DEBUNKING MEDIATION

The use of mediation, as a method of resolving disputes in the construction industry, continues to increase. Mediation is now mandatory for all small claims matters involving construction; the new Home Owner Protection Act gives a party the right to compel mediation; and the most recent CCDC industry standard construction contracts incorporate provisions requiring mediation before the parties proceed with more traditional dispute resolution methods. This increasing reliance on mediation is a recognition by the construction industry that the traditional ways of 'going to war' in construction matters are just too expensive!

In spite of its increasing use, there are still misconceptions and misunderstandings about the mediation process. Here are the answers to some frequently asked questions that may help to 'debunk' the myths and explain the realities of mediation as it applies to construction disputes.

What is mediation and where does it fit in the dispute resolution process?

In reality, there are really only two ways to resolve commercial disputes. The parties, either have the matter adjudicated by a court or an arbitrator, or they settle the matter through negotiation.

The adjudication processes of litigation and arbitration are very similar. It is a misconception that arbitration is faster or cheaper than litigation, and the opposite often proves to be true. Both litigation and arbitration are 'combative' methods of dispute resolution whose outcome turns on an inconsistent application of evidence (which is the self serving history of the dispute as told by the documents and the witnesses years after the fact), legal reasoning (which is not always the same as the reasoning of the common man), precedent (which assumes that what has been done before makes sense when applied to the present conflict) and advocacy (which is often passion and persuasion overcoming logic and reason). The objective of this legal warfare is to achieve gain for the 'winner' at the expense of the 'loser'. Both litigation and arbitration usually require lawyers, tend to be expensive and are characteristically uncertain as to their outcome.

Short of a coin toss, the only alternative to these formal processes of conflict resolution, is the less formal process of negotiation. The resolution of disputes through negotiation still involves the strategic presentation of one's case, but with the goal of reaching a mutually acceptable resolution to the dispute. Negotiation, in one form or another, is unquestionably the most common way that people resolve their conflicts and, even in cultures where litigation has become a popular 'blood sport', more commercial disputes are settled by negotiation than ever find their way before the courts.

If all commercial disputes are resolved by either *adjudication* or *negotiation*, then how does mediation fit between these two polar concepts? The answer is that mediation is nothing more than a variation of the less formal, and more heavily used, negotiation process, . It is simply a negotiation where the parties have agreed to draw on the services of a neutral mediator to facilitate the negotiation process. In most cases, the mediator makes no determination regarding the respective rights of the parties and makes no direction regarding the outcome of the negotiated settlement. The mediator, in this traditional model of mediation, 'greases the wheels' of the negotiation but never gets to drive the train. The parties, themselves, assume the power and responsibility of defining their own solutions and determining their own fate.

Who can be a mediator?

Surprisingly, the practice of mediation requires no formal training or certification. Anyone can hold himself or herself out as a mediator. and the growing lists of prospective mediators include candidates from a broad spectrum of vocational backgrounds. In reality, considerable skill is required to be an effective mediator, so much so that several colleges and universities offer graduate level programs in conflict resolution. Locally, the Justice Institute of British Columbia, the University of Victoria and Royal Roads all offer academic programs in conflict resolution leading to academic qualifications.

The crop of currently available mediators, available for mediating construction disputes, seems to fall into three experience catagories. The smallest group is comprised of experienced ADR (alternative dispute resolution) professionals who are full time mediators focusing on commercial (rather than interpersonal) disputes. The second group is comprised of professionals and others who subscribe to the idea of collaborative dispute resolution and make use of mediation in their vocation wherever possible. The third group is the growing contingent of aspiring mediators who have varying degrees of mediation training and who have yet to acquire significant experience in the process. The difficulty for the user of mediation services is in discerning among these categories in order to make an informed decision in selecting an appropriate mediator.

Recognizing the need of establishing a standard of competency on which the public can rely, ADR practitioners have formed several organizations that mediators and arbitrators can voluntarily join. Locally, these organizations include the B.C. Arbitration and Mediation Institute (BCAMI), the Mediation Development Association of British Columbia (MDABC), the British Columbia Association of Attorney Mediators (BCAAM), the Society of Professionals in Dispute Resolution (SPIDR) and the BC Roster Society. None of these organizations have any legislative authority to govern mediation practitioners and membership in these organizations is voluntary and not compulsory. Nonetheless, most of these organizations require a certain level of initial, and recurrent, training for their members and offer a referral service to persons seeking the services of a mediator.

How much does a mediator need to know about the subject matter of the dispute?

There is some controversy among mediators as to whether a mediator needs to know anything about the substantive content of the conflict. The argument, on the one hand, is that the mediator should be fully familiar with the jargon, technical concepts and legal principles that relate to the industry underlying a dispute. The argument on the other hand, is that, since the mediator's function is to facilitate the negotiation between the parties, no substantive knowledge of the subject matter of the conflict is required. As a result, it is possible to find mediators who are willing to mediate construction disputes who have no real understanding of the workings of the industry and the nature of the construction claims and activities. Depending on the circumstances, this may or may not be a plus.

To what extent does the mediator participate in designing solutions?

Sometimes one of the more difficult aspects of being a mediator whose function is limited to merely facilitating the negotiation, is controlling the impulse to 'wade' into the negotiation and point out the obvious solutions that seem to have escaped the negotiating parties. An 'industry wise' mediator, by virtue of the his or her experience, may have better insights regarding a workable solution to a dispute than the parties have themselves but is constrained from expressing his or her ideas by the generally adopted protocol that a mediator is not there to give advice. Sticking to this pure mediation model in construction disputes may deprive the parties of the benefit of some of the very qualities for which they may have chosen the mediator such as experience in the industry or knowledge of construction claims.

An alternative to this non-participatory form of mediation is the approach where in addition to having the mediator act as a facilitator, the parties call upon the mediator to make a determination between the two opposing interests on certain issues. For example, where the dispute involves a number of change orders, the mediator could be asked to determine the validity and value of claims for extra work based on agreed documents presented to the mediator for evaluation. In this case, the parties use the mediator as a 'referee' and agree to live with the mediator's determination. This latter model is known as '*evaluative*' mediation and is part really part meditation and part arbitration. While not the unanimous view of all mediators, this type of dispute resolution assistance may have a place in resolving complex or multi-faceted construction disputes.

When is the best time for a mediation?

Since the parties can meditate as many times as they choose, a mediation that does not result in a settlement on the first go around can always be reconvened at a future time. This suggests that the earlier the mediation occurs in a dispute, the better it

may be for the parties since they stand to gain from the possibility of an early settlement while having little to lose if the mediation fails.

Experience shows, however, that it is sometimes more effective to delay mediation until further along in the process when the parties are better informed as to the relative strengths and weaknesses of their case and of the case that they will have to meet from the other side if the matter proceeds to an adjudicative forum. The argument for delaying the mediation is that the better informed the parties, the more productive the negotiation. The ancillary benefit of delaying a mediation until closer to the date of adjudication is that, inevitably, the pressure to settle the dispute builds as the date for the trial or arbitration approaches. This, of course, is a sword that cuts both ways. The price of waiting may be a 'dramatic' expenditure of time, energy and expense spent in preparing for the adjudication not to mention the risk that, at some point, one of the parties will have committed so many resources to preparing for the battle that the fantasy of a potential victory (however remote) shines brighter than the spectre of defeat (however real) and obscures the obvious merits of reaching a negotiated settlement that is both immediate and certain.

Is an adjudicated decision more binding than an agreement reached in mediation?

While it may, at first, appear that a pronouncement of an adjudicator is more 'solid' than an agreement that the parties have designed themselves, that is probably not the reality. This is because the courts jealously guard their jurisdiction to hear disputes and are reluctant to give up that jurisdiction if there is even a hint that the parties have been 'unfairly' treated by a judge or an arbitrator. Accordingly, the law recognizes a number of circumstances whereby a judgment or an arbitration award (even if it purports to be finally binding) can be appealed to the courts including circumstances when the lower court may have made an error in law or where an arbitrator may have misapplied legal principles or otherwise acted unfairly.

Negotiated agreements, which the parties have designed for themselves, are also more likely to be wholeheartedly endorsed, and therefore fulfilled in their intent, by the signatories than are judgments that are imposed by an impartial but disinterested adjudicator (usually over the objections of one of the parties and sometimes to the dismay of both). Furthermore, agreements that have been voluntarily made by the parties bargaining in good faith will not lightly be interfered with by the judiciary. Our system allows consenting adults to agree to just about anything that is legal and in the absence of bad faith, the courts are loath to interfere in agreements that the parties have wilfully made for themselves. Since mediation is just a form of negotiation and therefore the same principles apply to agreements reached in the presence of a mediator. If the parties make an agreement in a mediation, it will be difficult to subsequently overturn that agreement before a judge.

"How do I "win" a mediation?

Even when attendance at a mediation is made mandatory by legislation or by contract, nothing compels the parties to actually conclude an agreement in a mediation. Mediation, therefore, will result in a settlement only if the parties are willing to collaborate in achieving a result that they both like or that, at least, they both equally dislike. In reality, the parties in an actual or pending lawsuit or arbitration are usually anything but collaborative. Not surprisingly, therefore, if mediation is offered as an alternative to warring parties, the question often asked is "*How do I 'win the mediation?*"

Even though mediation is a collaborative process, it is nevertheless possible to 'win' in a mediation. The key to winning lies in having the parties address what the conflict is <u>really</u> about rather than what the parties <u>say</u> the conflict is about. To explain, most lawsuits, and conflicts leading up to lawsuits, are defined by 'positions'. Positions are usually reflected in correspondence and in the pleadings that form the agenda for the litigation or arbitration. These positions are 'lines in the sand' drawn by the parties and reflect the outcomes that the parties imagine for themselves in order to 'win' the adjudication on that point. It is possible, however, to look behind the stated positions of the parties to their real, but sometimes undisclosed, goals and aspirations in prosecuting the conflict. Sometimes the interests of the parties are not reflected in the positions that they have identified to themselves or to their opponent for the purposes of the conflict.. The continuing working relationship of the parties might surface as an interest of one or both of the parties that might be of more significant value than winning a few dollars on a contentious change order. An apology from one side to the other might have considerably more meaning and value than financial compensation for the event, even though the need for an apology may not have been identified as a criterion for winning in the party's stated position. 'Interest based' mediation attempts to have the parties look behind 'lines drawn in the sand' to the interests that underlie the positions of both sides. Those interests, once uncovered with the assistance of a skilled mediator, may point to a solution that is a 'win' for both sides.

Mediation is not a panacea, but given the extraordinarily high costs of construction litigation it is a good idea that deserves a chance. The fact that it is a good idea does not ensure that mediation will flourish on a grand scale in the construction industry or that it will be accepted in the combative real world of commerce. The indicators are, however, that the industry is willing to give it a try.

Written by Nick Paczkowski – Construction Law Group