

Gold Standard ADR: The New National Standard for Mediation in Canada

Have you ever wondered how to build into a contract the plan for the resolution of any disputes which may arise? What about that sinking feeling when a problem comes up mid-contract, you realize that there is no clause for dispute resolution and now you're facing lengthy and costly litigation to try to resolve the situation? If you considered or would like to consider mediation as one of the options for the resolution of those disputes, then help has arrived.

On November 4, 2005 at their annual meeting in Toronto, the ADR Institute of Canada launched the new National Mediation Rules. This was the culmination of a long process undertaken with each regional group of the ADR Institute to ensure that the new Rules comply with provincial and territorial legislation across Canada. These rules join the National Arbitration Rules which were completed in 2002.

"The ADR Institute has become the Gold Standard in alternative dispute resolution in Canada," said Dave McCutcheon, President of the National Institute.

The ADR Institute's basic concept is to make it easy for people to include a dispute resolution process in their agreements. As an additional service, when requested, the ADR Institute will assist the parties to select a suitable mediator.

Along with the National Mediation Rules a new Code of Conduct for mediators in Canada was also launched. The purpose is to protect members of the public and to promote confidence in the mediation process when disputing parties use mediators provided through the ADR Institute of Canada.

As a Vice-President of the Board of Directors for the ADR Institute of Ontario and a member of the planning committee for the all-day workshop to launch the new Rules, I am delighted to provide you with some highlights.

Highlights of the National Mediation Rules

The National Mediation Rules apply where the people involved in the dispute have agreed that the Rules apply or if they have agreed to a mediation to be administered by the Institute without reference to the Rules. Any of the Rules may be changed by the agreement of the parties.

Mediator selection is a task that can be contentious between disputing parties. If the parties have named a mediator or a procedure for appointing a mediator by agreement then that agreement applies. If not, the parties may ask the Institute to either appoint a mediator or nominate three mediators. If the parties choose the option of three nominated mediators, the Institute provides the parties with the resumes of the three nominees. If the parties cannot agree on one of the three, they each rank the nominees (3-highest and 1-lowest) and the Institute selects the mediator with the highest composite ranking. If there is a tie in the parties' rankings the Institute appoints the mediator from the list of three nominees.

Independence and impartiality of the mediator is a requirement under the Rules. The mediator is not permitted to establish a professional relationship with or act for any of the parties individually in relation to the particular dispute unless all parties consent after full disclosure.

Before accepting an appointment a mediator is required to disclose any personal interest or other **conflicts of interest** in the dispute. The mediator is required to disclose bias or circumstances likely to give rise to a presumption of bias. If any party objects to the mediator based on this disclosure then the mediator is required to withdraw and the Institute appoints another mediator. The parties have the option of agreeing to proceed despite the personal interest, conflict, or bias that was disclosed by the mediator.

The Rules provide for a written **Mediation Agreement** and a sample agreement form is included to make this easy. A written Mediation Agreement is standard for most mediators. The Mediation Agreement is a place for the parties to refer to any Rules which they agree do not apply to their mediation or add any additional rules which they decide to apply to their mediation.

The **confidentiality** requirements are the same as those in the Institute's Model Code of Conduct for Mediators. The mediator is required not to disclose information from the mediation except in specific situations such as when ordered to do so by a court or when the parties consent in writing. The parties agree that the discussions and disclosures during mediation are not admissible in a subsequent arbitration or court proceeding. The most important factor is that the parties understand clearly what the confidentiality rules are before, during, and after the mediation.

For those at the point of developing a contract the National Mediation Rules provide a **model dispute resolution clause** for two different options. One option is resolution of disputes under the contract using mediation under the Rules. The other option is first to use mediation to resolve disputes and then to proceed with arbitration under the National Arbitration Rules for any disputes not settled during mediation.

Highlights of the Model Code of Conduct for Mediators

The Code of Conduct sets a high standard for Institute mediators. It applies to every mediator member of the ADR Institute of Canada and every mediator who accepts appointments from the Institute.

Impartiality, confidentiality and conflict of interest provisions are aligned with the National Mediation Rules.

The **principle of self-determination** is designed to make sure that the mediator serves the parties and not the other way around. The fundamental concept is that parties in a mediation have the right to make their own voluntary and non-coerced decisions about any issue in dispute.

A requirement for the mediator to conform to high standards of professional behavior is described in the **quality of the process**. The mediator has a positive duty to ensure that she or he conducts a process which provides parties with the opportunity to participate in the mediation and encourages respect among the parties.

Advertising is regulated in that representations must be fair, reasonable and accurate. For example, a mediator is not permitted to guarantee settlement or promise specific results.

The National Mediation Rules and Model Code of Conduct for Mediators are available at www.adrcanada.ca.

Munn-thly Memo

Q. I am the Human Resource Manager, new to the company where I now work. It is a manufacturing setting with employees who have a range of educational background including people who have not completed high school. Since I have been working here I have noticed that disputes between employees tend to go on for a long time and cause many other problems, large and small, that interfere in the workplace. What can I do to help resolve the disputes earlier and avoid escalation?

A. For your situation there are two approaches that I suggest. One approach involves training, and the other involves getting some help from a professional mediator.

The ability to resolve conflicts is a skill that can be learned and many of us have not had the opportunity to learn those skills in our schooling. You can provide training opportunities for the employees. You can also improve your own skills to be able to provide positive intervention for the employees' disputes.

Conflict resolution training is available for the employee group. For this you may wish to consider a provider who will deliver a program customized for your setting, taking into account the education levels and background of the employees as well as the types of disputes that arise. In my experience, a better understanding by the employees of their own approaches to conflict, strategies to deal with people who have different approaches and basic understanding of conflict resolution tools have been effective in improving the atmosphere in many workplace settings. Some employers choose to provide this training only to team leaders and other key employees. Others provide a basic level of training for all employees for example, in the range of three to four hours and then may provide additional training for team leaders and supervisors.

In order to provide positive intervention you may wish to consider developing your own skills by taking a course in mediation. It is a challenge for human resources personnel that you may not be seen by employees as independent and impartial in the manner that an outside mediator would be. Even with that challenge, human resources personnel can be extremely helpful by using mediation skills effectively. I suggest that you select a mediation course which provides an opportunity to practice applying the skills in a small group environment with a professional mediator coach. In my view, mediation is one of the skills which cannot be taught only in a theory format. One such course is Fundamentals of Mediation. Please see "Mark Your Calendar" in this issue of Common Ground.

If there is a backlog of unresolved disputes or if after the training there are still some unresolved disputes, I suggest that you obtain the services of a professional mediator. This person can provide the external perspective that may be needed to bring about a resolution. As you noted in your question, a key factor is resolving the disputes as early as possible. Sometimes a dispute has been going on for years before a manager consults me for mediation services. This may mean that the parties are very entrenched and the situation may have escalated significantly from where it began. I recommend strongly that you consider setting reasonable time guidelines for resolution of disputes within the disputing group, then with the intervention of your human resources department and if resolution is not achieved within the timeframes that you set, that you engage the services of a professional mediator promptly.

Mark Your Calendar

Upcoming Training Events
Presented by Kathryn Munn

Fundamentals of Mediation

Intensive 40 hour program

February 6, 7, 8, 13, and 14, 2006

9:00 AM to 5:30 PM each day

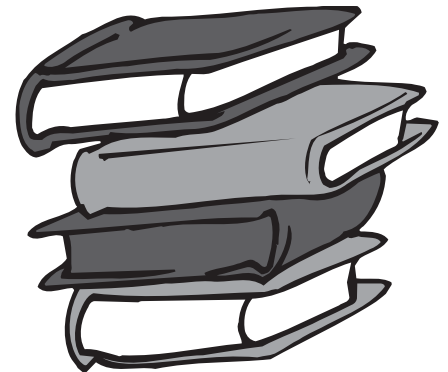
Course location: London, Ontario

This course is approved by the ADR Institute of Ontario. Please call 519-660-1242 (toll-free 1-888-216-3202) or email kmunn@munnrcs.com for more information.

I am pleased to fill requests for presentations about mediation and negotiation at meetings of professional and business groups. Call or email to make the arrangements.

Electronic Common Ground

If you prefer to be on our e-mailing list please send us an e-mail.



Kathryn Munn, LL.B., Cert.ConRes., C. Med., is a mediator, arbitrator, facilitator 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 / Windsor, a mediator under contract to the Farm Debt Mediation Service of Canada, the General Insurance Ombudservice and for government departments.

© Kathryn Munn, 2006



CONFLICT RESOLUTION SERVICES

2090 Richmond Street

London, Ontario, Canada N5X 4C1

TEL: 519-660-1242 FAX: 519-660-1618

TOLL-FREE: 1-888-216-3202

www.munnrcs.com

E-MAIL: kmunn@munnrcs.com