied by an explanation to the plaintiff about what went wrong is crucial,⁴⁸ and could eliminate the need for any formal (or informal) dispute resolution. Absent such training, there are benefits to all parties should they engage in mediation as an initial step. 

- 1 Between 2010 and 2020, there were 615 reported cases of medical malpractice on Westlaw Next Canada, 43 of which were reported in 2020. In only six of those cases was the plaintiff patient successful in advancing a claim against a defendant physician. See also *Warner v Calgary Health Authority*, 2020 ABQB 172; *Woods v Jackiewicz*, 2020 ONCA 458; *Hacopian Armen v Mahmoud*, 2020 ONSC 4946; *Stevenhaagen Estate v Kingston General Hospital*, 2020 ONSC 5020; *Uribe v Tsandelis et al*, 2019 ONSC 7093; *Harbord v Dupont*, 2020 ONSC 2003.
- 2 *Cherry (Guardian ad litem of) v Borsman*, [1990] BCJ No 2567, 24 ACWS (3d) 400.
- 3 *Reibl v Hughes*, [1980] 2 SCR 880, [1980] SCJ No 105 [Reibl].
- 4 *Malette v Shulman*, [1990] OJ No 450, 72 OR (2d) 417 [Shulman]. In emergency situations, however, the consent of the patient is not required, and a physician is entitled to exercise discretion and apply medical or surgical treatments to save the life of the patient. See *Marshall v Curry*, [1933] 3 DLR 260, 60 CCC 136.
- 5 *Ibid.* See also *Shulman*, *supra* note 4; *Reibl*, *supra* note 3.
- 6 *Snell v Farrell*, [1990] 2 SCR 311, [1990] SCJ No 73.
- 7 It is reasonable to assume that medical malpractice cases will continue to inform Canadian tort law, and it is not in the public's interest to lose the precedential value of all medical malpractice cases to private mediation.
- 8 The Canadian Medical Protective Association, "2019 Annual Report" (June 2020) at 4, online: *CMPA – Annual Report* <www.cmpa-acpm.ca/static-assets/pdf/about/annual-report/2019/annual-report-e.pdf#page=33> [perma.cc/89TJ-4NT7].
- 9 *Ibid* at 9.
- 10 *Ibid* at 35.
- 11 Canadian Medical Protective Association, "Glossary" (2020), online: *Glossary – CMPA* <www.cmpa-acpm.ca/en/site-resources/glossary-of-terms#content-form> [perma.cc/9332-J3JD].
- 12 Canadian Medical Protective Association, "Medical-Legal Handbook" (March 2020) at 3, online: *CMPA Medical Legal Handbook for Physicians in Canada* <www.cmpa-acpm.ca/static-assets/pdf/advice-and-publications/handbooks/com_16_MLH_for_physicians-e.pdf> [perma.cc/J5FA-2M48].
- 13 *Ibid* at 6.
- 14 *Harte Law*, "Paul Harte" (2020), online: *Harte Law* <chartelaw.com/lawyers/paul-harte/>.
- 15 Habiba Nosheen & Andrew Culbert, "As fewer patients sue their doctor, the rate of winning malpractice suits is dropping too" (18 April 2019), online: *CBC News* <www.cbc.ca/news/health/medical-malpractice-doctors-lawsuits-canada-1.4913960> [perma.cc/8W73-9C2H].
- 16 *Ibid.* To this, Dr. Douglas Bell, Special Advisor to the Chief Executive Officer of the CMPA, said that the CMPA will not mount an unethical defence; puts in considerable effort to streamline the management of cases; and finds that it is beneficial to everyone involved in medical negligence cases – including the CMPA – when cases are handled expeditiously.
- 17 Jennifer L. Schulz, "Mediator Liability: Using Custom to Determine Standards of Care" (2002) 65 Sask L Rev 163.
- 18 Jane Kidner, "The Limits of Mediator "Labels": False Debate between "Facilitative" versus "Evaluative" Mediator Styles" (2011) 30 Windsor Rev Legal & Soc Issues 167 at 167.
- 19 Lorraine E. Ferris, "Using Therapeutic Justice and Preventive Law to Examine Disputants' Best Interests in Mediating Cases about Physicians' Practices: A Guide for Medical Regulators" (2004) 23:1 Med & L 183 at 194.
- 20 James Shing-Ping Chiu, "Better Education and Training in Apologies to Resolve Medical Mishaps Disputes" (2019) 38:1 Med & L 59 at 60 ["Better Education and Training in Apologies"].
- 21 *Ibid.* See also Brennan et al, "Incidence of Adverse Events and Negligence in Hospitalized Patients – Results of the Harvard Medical Practice Study I" (1991) N Engl J Med; Beckman et al, "The Doctor-Patient Relationship and Malpractice: Lessons From Plaintiff Depositions" (1994) *Arch Intern Med* 1365.
- 22 Better Education and Training in Apologies, *supra* note 20 at 61.
- 23 *Ibid* at 64.
- 24 See for example *The Apology Act*, SM 2007, c 25; *Apology Act*, SO 2009, c 3; *Apology Act*, SBC 2006, c 19.
- 25 *The Apology Act*, SM 2007, c 25.
- 26 *Ibid*, s 2(1)(a).
- 27 *Ibid*, s 2(2).
- 28 Manitoba, Legislative Assembly, *Hansard*, 39th Parl, 1st Sess, (12 June 2007).
- 29 Michaela Keet, Heather Heavin & Shawna Sparrow, "Anticipating and Managing the Psychological Costs of Civil Litigation" (2017) 34:2 Windsor YB Access Just 73.
- 30 *Ibid* at 78.
- 31 *Ibid.*
- 32 *Ibid* at 79.
- 33 See e.g. *Smith v Leech Brain & Co*, [1962] 2 QB 405, [1961] 3 All ER 1159.
- 34 *Ibid* at 90.
- 35 *Ibid.*
- 36 Julie Macfarlane, "Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model" (2002) 40:1 Osgoode Hall LJ 49.
- 37 Tamara Relis, *Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs and Gendered Parties* (Cambridge: Cambridge University Press, 2009) at vii.
- 38 *Ibid* at 87.
- 39 *Ibid.*
- 40 *Ibid* at 136.
- 41 *Ibid* at 107.
- 42 *Ibid.*
- 43 *Ibid* at 135.
- 44 *Ibid* at 88-90.
- 45 *Ibid* at 11.
- 46 *Ibid* at 199.
- 47 *Ibid.*
- 48 Better Education and Training in Apologies, *supra* note 20.



New

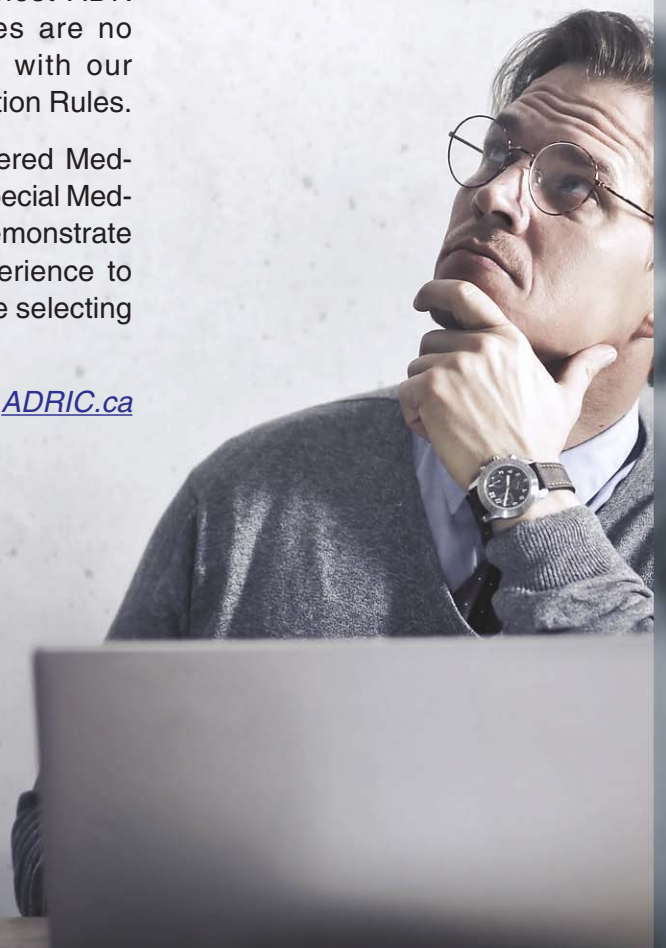
ADRIC Med-Arb Rules, Course and Designation

Med-Arb is a hybrid approach that combines the benefits of mediation and arbitration. Parties first attempt to collaborate on an agreement through non-binding mediation, with the help of a mediator. If the mediation does not result in a settlement, the mediator assumes the role of arbitrator and, following agreed upon arbitration procedures, issues a binding decision.

ADRIC committed to develop guidelines for Med-Arb processes in 2015. The new Med-Arb Rules are now available! Our mission is always to promote and maintain the highest ADR practice standards; the new Rules are no exception and blend seamlessly with our existing Mediation Rules and Arbitration Rules.

We have also developed the Chartered Med-Arb (C.Med-Arb) designation and a special Med-Arb Course. Practitioners can now demonstrate the appropriate education and experience to achieve the designation so that those selecting a professional can be assured.

Learn more at ADRIC.ca



The Alternative Dispute Resolution Processes in Canada's New CCDC 2-2020 Construction Contract

Since its formation in 1974, the Canadian Construction Documents Committee (CCDC) has developed, revised, and published a suite of standard form contracts (and accompanying forms, guides, and bulletins) for use in both the public and private sectors of the Canadian construction industry.

One such standard form is the stipulated or fixed price contract, known as "CCDC 2," which is the most widely used construction contract in Canada¹. The 1994 version, which introduced alternative dispute resolution, was updated and revised in 2008 and then again in December of 2020. The construction industry welcomed the 2020 version because it incorporates

- new streamlined and consolidated requirements relating to the introduction of prompt payment legislation
- the role of "adjudication" in resolving payment disputes
- evolving responsibilities for overall health and safety
- valuation of change directives
- responsibility for delays, and
- prerequisites for both early occupancy of the project by the owner and a new "Ready-for-Takeover" completion milestone.

Owners, who might be prepared to use the standard CCDC 2 contract as a baseline document, may add supplementary general conditions (**SGCs**) in order to reallocate responsibilities and risk.

Authority and Role of Consultant

CCDC 2-2020 includes provisions relating to the decision-making function and role of the "Consultant²." During the construction phase of a project, the Consultant is responsible for contract administration services³ which include, among other things,

- inspecting
- testing
- reviewing shop drawings
- preparing change orders
- responding to requests for time extensions
- rejecting deficient work
- determining amounts owing to the Contractor⁴, and
- issuing payment certificates.

Furthermore, the Consultant has traditionally been the arbiter of first instance with respect to disputes between the Owner⁵ and the Contractor⁶ as to the interpretation, application or administration of the contract. If a particular dispute is not resolved promptly, the Consultant will usually give instructions

to the parties to ensure the proper and continuous performance of the work and to prevent delays pending resolution of the dispute⁷. The parties are obliged to follow those instructions, on the understanding that doing so would be without prejudice to any claim either party may have⁸.

After the passage of fifteen Working Days⁹ from the date of receipt of the Consultant's finding (and assuming that neither party challenges it), the parties are deemed to have accepted the finding and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in it¹⁰.

Arbitral Immunity of Consultant

Over the past one hundred years, courts in England have grappled with the issue of whether a Consultant, in purporting to resolve disputes between the parties, acts as an agent for the Owner or as an arbitrator between the Owner and the Contractor. The early court decisions held that as the Owner's agent the Consultant is potentially liable for negligence,

HARVEY KIRSH, B.A., LL.B., LL.M., C.S., C.ARB

Harvey Kirsh is an Arbitrator and Mediator for construction claims and disputes arising out of infrastructure, transportation, energy, residential, industrial, commercial, and institutional projects. He has received the Ontario Bar Association's Awards of Excellence in both Alternative Dispute Resolution and Construction and Infrastructure Law. For his professional bio, see <http://kirshadr.com/>.



whereas as arbitrator the Consultant is protected from actions for negligence by the doctrine of "arbitral immunity¹¹."

The English decisions¹², which have been followed in Canada¹³, have held that, absent proof of bad faith or fraud, arbitral immunity applies where the Consultant acts as a quasi-judicial decision-maker in respect of a dispute in which both sides put forward evidence and submissions. This immunity applies to contractual liability that may arise out of the arbitration agreement and to tort liability that may result from the arbitrator's acts or omissions.

Despite the fact that Consultants are generally retained by and have the authority to act on behalf of Owners,

their arbitral role is intended to be exercised in an impartial, unbiased, fair, and professionally competent manner¹⁴. This is reflected in GC 2.2.8, which provides that “(i)nterpretations and findings of the Consultant shall be consistent with the intent of the Contract Documents. In making such interpretations and findings the Consultant will not show partiality to either the Owner or the Contractor.”

This policy of impartiality is further reflected in legislation which provides, at least for architects in Ontario, that “(f)ailing to act fairly and impartially between the parties to a contract that the [architect] is administering” constitutes “professional misconduct¹⁵,” and exposes the offending architect to the prospect of sanctions, such as a suspension or revocation of his licence and a fine of up to \$5,000¹⁶.

The Consultant’s arbitral role dovetails with provisions contained in widely used forms of architectural consulting agreements. For example, GC 5.4.2 of the 2018 Edition of the Canadian Standard Form of Contract for Architectural Services (known as “Document Six”) contemplates that the architect “shall be, in the first instance, the inter-

preter of the Construction Contract, and shall make written interpretations and findings that are impartial and consistent with the intent of the Construction Documents.” Furthermore, GC 1.1.11 of Document Six provides that the architect “will perform the Services with impartiality.” These provisions segue to GC 9.2.3, which provides that “The Architect shall not be liable, in contract or tort, for the result of any interpretation or finding of the Architect rendered in good faith in accordance with the Construction Documents.” Thus, Document Six contains within its four corners a qualified and slightly modified notion of arbitral immunity which is supplemental to the protection afforded by common law.

The Three Steps in the Sequential Process of Dispute Resolution

(i) Negotiation

If either party should decide to challenge the Consultant’s finding, then the first of three steps in the sequential process of dispute resolution would be launched. The unsatisfied party sends a formal written Notice in Writing¹⁷ of the dispute to the

Have your organization become a Corporate Member

Corporate members are an important part of ADRIC.

The long-term commitment of our supporters contributes to the advance of ADR in our legal system, the dispute-resolution alternatives that lawyers present to clients, and the manner in which businesses operate and resolve disputes. Our corporate members provide us with important perspectives on the needs of individuals and organizations – often via our Corporate Advisory Board and receive numerous benefits.

Alberta Energy Regulator
Borden Ladner Gervais LLP
Burnet, Duckworth & Palmer LLP
Cox & Palmer
Deloitte LLP
Dentons Canada LLP
Environmental Appeals Board
Fairway Divorce Solutions
Gowling WLG
Imperial Oil Ltd.
Insurance Bureau of Canada
Ismaili Conciliation and Arbitration Board for Canada
KPMG LLP
Oster, Hoskin & Harcourt LLP
Rose LLP

Consultant¹⁸ and the opposing party calling for negotiation, and the opposing party in turn sends a formal Notice in Writing of reply¹⁹, whereupon the battle begins, tempered somewhat by the fact that GC 8.3.3 mandates that “(t)he parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations”.

(ii) Mediation

GC 8.3.1 of CCDC 2-2020 calls for the appointment of a Project Mediator²⁰ shortly after the award of the contract for the general purpose of assisting the parties, by way of a mediated negotiation, to reach agreement from time to time on disputed findings made by the Consultant and on any other unresolved issues.

CCDC 40-2018, which is a companion document incorporated by reference into the CCDC 2-2020 contract²¹, embodies the “Rules for Mediation and Arbitration of Construction Industry Disputes.” Rule 5.3 provides that the Project Mediator “shall be impartial and independent of the Parties, be experienced and skilled in commercial mediation, and have knowledge of relevant construction industry issues.”

Appended to CCDC 40-2018 is a sample Mediator Services Agreement which sets out proposed rules regarding the

- appointment of a mediator
- conduct and timelines relating to the mediation
- elements of privilege and confidentiality
- requirement for frank, candid and timely disclosure
- exchange of mediation briefs and key documents, and
- possible joinder of additional parties (subject to the consent of all affected parties).

The Project Mediator is jointly appointed by both parties and may be more readily accepted as a neutral person, not having the perceived “baggage” which encumbers the project Consultant as the arbiter of first instance. Furthermore, the appointment of the Project Mediator by both parties may eliminate the skepticism of some Contractors as to the impartiality of the Consultant who is paid by the Owner and whose own negligence may have caused or contributed to the very claims being reviewed.

Mediation is non-binding and is conducted on a “without prejudice” basis. No decision is imposed and the Project Mediator’s role is to help the parties to communicate with each other. In essence, the process offers the parties the opportunity to avoid the uncertainty, risks, and expense inherent in both arbitration and litigation. Furthermore, there is a general sentiment among litigation counsel that mediation is an effective and successful dispute resolution process.

Either party is at liberty to withdraw from the mediation and may elect to invoke the next step of the dispute resolution process, namely arbitration.

(iii) Arbitration

If the dispute has not been resolved through mediation, the Project Mediator will terminate the mediated negotiations by giving Notice in Writing to the parties and the Consultant²². Then, within ten Working Days, either party may refer the dispute to be finally resolved by arbitration in accordance with the Rules for Arbitration set out in CCDC 40-2018²³.

Many commentators and judges have promoted arbitration “for purposes of speed, economy, finality and privacy”²⁴; and it is widely accepted that arbitration has advantages over conventional litigation by

- permitting the parties to select a neutral person with particular expertise in the area of the dispute
- being a more informal (and possibly less expensive) process which is governed by relatively straightforward rules
- bringing the dispute before the arbitrator in a timely way at a time and place which suits the parties, thus avoiding the delays often associated with litigation
- facilitating a more private process (which may be important if the parties expect to continue to do business together after the conclusion of the arbitration), and
- limiting or eliminating the likelihood of appeals²⁵.

Appended to CCDC 40-2018 is a sample Arbitrator Services Agreement which sets out proposed rules regarding the

- requisite qualifications and powers of an independent, impartial single Arbitrator or a three-person arbitral tribunal
- initial procedural meeting which would launch and define the arbitration
- conduct and timelines relating to the arbitration
- exchange of written position statements or pleadings and key documents
- guidelines relating to both factual and expert evidence, and
- interim and final reasoned Awards.

Construction projects are often characterized by a complex web of legal relationships, and many issues come into play in determining whether or not to refer a dispute to arbitration. A typical project may involve one or more owners, design professionals, sub-consultants, lenders, quantity surveyors, project managers, general contractors, subcontractors, material suppliers, insurers, sureties, and others. Construction disputes often involve multiple contracts, subcontracts, and service agreements, and multiple parties, some of whom might not be privy to an arbitration clause in a particular construction contract. Bilateral arbitration may not be the best strategy or solution where there are multiple parties who may have contractual responsibilities, obligations, and potential liability, but who may not be compelled by contract or inclination to participate in or be bound by a final and binding arbitration award. This dilemma is addressed to an extent by Rule 3.1 of CCDC 40-2018 which provides that “(t)he joinder of Additional Parties with an interest in a dispute to be resolved by arbitration is permissible only if all Parties consent and the

proposed Additional Party consents”.

Adjudication: A New Construction Industry Remedy


Amendments to Ontario's *Construction Act*²⁶, promulgated in October of 2019, introduced a legislative scheme referred to as “prompt payment”²⁷ which was intended to facilitate a more continuous flow of funds down the construction pyramid. The scheme is enforced by a new interim binding dispute resolution mechanism known as “adjudication.”

In the context of this discussion, the processes of negotiation, mediation, and arbitration are all derived from CCDC 2-2020, following sequentially on the heels of a finding by the Consultant. However, adjudication as a method for facilitating “prompt payment” is enabled strictly by the *Construction Act*. There is no reference to adjudication in CCDC 40-

2018 and only passing reference in CCDC 2-2020, where GC 8.2 provides that “(n)othing in this Contract shall be deemed to affect the rights of the parties to resolve any dispute by adjudication as may be prescribed by applicable legislation.”

The enactment of prompt payment legislation in Ontario and its proposed introduction in other provinces and by the federal government has apparently justified the reference in CCDC 2-2020 to adjudication in GC 8.2.

Conclusion

Taking disputes to court is viewed as a last resort under CCDC 2-2020. Some parties, although apprehensive about unfamiliar alternative dispute resolution processes, are nevertheless mindful of the fact that the time, expense, and risks of litigation are significant burdens to be avoided. 

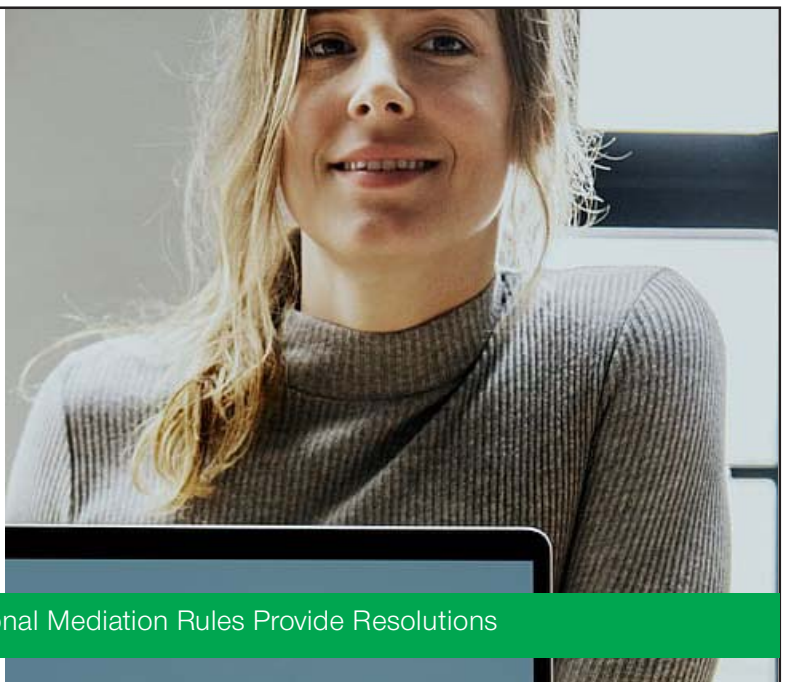
- 1 For a review of two annotated iterations of the CCDC 2 contract, see Harvey J. Kirsh, *Annotated Stipulated Price Construction Contract (CCDC 2-1982)* (Canada Law Book Inc., 1989), and Harvey J. Kirsh and Lori Roth, *Kirsh and Roth: The Annotated Construction Contract (CCDC 2-1994)* (Canada Law Book Inc., 1997)
- 2 As defined in CCDC 2-2020
- 3 GC 2.2.1
- 4 As defined in CCDC 2-2020
- 5 As defined in CCDC 2-2020
- 6 GC 2.2.7
- 7 GC 8.1.3
- 8 *ibid*
- 9 As defined in CCDC 2-2020
- 10 GC 8.3.2
- 11 For a discussion of this doctrine, see Harvey J. Kirsh, “Arbitral Immunity of Design Consultants”, Pipeline Magazine (Mechanical Contractors Association of Toronto, 2001), Vol. 3, No. 3, Summer 2001; and Harvey J. Kirsh, “Resolving Disputes: When Arbitral Immunity Protects Design Consultants”, Osler Construction Briefing newsletter, Spring 2001. Also see David I. Bristow and Jesmond Parke, “The Gathering Storm of Arbitrators’ and Mediators’ Liability”, 7 C.L.R. (3d) 238
- 12 See, for example, *Sutcliffe v. Thakrah* [1974] A.C. 727; *Arenson v. Casson Beckman Rutley & Co.* [1977] A.C. 405
- 13 See, for example, *Zittler v. Sport Maska Inc.* [1988] 1 S.C.R. 564 [S.C.C.]; *Flock v. Beattie*, 2010 ABQB 193

- 14 See, for example, *Coady Construction and Excavating Limited v. St. John’s (City)*, [2004] N.J. No. 259 (T.D.), supplementary reasons, [2004] N.J. No. 327 (T.D.); *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, [1999] N.S.J. No. 163 (S.C.), *aff’d* [2000] N.S.J. No. 96, 3 C.L.R. (3d) 22 (C.A.)
- 15 See s. 42(46), R.R.O. 1990, Regulation 27 under Ontario’s *Architects Act*, R.S.O. 1990, Ch. A.26
- 16 *Architects Act*, R.S.O. 1990, Ch. A.26, section 34(4)
- 17 As defined in CCDC 2-2020
- 18 GC 8.3.2
- 19 *ibid*
- 20 GC 8.3.1 provides that “the parties *shall* appoint a Project Mediator” [emphasis added], implying that this is mandatory
- 21 See GC 8.3.1
- 22 GC 8.3.5
- 23 GC 8.3.6
- 24 *Valley Ridge Homes Ltd. v. Caldecott*, (2008), 2008 BCSC 121 (at para. 2 (per Brooke, J.)), 2008 CarswellBC 178, 73 C.L.R. (3d) 159 (B.C. S.C.)
- 25 *ibid*
- 26 R.S.O. 1990, Chap. C.30, as am.
- 27 “The prompt payment scheme was introduced to ensure payment continuously flows down the construction pyramid by providing statutory deadlines for payment on construction projects”: Howard Krupat and Emma Cosgrave, “Construction Adjudication: An Overview”, 36 Constr. L.L. 2 at 3 (November / December 2019)

Simple Guidelines for Initiating Mediations

When Drawing Contracts Use the Model Dispute Resolution Clause

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 mediated pursuant to the National Mediation Rules of the ADR Institute of Canada, Inc. The place of mediation shall be [specify City and Province of Canada]. The language of the mediation shall be [specify language].



Obtain Your Copy - ADRIC National Mediation Rules Provide Resolutions

Role Plays: Do They Really Prepare New Graduates for Workplace Conflict?

For over twenty years, I have taught undergraduate students in Canadian business schools, and in my classroom role plays, case studies, and simulations have been an important part of my negotiation and conflict resolution courses. But do they work? And perhaps more importantly, do they translate into successful management of conflict in the workplace in those important early years? I will briefly discuss some of the evidence that supports this approach to teaching conflict resolution skills, and pose a critical question—how do we know these teaching tools actually make a difference when new graduates face conflict in the early days of their careers? More research is in order.

Why test our assumptions about role plays?

Testing is vital. Certainly, that is something we have learned from our shared experience with COVID-19, no matter what our attitudes may have been toward verifying our assumptions in the past. The recent global pandemic has brought home a fundamental principle as true in organizational life as it is educational settings: just because we have not seen (e.g. contact with an infected person) or experienced something (e.g. exhibiting symptoms) is no guarantee that a phenomenon is not having an impact on our lives. The reverse is also true, of course: simply because we have taken a specific measure (e.g. wearing a mask indoors, washing hands) is also no guarantee that we are able to successfully avoid the impact of the same phenomenon. Testing, or assessment, matters.

Since ancient times, games have been used to teach and prepare young adults for the demands of their

social roles (Leigh, Courtney, & Nygaard, 2012). Almost since the inception of the modern business school, roles plays, case studies, and simulations have been used to link theory with practical skills development (Henriksen & Lainema, 2012) for undergraduate students. You need only look at the web pages of universities and colleges across the country to see the prominence of experiential education in programs that prepare organization managers of the future.

The case for experiential learning

In their introductory comments for the volume *Simulations, Games, and Role Play in University Education*, Geurts and Duke (2012) state “Games are productive temporary arenas for realistic exploration and clarification of *conflicts* of interest and perceptions” (emphasis in the original). Making the case for the use of these teaching tools, the authors go on to state that educational settings parallel modern organizations in the need for an element of “play” in order to foster innovation. Learning to play in university prepares young professionals for the modern work of work (Geurts & Duke, 2012). This kind of thinking corresponds to the increasing emphasis on “experiential learning” in Canadian business schools

Experiential learning is not without its ethical cautions, as noted by Dean, Wright & Foray (2020). However, there is no doubt that simulations and role plays are valuable educational tools. Research shows a range of attributes that contribute to the effectiveness of learning tools and resultant skills development; these can include technology, contextual familiarity, cultural relevance, (Martin, Kolomito, & Lam, 2014) and



SHELAGH CAMPBELL, PHD

Shelagh Campbell is Associate Professor of Conflict Resolution and Business Ethics at the University of Regina where she teaches in the Hill and Levene Schools of Business. Prior to a career in academia, Dr. Campbell worked in Human Resource Management and maintained a 20 year arbitration practice with the Canadian Motor Vehicle Arbitration Plan (CAMVAP).

memory consolidation (Taras & Steel, 2007), all within the course and classroom setting.

A good portion of the academic literature is devoted to how specific teaching tools are structured and delivered, and how the resulting learning is measured. But how do these tools specifically support managing conflict in organization settings for new career entrants?

Value of role plays

A recent report of the Project on Negotiation at Harvard Business School examined the impact of role play simulations on negotiation (PON, 2019). Several authors weigh in on different aspects of teaching students and future negotiators using role plays, with the pros and cons of realism in those role play scenarios. Crampton and Manwaring (2019) discuss the advantages and drawbacks of role plays that closely match the workplace reality of students (familiarity) compared to real world event settings that may be unfamiliar but are historically accurate. They

discuss the tactics for generating authentic emotional response in role plays. These are all features that have been addressed in the application of role-plays in more general education settings, as noted above. The authors conclude that there is value in both artifice and reality, depending on the learning objectives of a learning event.

An underlying assumption in the Harvard report is that these students of negotiation are already placed in organizations and taking specialized content workshops on dispute resolution. But what about students who are in a full time, formative education space, building credentials for a career that has not yet started? It may not be possible to align a role play context and content with a diverse audience of undergraduate students in a business school or a liberal arts program. Many, of course, will have core organizational experiences. They have all enrolled in the program, contacting various administrative people and undergone various processes. Many will have retail employment experience in various subsectors of that industry: food and beverage, clothing, service centre support, etc., where conflict is

likely an everyday occurrence. However, they come from a range of walks of life, from very different places and cultural spaces, and increasingly they meet online. Yet we offer a non-customizable course over a thirteen week semester to prepare them to assess and address conflict in organizations. Does the use of role plays in this setting really add value and transferrable skills when graduates find themselves in their first “real” job?

A call for further research

The question for readers, and indeed recruiters, to consider is how well a

range of approaches to teaching conflict resolution prepares new job entrants for the reality of organization conflict that they **will** face in the early years of their careers. It is only possible to truly test our assumptions about the effectiveness of experiential education in undergraduate conflict resolution courses through rigorous research on the early career experiences of recent graduates. The value of this type of research is even more important as we face the aftershocks of COVID-19 and come to terms with dramatically changed workplaces and the resulting changes to the way we encounter and manage conflict in organizations. 🏠

References

- Crampton, A. & Manwaring, M. 2019 Shaping the context, meaning, and effectiveness of negotiation simulations: teaching and training insights. pp 2-10 in *Understanding the impact of role play simulations* Teaching Negotiation: Program on Negotiation Harvard Law School
- Dean, K.L., Wright, S., & Forray, J. 2020 Experiential learning and the moral duty of business schools *Academy of Management Learning and Education* 19(4) <https://doi.org/10.5465/amle.2018.0335>.
- Geurts, J. & Duke, R. Foreword pp ix-xii in *Simulations, Games and Role Play* Nygaard, C., Courtney, N., & Leigh, E. Eds. Libri Publishing, UK
- Henriksen, T.D., & Lainema, T. A framework for integrating learning games in business education. pp 63-84 in *Simulations, Games and Role Play* Nygaard, C., Courtney, N., & Leigh, E. Eds. Libri Publishing, UK
- Leigh, E., Courtney, N., & Nygaard, C., The coming of age of simulations, games and role play in higher education. pp 1-22 in *Simulations, Games and Role Play* Nygaard, C., Courtney, N., & Leigh, E. Eds. Libri Publishing, UK
- Martin, B.O., Kolomitro, K., Lam, T. 2014 Training methods: A review and analysis. *Human Resource Development Review* 13(1) pp 11-35
- Program on Negotiation 2019 *Understanding the impact of role-play simulations*. Teaching Negotiation Harvard Law School
- Taras, D., & Steel, P. 2007 We provoked business students to unionize: Using deception to prove and IR point. *British Journal of Industrial Relations* 45(1) pp 179-198 <https://doi.org/10.1111/j.1467-8543.2007.00607.x>

Subscribe and follow

Receive topical insights and information on issues of central concern to ADR practitioners and ADR end users (parties and their lawyers).



<http://adric.ca/communication-preferences>



Dispute Resolution Services

Financial knowledge.
Informed opinions.
Successful dispute resolutions.

home.kpmg/ca

Let's do this.

© 2021 KPMG LLP, an Ontario limited liability partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved. 12529



CADN

Canada's Premier Civil Trial Mediators & Arbitrators Online

www.mediators.ca

*The Canadian Academy of Distinguished Neutrals is
proud to partner with our US sister association*



THE NATIONAL ACADEMY OF
DISTINGUISHED NEUTRALS

www.NADN.org

Diversity in Mediation?

Bring It On!

My husband grew up in rural Saskatchewan. His mother cooked potatoes and meat, while his father made sure they had the best beef, pork, deer, duck, and chicken. They hardly had any spices, nor did they use onions or garlic, and they ate fresh tomatoes only during the summer.

My husband didn't try garlic, pizza, or spices until he left home at age 17, and he never dreamed of a future where he would travel and meet different cultures, places, and people, let alone marry someone like me who comes from Mexico with its different cuisine, customs, and language. The Regina he grew up near was once made of Western European immigrants with some newer migrants from Ukraine. Today, however, it has a variety of people and tastes, and I maintain that this variety has much to offer the process of mediation.

Mediation is naturally diverse because one cannot know in advance

- what options participants will bring to the table
- how long it will take
- what it will uncover, or
- what it will solve.

The diversity of the process and of us as humans is not a negative attribute. Rather, it is something that enriches our day-to-day life and the process itself. Mediation grows by the diversity of the people involved in it. Our minds expand when we are able to broaden our horizons, and this is a key element for mediation's success.

I suggest that within this evolving diversity a category of service providers exists that I refer to as "Culturally and Linguistically Diverse" or CLD. These are individuals who are

versed in two or more cultures and/or languages and can bring their knowledge and experience to bear on solving problems and resolving disputes. As mediators, CLDs can enhance the mediation process, contribute life experiences, add spice to the mix, enrich the flavor and help the parties to open themselves to new, great, unusual, and sometimes exotic options for resolution.

CLDs, such as people who have come to Canada from other countries, must develop a number of skills relevant to mediation in order to succeed in an environment that may be unusual for them. These approaches include being open to hearing and learning about new things, being adaptable and fitting in. CLDs need to be curious about others, as curiosity is a survival tool for them; it allows them to see how things are done and what behaviours are expected as they try to fit in and be accepted. They approach the world with eyes wide open, truly noticing those around them and how they are expressed in this new environment. People from other cultures have learned how families behave in the new country and how to figuratively "take off their shoes" when entering a house.

New Canadians learn the use of the word "sorry," ask for a "double-



**REINY ORTEGA CUBAS, LL.L.,
MCR, Q.MED, Q.ARB**

Reiny Ortega Cubas is a tenured law professor from UNAM. She worked in the Judiciary and in the Center for Alternative Justice. Reiny designed a manual of peace for elementary schools and is the founder of ADR Saskatchewan's online Regina Mediation Practice Group and "Accent Mediation". <https://accentmediation.ca/>

double", go camping, understand hockey. Depending on where they made their place of residence, they adapt to the cold, wear winter coats, boots and even wear shorts at 12 degrees or less! They comprehend the differences between unfamiliar worlds and contrasting perspectives, discipline themselves into leaving their past judgments behind and adapt. If their priority is to belong, they look for the opportunity to learn, to observe, to be a part of Canada, rather than to judge. They search for points of connection.

Some CLDs are bilingual speakers. As such, they are natural mediators by which I mean they tend to be agile and alert in the face of linguistic differences. Being able to converse in more than one language may allow them to more readily detect different structures and possibilities since they know two different ways to get ideas across and divergent approaches to the same problem.

Just think about the following:

French and English people both know the number eighty, but while the English simply say *eighty*, the French name it *four-twenty*. In English inanimate objects don't have a grammatical gender, while in many other Indo-European languages they do. The Spanish pronoun for his and hers is the same, while Korean doesn't have articles. Some languages write right to left, others left to right. English and French uses the Latin alphabet, others use a different alphabet or script.

Language defines reality. Weird as it may seem, not every language defines the same colours, agrees on which person must be considered a relative, or confers

respect by using particular pronouns. While switching from one language to another, bilingual CLDs have developed the "ability to recognize two simultaneous truths [and this] leads automatically to the values that lie at the heart of dispute resolution, including tolerance, pluralism, and an appreciation of diversity" (Clove, 2013). As mediators, bilingual CLDs may know many ways of getting something equivalent, seeing different perspectives for everything, and creating different ways of constructing thoughts and sentences.

Present day bilingual CLDs are intuitively aware of the power of words, a trait which serves them well

as mediators. They must work hard to understand exactly what a person is saying, thereby practising active listening. They must be alert to the various implications of words, a core aspect of their daily experience. They are likely to ask more questions than did Jacques Cartier, who assumed that "Kanata" meant half of a continent, rather than just a village, when he asked First Nations people where he was.

It might seem illogical at first, but even the fact that CLDs sometimes lack the specific English vocabulary enhances their communicative capabilities and creates a useful ambiguity for the parties. CLDs are capable of creating metaphors, quoting folk

SEND YOUR MESSAGE TO

ADR Specialists and Users across Canada!

Place your ad in:

- The prestigious ***Canadian Arbitration and Mediation Journal***, published twice annually, distributed to over 2,400 ADRI members, firms, libraries, and now available on [CanLII](#)
- ***ADR Perspectives*** newsletter, published four times per year, distributed to over 2,400 ADRI members and

ADR end users including in-house counsel and their parties

- ***ADRI Member News*** e-newsletter, sent monthly to ADRI's 2,400+ Full members across Canada
- ***ADR in Canada News & Events*** newsletter, sent four times annually to all of ADRI's Corporate Members, Stakeholders and Friends

as low as

\$158
per insertion



VIEW OUR RATE CARD

COMPETITIVE RATES & MARKETING OPTIONS, TAKE ADVANTAGE OF ADRI'S CREATIVE ADVERTISING TO PROMOTE YOUR SERVICES.

sayings, or sourcing words in the most elegant Latin locutions. These are all useful tools available for the mediation process if a CLD individual is invited in.

While I was writing this article, I came to realize that, although CLDs have much to offer in mediation and can bring a high degree of learning and cultural competency to the process they are under-represented in the mediation workforce. The publicly available data on the ADR Institute of Canada members' directory (which, of course, doesn't consider the totality of mediators), does not indicate ethnicity or cultural origin but did allow me to compare language use. I observed that

- 93.7% of ADRIC members have working knowledge of English, compared with 86.2% of Canadians according to the results of the 2016 census, and
- 14.2% use French compared to 29.4% of Canadians.

According to the census, 20.6% of Canadians report a mother tongue other than English or French.

It would be interesting to know from ADRIC members how many languages they speak and in particular whether they can communicate in First Nations and Métis languages. The absence of information about cultural and linguistic diversity is, in my view, unfortunate. Not only would such information help our clientele to appreciate the great variety of mediators and their backgrounds and help to close the gap to differences, it would also allow those who use ADR services to make more informed choices.

Bringing different people with different stories and perspectives enriches the process of mediation. It is known how vast Canada is and how different her provinces are. The world is also rich and diverse. City dwellers and rural dwellers are different too, and within these two groups, there are further categories. People from the city

know how to react to things in a different way than people from the rural areas. Sound, silence, security, and values may change depending upon where you are, and a CLD mediator can help participants understand these differences.

Most mediators have a few favorite stories or analogies that they rely upon when particular patterns emerge during a conversation. The same idea brought out in a different way can help the parties see past their positions. Sayings like "Wherever you go, do as they do" has the same meaning as "While in Rome, do as the Romans do," but the idea may resonate stronger to the parties if they hear a restatement of a familiar saying.

CLDs as mediators can also bring their own stories to help the parties see their problems with distinct and/or different lenses. A Mexican mediator, for example, could explain to the parties when the mediation process begins, that the process could feel like "swinging at a piñata (piñata) with a blindfold on." This analogy might make them smile, release tension, and create rapport. It also makes them aware of the uncertainty of time, interests that will develop and the surprising result.

Alternative images for conflict can open the path for conflict transformation. As an example, a Philippine mediator could easily bring their picture of Taal Volcano to explain that a conflict is not always what we see. The interests may be hidden within the core of the volcano and, if not recognized, can explode into a conflict. The metaphor of the apparent tranquility of Taal Lake and the danger of the Taal Volcano gives the parties a picture of what conflict is, works for them and takes them to a different place. The parties can remember this picture more easily than any theoretical class.

In summary, CLD mediators can broaden the palette available to

people in conflict. They can bring new perspectives, new narratives, and direct the mediation towards agreements, common ground, and a possible settlement.

Now, going back to the beginning, let us imagine for a moment that mediation is like a meal and its participants are the food. Notwithstanding its origins in Ethiopia, some of us enjoy coffee in our daily diets, while others rather prefer tea, originating in China. We grew accustomed to Egyptian bread, French jam, Mexican tomatoes, and Mesopotamian eggs. A fulfilling diet without Peruvian potatoes seems unthinkable. Even Sumerian milk and New Guinean sugar are very familiar to us.

These various kinds of produce, ideas, and their use are no longer considered foreign on our tables. They have become woven into our society and society has been enriched by the combination. Canadians today make "ethnic foods" at home and enjoy exotic flavors that intensify the palate. We have truly become foodies, and we all know that there are meals whose flavor would be just perfect with the appropriate spices. We are so fortunate in having highly skillful native English and French speakers that represent for me beef, duck, and chicken, to which I would add the milk, vegetables, fruits, and spices offered by CLDs. In combination, these things can lead to a great meal.

It has been 50 years since Canada became the first country in the world to adopt an official multiculturalism policy. CLDs as mediators will demonstrate the diversity of the Canadian society, give a space to everyone, and show the humanity behind colors, sizes, histories, and geographies.

Mediation is malleable. The world changes. CLDs and Canada have set a path. Let's work together to set the table. 🏠

ADRIC is Grateful for the Support of its Corporate Members:

Learn about the benefits of ADRIC corporate membership and join today.



Congratulations to our New Designation Recipients!

We congratulate ADR Institute of Canada members who were recently awarded the designation of Chartered Mediator, Chartered Arbitrator, Chartered Med-Arbitrator, Qualified Mediator, or Qualified Arbitrator.

NEW CHARTERED ARBITRATORS

Marsha Graham, C.Arb (AB)
Tina Huizinga, C.Arb (AB)
John Lee, C.Arb (BC)
Roy McPhail, C.Arb (MB)

NEW CHARTERED MEDIATORS

Anik Beland, C.Med (ON)
Jason Dykstra, C.Med (ON)
Nick Greer, C.Med (BC)
Lori Henderson, C.Med (SK)
Shelly McLaughlin, C.Med (BC)
Richard McCormick, C.Med (SK)
Greg Nelson, C.Med (SK)
Dominique Panko, C.Med (SK)
Cecilia Rockel, C.Med (SK)
Jim Skinner, C.Med (BC)
Ilana Tamari, C.Med (ON)

NEW CHARTERED MED-ARBITRATORS

Kathleen Bellamano, C.Med-Arb (BC)
Joan Cotie, C.Med-Arb (BC)
Richard Moore, C.Med-Arb (ON)
Michelle Simpson, C.Med-Arb (AB)

NEW QUALIFIED ARBITRATORS

Ryan Armstrong, Q.Arb (SK)
Faith Baron, Q.Arb (SK)
Jean Bedard, Q.Arb (ON)
Pamela Bell, Q.Arb (AB)
Shannon Belvedere, Q.Arb (AB)
Louis Belzil, Q.Arb (AB)
Brad Bianchin, Q.Arb (BC)
Joe Bradford, Q.Arb (AB)
Vicki Buder, Q.Arb (ON)
Abraham Costin, Q.Arb (ON)
Jodi Engel, Q.Arb (ON)
Aaron Enns, Q.Arb (BC)

Peter Gallagher, Q.Arb (NS)
David Neil Gray, Q.Arb (SK)
Jamieson Halfnight, Q.Arb (ON)
Robert Harason, Q.Arb (ON)
Sarah Harvey, Q.Arb (ON)
Martin Henderson, Q.Arb (BC)
Moosa Jiwaji, Q.Arb (AB)
Art Kanzaki, Q.Arb (BC)
Michael Katz, Q.Arb (SK)
Susan N. Kennedy, Q.Arb (AB)
Fisnik Kumnova, Q.Arb (BC)
Desmond MacMillan, Q.Arb (BC)
Robyn Marttunen, Q.Arb (ON)
John McClure, Q.Arb (AB)
Eric Morgan, Q.Arb (ON)
James Morrison, Q.Arb (SK)
Eric Myles, Q.Arb (ON)
Niels Ortvad, Q.Arb (ON)
Gregory Owens, Q.Arb (ON)
Tiffany Paulsen, Q.Arb (SK)
Tim Pearkes, Q.Arb (BC)
Ricardo Alcolado Perez, Q.Arb (ON)
Allan Pootoolal, Q.Arb (ON)
Dianna Robertson, Q.Arb (BC)
Praveen Sandhu, Q.Arb (BC)
Andrew Scott, Q.Arb (ON)
Megan Shields, Q.Arb (SK)
Jim Skinner, Q.Arb (BC)
Everton Thomas, Q.Arb (ON)
Phil Thompson, Q.Arb (ON)
Darrell Thorvaldson, Q.Arb (SK)
Adam Touet, Q.Arb (SK)
Scott Tracze, Q.Arb (ON)
Peter Unruh, Q.Arb (BC)
Paul Winfield, Q.Arb (ON)
James Yerxa, Q.Arb (AB)

NEW QUALIFIED MEDIATORS

Carla Bekkering, Q.Med (BC)
Shannon Belvedere, Q.Med (AB)

Tamara Bews, Q.Med (AB)
Jeff Brosseau, Q.Med (ON)
Jag Budwal, Q.Med (ON)
Carol Butz, Q.Med (AB)
Dana Campbell, Q.Med (ON)
Marina Carbonell, Q.Med (NS)
Christiana Carty, Q.Med (ON)
Wai Chi Chan, Q.Med (MB)
Donald Dueck, Q.Med (ON)
Jodi Engel, Q.Med (ON)
Pamela Giesbrecht, Q.Med (AB)
Ben Grebinski, Q.Med (SK)
Nazia Haider, Q.Med (ON)
Chelsea Hazewinkel, Q.Med (AB)
Teresa Hunt, Q.Med (ON)
Kristie Irving, Q.Med (ON)
Michael Kaufman, Q.Med (ON)
Andrew Kemp, Q.Med (BC)
Sherri Koven, Q.Med (ON)
Cynthia Malouin, Q.Med (BC)
Laurel Marshall, Q.Med (ON)
Teresa Michayluk, Q.Med (SK)
Patricia Miller, Q.Med (SK)
Rose-Anne Moore, Q.Med (ON)
Julie Morton, Q.Med (ON)
Karlana Noel, Q.Med (AB)
Megan Paterson, Q.Med (BC)
Bettina Plendl, Q.Med (BC)
Patrick Predy, Q.Med (SK)
Saba Quadri, Q.Med (ON)
Bryan Richards, Q.Med (SK)
Colleen Selby, Q.Med (BC)
Praveen Sandhu, Q.Med (BC)
Brigitte Shoppoff, Q.Med (MB)
Marie-Josée Smith, Q.Med (ON)
Yasifina Somji, Q.Med (AB)
Wes Thiessen, Q.Med (AB)
Alyson Townsend, Q.Med (NS)
Firoz Verjee, Q.Med (AB)
Robert Todd Wellman, Q.Med (BC)
Glenndon Whitaker, Q.Med (ON)
Janelle White, Q.Med (SK)

The Chartered Mediator (C.Med) and Chartered Arbitrator (C.Arb) are senior designations. These, as well as the Qualified Mediator (Q.Med) and Qualified Arbitrator (Q.Arb) are Canada's only generalist designations for practicing mediators and arbitrators. They demonstrate the member's specific credentials, education and expertise. Recognized and respected across Canada and internationally, they allow the holder to convey their superior level of experience and skill. Clients and referring professionals can feel confident knowing that ADR practitioners holding an ADR Institute of Canada designation have had their education and performance reviewed, assessed and verified by a team of senior and highly respected practitioners.

[More information](#)

ADRIC Special Honourees

ADRIC honours Past Presidents, Fellows, Directors Emeritus and Recipients of the McGowan Awards for their support and significant contributions to the growth and development of ADR and ADRIC.

PAST PRESIDENTS

1974-1975 **L. J. McGowan**
1975-1976 **J. T. Fisher**
1977-1979 **W. E. Hickey**
1979-1981 **P. B. Walters, C.Arb**
1981-1981 **B. V. Orsini**
1981-1984 **Joseph W. Myers**
1984-1985 **W. John C. Stikeman**
1985-1986 **Norman A. Richards**
1986-1988 **William G. Geddes**
1988-1990 **C. H. Laberge**
1990-1991 **D. C. Andrews**
1991-1994 **H. J. Wilkinson**
1994-1995 **Joanne H. Goss**
1995-1997 **Roman Evancic**
1997-1999 **Gervin L. Greasley**
1999-2000 **Heather A. de Berdt Romilly**
2000-2001 **Allan Stitt, C.Med, C.Arb**
2001-2002 **Kent Woodruff, C.Med, C.Arb**
2002-2004 **Barry C. Effler, C.Arb**
2004-2007 **P. David McCutcheon, C.Arb**
2007-2009 **Donald E. Short, C.Arb, FCIArb**
2009-2012 **R.J. (Randy) Bundus**
2012-2014 **James (Jim) Musgrave, Q.C., C.Med, Q.Arb**
2014-2017 **M. Scott Siemens, C.Med**
2017-2018 **Thierry Bériault, C.Med**
2018-2020 **Andrew D. (Andy) Butt, C.Med, C.Arb**

FELLOWS

Archie M. Doyle, BSc (EE), MEIC, PEng
Basil V. Orsini, CMP, CIE, MCIQS, FCIArb
Carson F. Morrison, BE, MSc, FEIC, PEng
Charles H. Laberge, BComm, MBA, C.Arb
David C. Elliott, C.Arb
David Lemco, C.Arb
Donald M. Batten, FCIArb, FIIC, FAIC
E. Leonard Weldon, Q.C.
H.D.C. Hunter, BA, MA, C.Arb
Harold J. Wilkinson, PEng
John A. Tuck, Q.C.
Joseph W. Myers
Lionel J. McGowan
Paul B. Walters, BASc, MBA, MEIC, PEng
Philippe Ferland
Professor Roger Fisher

W. John Stikeman, MBE
William G. Geddes, LL.B., BSc, Civil Eng, C.Arb, Mediator
William R. Kay
Winston E. Hickley, LLD, FEIC, PEng

HONOURARY FELLOWS

B.W. Vigrass
Past Director and Secretary,
The Chartered Institute of Arbitrators
Cedric Barclay
Past President
The Chartered Institute of Arbitrators
Robert Coulson
Past President
American Arbitration Association
Richard J. Soper
Past President
The Chartered Institute of Arbitrators

DIRECTORS EMERITUS

Alex S. Hamilton
Andrew G. Farquharson, BSc, PEng
Angus McClaskey
Archie M. Doyle, BSc (EE), MEIC, PEng
Carson F. Morrison, BE, MSc, FEIC, PEng
Clifford A. Lincoln, FCIArb, FCII, FHC.
D.M. Batten, FCIArb, FIIC.
David L. Campbell, BSc, PEng
Douglas V. Gonder
Francois Beauregard
Frank A. Wright, LLB, FCIArb, FCIS.
Gervin L. Greasley, C.Arb
H.D.C. Hunter, BA, MA, C.Arb
R.F. Legget, O.C. Deng, FRSC
W.F. James, PhD, FRSC, PEng
William J. Hartnett, Q.C.
William R. Kay
Winston E. Hickley, LLD, FEIC, PEng

HONOURARY MEMBER

Hon. Thomas A. Cromwell

RECIPIENTS OF THE LIONEL J. MCGOWAN AWARDS OF EXCELLENCE

NATIONAL :

1999 **Roman Evancic (BC)**
2000 **NIL**
2001 **William J. Hartnett (AB)**

2002 **Barry Effler, C.Arb (MB)**
2003 **P. David McCutcheon, C.Arb (ON)**
2004 **Noel Rea (AB)**
2005 **Gervin L. Greasley (MB)**
2006 **Gerald Ghikas, C.Arb (BC)**
2007 **Bill Remmer (AB)**
2008 **Harold J. Wilkinson, C.Arb (ON)**
2009 **Donald E. Short, C.Arb (ON)**
2010 **William G. Horton, C.Arb (ON)**
2012 **Brian J. Casey (ON)**
2013 **Jeffrey Smith (ON)**
2014 **James (Jim) Musgrave, Q.C., C.Med, Q.Arb (Atlantic)**
2015 **Anne M. Wallace, Q.C., C.Med, C.Arb (SK)**
2016 **Jim McCartney, C.Med, C.Arb (AB)**
2017 **Angus Gunn, Q.C. (BC)**
2018 **M. Scott Siemens, C.Med (SK)**
2019 **Wendy Hassen, C.Med (AB)**
2020 **Serge Pisapia, C.Arb, C.Med (QC)**

REGIONAL:

1999 **Harry Hunter, (BCAMI)**
2000 **Kent Woodruff, C.Med/C.Arb (BCAMI)**
2001 **Annette Strug, C.Med (ADRAI)**
2002 **Bernie McMullan, C.Arb (ADRIIM)**
2003 **Randy A. Pepper, (ADRIO)**
2004 **Gary Fitzpatrick, C.Arb (BCAMI)**
2005 **Gary T. Furlong, C.Med (ADRIO)**
2006 **Kenneth A. Gamble, C.Med/C.Arb (ADRSK)**
2007 **Mary T. Satterfield, C.Med/C.Arb (ADRIO)**
2008 **Sheila Begg, C.Med/C.Arb (BCAMI)**
2008 **Bill Diepeveen, (ADRIA)**
2009 **Tom W. Smith, C.Med (ADRIA)**
2010 **Richard H. McLaren, C.Arb (ADRIO)**
2011 **Camilla Witt, (ADRIA)**
2011 **Dr. Barbara Landau, C.Med, Cert.F.Med (ADRIO)**
2012 **Pamela Large-Moran, C.Med, C.Arb (ADRAI)**
2013 **Dr. Barbara Benoliel, (ADRIO)**
2014 **Claude Métras, Méd.A/Arb.A (IMAQ)**
2015 **Dr. Jennifer L. Schultz (ADRIIM)**
2016 **Andrew D. Butt, C.Med, Q.Arb (ADRAI)**
2017 **Heather Swartz, C.Med (ADRIO)**
2018 **The Honourable Andrea Moen (AB)**
2019 **Charmaine Panko, C.Med, Q.Arb (ADRSK)**
2020 **Eric Slone, C.Arb (ADRAI)**

ABOUT ADRIC

ADRIC brings together seven affiliates in addition to major corporations and law firms to promote the creative resolution of disputes internationally and across the country. Our broad membership base allows for diverse skills and experience that address all types of dispute resolution needs in Canada. Numerous organizations refer to ADRIC for guidance in administering disputes between organizations, their clients or customers, between employees,

or between employees and management using ADRIC's Rules for Mediation, Arbitration and Med-Arbitration. Members adhere to ADRIC's Code of Ethics and are subject to disciplinary policies. Those who have achieved the required education and practical experience may apply for recognition as designated Qualified Arbitrators, Chartered Arbitrators, Qualified Mediators, or Chartered Mediators as generalist practitioners and now, Family practitioners.

2020-2021 BOARD OF DIRECTORS

EXECUTIVE

Elton Simoes, C.Med, Q.Arb
President and Director-at-large,
Vancouver, BC

Andrew D. (Andy) Butt, C.Med, C.Arb
Past-President and Director-at-large,
St. John's, NL

Michael Schafler, Q.Arb
Vice-President, President-Elect and
Director / Corporate Representative
- Dentons Canada LLP, Toronto, ON

Daniel Faucher, CStJ, B.Sc. AdeC, RCCTm
Vice-President and Director /
Affiliate Representative - IMAQ, QC

Jasmine Schulz, B.A.
Vice-President and Director /
Affiliate Representative - ADRI, MB

Josie Parisi, CPA, CA, CBV, CIRP
Treasurer and Director-at-large,
Toronto, ON

Sara Ahlstrom, MA, BA, C.Med
Secretary and Director / Corporate
Representative - Dispute
Resolution Services, Alberta
Municipal Affairs, Edmonton, AB

DIRECTORS

Naiim-Alexandre Antaki
Director / Corporate Representative
- Gowlings, Montréal, QC

Paul Bradley, CPA, CA, CBV, CFF
Director / Corporate Representative
- Deloitte, Halifax, NS

Adam Fox, MA, J.D, C.Med
Director / Affiliate Representative -
ADRI, ON

Isabelle Keeler, J.D.
Director / Corporate Representative
- Cox & Palmer, Halifax, NS

Matti Lemmens, LL.B
Director / Corporate Representative
- Borden Ladner Gervais LLP,
Calgary, AB

Barrie Marshall, QC, BA, LL.B
Director / Affiliate Representative -
ADRIA, AB

Stacey O'Dea, B.A., LL.B
Director / Corporate Representative
- Imperial Oil Ltd., St. John's, N.L.

Wendy Scott, B.I.S., C.Med
Director / Affiliate Representative -
ADRI, Atlantic

Scott Siemens, C.Med, FICB, B.Comm
Affiliate Representative - ADRSK,
SK

Lauren Tomasich, LL.B
Director / Corporate Representative
- Osler, Hoskin & Harcourt LLP,
Toronto, ON

Affiliate Representative
- ADRBC, BC

OTHER OFFICERS

Janet McKay
Executive Director ADRIC

ADRIC CORPORATE MEMBERS

Alberta Energy Regulator
Borden Ladner Gervais LLP
Burnet, Duckworth & Palmer
LLP
Cox & Palmer
Deloitte LLP

Dentons Canada LLP
Environmental Appeals Board
Fairway Divorce Solutions
Gowling WLG
Imperial Oil Ltd.
Insurance Bureau of Canada

Ismaili Conciliation and
Arbitration Board for Canada
KPMG LLP
Osler, Hoskin & Harcourt LLP
Rose LLP

BECOME A CORPORATE MEMBER:

Contact Janet McKay, Executive Director. 1-877-475-4353, ext 105 executivedirector@adric.ca

OUR AD RATES

Advertise in the Canadian Arbitration and Mediation Journal. Reach over 2,400 ADRIC members, and a growing number of individuals, firms, organizations and libraries.

Release dates: March and September

Material deadline: 6 weeks prior to release date

CONTACT: journal@adric.ca

Canadian Arbitration and Mediation Journal (ISSN 1192-537X) is published twice a year by the ADR Institute of Canada, Inc. ©2021. All rights reserved. Reproduction or transmittal, in whole or in part, in any form or by any means, or its storage in a retrieval system, without prior permission of the copyright owner in writing, is forbidden.

	1 Issue	2 Issues
FULL PAGE	\$468	\$850
1/2 PAGE VERTICAL	\$292	\$525
1/2 PAGE HORIZONTAL	\$292	\$525
1/4 PAGE	\$158	\$285
BASEBAR	\$158	\$285



ADR Institute of Canada
Institut d'arbitrage et de
médiation du Canada ^{TM/MC}

LEADING DISPUTE RESOLUTION IN CANADA
À L'AVANT-PLAN DE LA RÉOLUTION DES DIFFÉRENDS AU CANADA

ADR INSTITUTE OF CANADA, INC.

Suite 407, 234 Eglinton Avenue East
Toronto, ON (Canada) M4P 1K5

Toll Free: 1-877-475-4353

Phone: 416-487-4733

Fax: 416-901-4736

Email: admin@adric.ca

Website: www.adric.ca

**ADR INSTITUTE OF
BRITISH COLUMBIA**

347 - 1275 West 6th Ave
Vancouver, BC V6H 1A6

Toll Free: 1-877-332-2264 (in BC)

Phone: 604-736-6614

Fax: 604-736-6611

Email: mcrelations@adrbcc.com

Website: www.adrbcc.com

ADR INSTITUTE OF ALBERTA

#225, Tower 1

3697 Mill Woods Road NW
Edmonton, AB T6K 3L6

Toll Free: 1-800-232-7214

Phone: 780-433-4881

Fax: 780-433-9024

Email: info@adralberta.com

Website: www.adralberta.com

**ADR INSTITUTE OF
SASKATCHEWAN**

Box 22015, RPO Wildwood
Saskatoon, SK S7H 5P1

Toll Free: 1-866-596-7275

Email: info@adrsaskatchewan.ca

Website: www.adrsaskatchewan.ca

ADR INSTITUTE OF MANITOBA

c/o 141 Marion Street
Winnipeg, MB R2H 0T3

Toll Free: 1-877-489-7452

Email: admin@adrmanitoba.ca

Website: www.adrmanitoba.ca

ADR INSTITUTE OF ONTARIO

Suite 405, 234 Eglinton Avenue East
Toronto, ON M4P 1K5

Phone: 416-487-4447

Toll Free: 1-844-487-4447 (Outside GTA)

Fax: 416-487-4429

Email: info@adr-ontario.ca

Website: www.adr-ontario.ca

**INSTITUT DE MÉDIATION ET
D'ARBITRAGE DU QUÉBEC**

1445, rue Stanley, bureau 1501
Montréal (Québec) H3A 3T1

Phone: 514-282-3327

Fax: 514-282-2214

Email: info@imaq.org

Website: www.imaq.org

ADR ATLANTIC INSTITUTE

Box 123

Halifax CRO, NS B3J 2M4

Email: admin@adratlantic.ca

Website: www.adratlantic.ca