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## Alternative Dispute Resolution

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### Chair

**Brad Mustard**

Moe Hannah LLP

Calgary, Alberta

### Faculty

**Rhoda Dobler QC**

Widdowson Kachur Ostwald Menzies LLP

Calgary, Alberta

**Sid Kobewka**

Kobewka Stark Lawyers and Mediators

Edmonton, Alberta

**Robert McBean QC**

Parlee McLaws LLP

Edmonton, Alberta

**Jim McCartney**

McCartney ADR

Calgary, Alberta

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# Commonplace, but Not Routine: Make the Most of Your Mediation

Prepared by:

**Jim McCartney**  
**McCartney ADR**

**Emily McCartney**  
**Gowling WLG**



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**COMMONPLACE, BUT NOT ROUTINE:**  
**MAKE THE MOST OF YOUR MEDIATION**

Prepare for the Mediation with the Same Level of Effort and Care That You Would Treat an Application for Summary Judgment.....3

Mediation is Not a ‘Low-Cost’ Alternative to the Traditional Litigation Path .....3

Have a Real Understanding of Potential Exposure .....4

A Well-Written and Measured Brief Sets the Stage .....4

Come Prepared to Make and Consider All Reasonable Offers .....5

Avoid Trying to Convince the Mediator or Yourselves.....5

Consider Exchanging Pre-Mediation Settlement Offers .....6

Conclusion .....6

Mediation is the best value for money tool parties can use to reach a confidential negotiated settlement of their dispute.

There are few times during disputes, whether litigated or arbitrated, when there is a real opportunity to settle. Those times are when all parties and their counsel are thinking about the dispute at the same time. This happens when:

- the dispute has just started,
- the dispute becomes the subject of a statement of claim or notice to arbitrate and responses to them,
- parties are compiling records production,
- parties prepare for and participate in questioning,
- parties prepare for and attend a mediation or JDR, and
- trial preparation begins in earnest.

Mediation is the only time when everyone is focused on the goal of settling. The other events are mostly steps taken to reach a point where a judge or arbitrator will impose a result.

Make the most of the earlier opportunities and remember that if the matter does not settle at mediation, clients are going to spend a lot more money<sup>1</sup> before the next opportunity arises. Settling on the courthouse steps eliminates litigation risks, but it saves far less than would an earlier mediated settlement.

The trend in commercial disputes over the last several years, even during the suspension of the mandatory ADR provisions of the *Rules of Court*, has been for good counsel to arrange a mediation

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<sup>1</sup> The cost may take many forms. It includes the time-cost and opportunity-cost of:

- in-house counsel and business decision makers,
- staff who must retrieve, review, catalogue, and scan thousands of documents,
- locating former employees,
- obtaining statements from former and current employees,
- management and staff who may be formally questioned under oath (and the attendant preparation),
- instructions to and reports from outside counsel, and
- the fees and disbursements of outside counsel.