

Spotlight on Debtor – Creditor Mediation

Personal or business insolvency situations are difficult times for the debtors and the creditors. Innovative use of mediation allows all parties to participate in the decision-making process and seek a solution which benefits everyone involved.

Mediation provides flexibility and opportunity for informal communication which is effective in resolving difficult situations. If the mediation process does not bring a full resolution the parties retain their access to the court system for a decision by a judge. By using the mediation process they may have a lot to gain and yet nothing to lose.

The debtor and creditors can agree to use mediation to resolve conflicts between them. Using mediation early in the process is most effective. Before communication between the parties has broken down it is easier to discuss issues in an atmosphere of trust. A key component of mediations by agreement of the parties and formal mediation programs is the requirement for strict confidentiality.

Mediation programs are widely used for bankruptcy cases in the United States. Canada also has implemented formal mediation programs between debtors and creditors. Two Canadian examples of formal programs are the program for insolvent farmers under the Farm Debt Mediation Act and mediation for bankrupt consumers under the Bankruptcy and Insolvency Act.

Mediation for insolvent farmers

The Farm Debt Mediation Service is a program of the government of Canada which provides insolvent farmers and their creditors with mediation services. In the 1998-99 fiscal year about 66% of cases that went to mediation under the program resulted in an arrangement between the farmer and the creditors. About nine months into the 1999-2000 year the number of cases is proportionately ahead of

last year and at the same time the percentage of mediations resulting in an arrangement has increased to about 80%.

To qualify, the applicant farmers must be producing commodities for commercial sale rather than personal use of their families. To be considered insolvent the farmer must be unable to meet their obligations as they come due, have ceased to pay their obligations in the ordinary course, or the value of their property if sold would not cover payment of outstanding obligations.

The farmer can apply before getting a formal demand for payment. If the farmer receives notice of legal proceedings or a Notice of Intent to Realize on Security there is a time limit of 15 business days to respond. Depending on the situation there are two application processes. Both include a financial review and mediation. The key difference is whether a stay of proceedings is part of the process.

When the farmer applies for a stay a Notice of Stay of Proceedings is sent to all creditors. The creditors have the right to appeal the stay. The maximum duration of a stay of proceedings is a total of 120 days.

The Farm Debt Mediation Service hires financial experts to provide financial reviews as the first phase of the assistance to farmers. The expert may also help the farmer prepare a recovery plan or the farmer may hire their own financial consultant to prepare a recovery plan.

For the next step, the Farm Debt Mediation Service hires a qualified mediator to meet with the farmer and the creditors. In 1999-2000 there is a roster of eight private mediators for Ontario.

In most cases, the farmer and the creditors are able to reach a settlement or "arrangement" with the assistance of the mediator. Arrangements signed in 1998-99 included

restructuring the debt in almost 50% of cases. In about 25% of cases, disposing of some assets was part of the terms of the arrangement.

Mediation for bankrupt consumers

Beginning in the spring of 1998 the Bankruptcy and Insolvency Act brought in a program of mediation for disputes between the bankrupt, the trustee and the creditors. Mediation can be used in two situations: where there is disagreement as to the amount of surplus income or where there is opposition to the discharge of the bankrupt. In surplus income cases the bankrupt or the creditors may ask for mediation. For discharge mediation the request can be made by the trustee, the bankrupt or the creditors. Discharge mediation is available only to a first-time bankrupt; surplus income mediation is available to any bankrupt.

The only mediators appointed under the Act are government employees who have other duties in addition to their role as mediators. The Superintendent of Bankruptcy has power to appoint mediators outside of government but so far has not done so.

If parties agree they sign a "mediation settlement agreement". If the parties cannot agree the trustee applies to court according to the formal procedure.

Find out more

For details about mediation for farmers @ <http://www.agr.ca/policy/adapt/fdms.html> and for consumers @ <http://strategis.ic.gc.ca>

Contact the Farm Debt Mediation Service in Ontario at:

174 Stone Road West
Guelph, Ontario N1G 4T1
1-800-265-4775 or 519-836-8135

Munn-thly Memo

Question:

I am the owner of a small manufacturing company. The collective agreement expires in three months and negotiations are scheduled to start soon. It's important to me to get the collective agreement in place as soon as possible because if I don't have the collective agreement finalized it may cost me a couple of large contracts with customers over the next few months. I'd like some help with negotiating strategy. What can I do to keep things on track?

Answer:

You've already taken the first step by scheduling negotiations. Before the negotiations start take the time to prepare carefully. For each topic think through your interests, guess at their interests, consider your alternatives in detail and start to come up with ideas for options that would meet the interests of both sides. Make sure everyone on your side of the table has an opportunity to provide their point of view and participate fully in the negotiation both in the preparation stage and while negotiations are progressing.

I provide assistance for negotiations in two ways. The first way I can help is as a mediator, a neutral facilitator of negotiations. Both parties agree on my role in advance. Generally both sides contribute to payment for my services.

The other way I can help is as an adviser for one party, either in attendance at the negotiations or behind the scenes. I help that party with the preparation and with strategy considerations as negotiations proceed.

The agenda may be developed before the first meeting and or negotiated at the first meeting. The strategy of dealing with the easy items first creates some positive momentum which carries through on the more difficult items. Sometimes it is more effective to deal with the hard items first. This is based on both parties' assessment of the negotiators and the context for that negotiation.

When discussing the more contentious items your thorough preparation pays off. Be prepared to listen carefully to what they are saying and really try to understand. Express your point of view in a way which is genuinely informative rather than an attack. If you find yourself reacting strongly, take a break and assess what is happening. You can not control THEM. You can make sure that YOU are not the problem in reaching a successful agreement. You might assign one member of your negotiating team to have the primary function of watching non-verbal communication such as body language of the negotiators on both sides of the table.

Some of the previous issues of Common Ground expand on these topics. For example in the September 1999 issue you can read more about the importance of knowing your alternatives. Contact us if you would like a copy sent to you or check our website at www.munncrs.com

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Upcoming Training Events Presented by
Kathryn Munn

Fanshawe College, Business and Career Development in London – Call (519) 452-4425 for more information.

Business Consultant Institute - Pursuing a Career as a Paid Consultant

● *Building Bridges, Getting Contracts*

Free "Taste and Talk" presentation evening – March 8, 2000

Classes start the week of March 20, 2000

Civil Justice for Mediators – April 5, 2000

The Management Centre, Lambton College, in Sarnia – Call (519)542-7751 Ext. 505 for more information

Communication from Conflict to Consensus
February 15 & 16, 2000

Conflict Resolution April 13 & 14, 2000

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Kathryn Munn, LL.B., C.R.C. is a mediator, arbitrator and lawyer. Through her firm Munn Conflict Resolution Services she works exclusively in alternate dispute resolution from a base in London, Ontario. She is a Roster Mediator, Ontario Mandatory Mediation Program - Toronto / Ottawa and a mediator under contract for Canadian federal government departments and Crown Corporations. She is a mediator for the Farm Debt Mediation Service in Ontario.

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