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Invoking and Participating in Mediation in British Columbia



Alex and John

Mediation processes can be classified in various ways, a typical one being the *evaluative/facilitative schema*—which looks at whether a mediator gives an opinion on a dispute’s merits or, alternatively, tries to help disputants develop their own solutions based on identified interests and without reference to the mediator’s view of the merits.

Another *schema* is the *mandatory/voluntary* one, which refers to how mediation or other alternative dispute resolution processes are invoked and how people take part in them—that is, whether they do so in a way that is voluntary, mandatory, or *quasi*-mandatory.

Understanding the voluntary/mandatory/*quasi*-mandatory distinction is key to understanding mediation in BC. Like the legs of a three-legged stool, where each leg plays an equal role in keeping the stool’s balance, the three approaches to invoking and participating in mediation combine to create the balanced dispute resolution system we have in BC.



Mandatory Approach

The mandatory approach is illustrated by the Court Mediation Program run from five Provincial Court Registries. Parties in small claims actions of up to \$10,000 may get a program notice telling them to attend at court on a certain day for a confidential 2-hour mediation. Although the mediations take place at the courthouse, the mediators are independent of the courts (they contract with the program on an *honorarium* basis) and follow a facilitative or “interest-based” approach rather than an evaluative or “rights-based” approach.

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In other words, they don’t tell the parties how they think a judge would rule, though they may work quite hard to get the parties to do their own realistic assessments of the risks of going to trial. The mediators have all taken professional study and training, including a court mediation practicum supervised by an experienced mentor.

The notice is sent out after the claimant has filed the notice of claim and the defendant has filed a reply and before most other steps in the Small Claims Court Rules. There is no expense to the parties other than for ancillary services such as interpreters. That said, there is the opportunity cost of having to take the time to attend the mediation—sometimes enough of an incentive to spur parties to settle on their own.

The mediation is mandatory in that parties must attend unless they have applied for and received an exemption. There are sanctions for non-attendance: claimants who don’t show up may have their cases dismissed; non-attending defendants may face default judgment.

But while the parties are compelled to come to mediation, they aren’t compelled to stay or, having decided to stay and try the process, they may leave at any time if they feel it is not helping. Most parties do stay and a large number of them find the process works. Since the program started in 1998, over half the cases that went to mandatory mediation resulted in consensual settlement.

Further, in post-mediation surveys, participants responded favourably to the way mediations were conducted (average ranking exceeding 4 out of 5 on a 5 point satisfaction scale) and more

than 90 percent of participants said they would take part in mediation again if they were involved in another small claims action.

If the parties settle, they enter into an agreement, drafted with the mediator's assistance and executed at the mediation session. The agreement is subsequently reviewed by program staff and filed with the Registry; it can then be enforced in Small Claims Court in much the same way as a payment order.

The mandatory model is also used by various administrative tribunals in one form or another. The Immigration and Refugee Board of Canada, for example, steers immigration appeals to an alternative dispute resolution (ADR) session before proceeding to a hearing. The ADR session is conducted by a tribunal member who doesn't sit on the tribunal that hears the appeal if the session is unsuccessful. The participants are the appellant, his or her counsel or representative, and the Minister's counsel.

The program started as a pilot project in the Toronto office in the late 1990s, was expanded to Vancouver in 2000, and has recently spread to other cities. An external evaluation of the program reported that it gives appellants a process generally seen as fair, productive, and less adversarial than a hearing.

The program is more closely connected to the immigration bureaucracy, though, than the small claims mediations are to the court bureaucracy: the Minister's counsel, for instance, is permitted to pass on information gleaned during the mediation to office colleagues, any of whom can use it against the appellant in a subsequent hearing. This factor may constrain some appellants' willingness to make full disclosure in the ADR session.

Quasi-Mandatory Approach

The *quasi*-mandatory approach is illustrated by the Notice to Mediate that applies to BC Supreme Court actions. It was developed in 1998 by the Attorney General's Dispute Resolution Office to

deal with personal injury claims from motor vehicle accidents, but usage has since spread to other types of actions.

A party wanting to mediate does so by delivering a Notice to the other parties, effectively compelling them to mediate unless they can justify an exemption. The Notice has government backing through detailed regulations; Notice recipients who don't comply can face court sanctions. Thus the process is driven by the parties—or by at least one of them—in contrast to the mandatory Small Claims mediations.

In actions to which the *Notice to Mediate (General) Regulation* applies, the initiating party triggers the process by delivering a Notice to Mediate to the other parties and to the Dispute Resolution Office (allowing it to track Notice usage) between 60 days after pleadings close and 120 days before trial. The parties—now the mediation participants, unless exempted by court order—must agree on a mutually acceptable mediator within 10 days,

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failing which any of them can apply to a designated roster organization to choose a mediator.

The BC Mediator Roster Society is the organization that has been so designated. It has a Website (www.mediator-roster.bc.ca) with profiles of qualified mediators, along with their training and experience. The Society has separate rosters for distinct types of disputes, for example, one for mediators for civil/commercial disputes and another for family mediators. The mediator's fee is paid by the participants, who share it equally unless they agree otherwise.

The regulations have provisions about attendance at mediation, including attendance by legal counsel, and a provision that lets a participant apply to court for a remedy if another participant doesn't comply. Remedies range from sparing (adjourning the case, ordering a mediation) to severe (dismissing the case, granting judgment). There are also provisions about confidentiality and disclosure of information needed to help reach a mediated resolution.

Aside from these basic requirements, the mediator may conduct the mediation in any manner he or she thinks fit to reach a "timely, fair, and cost-effective" resolution, to use the regulation's wording. In other words, mediators can be facilitative/interest-based or evaluative/rights-based, or some combination of the two.

The Notice to Mediate regime has been very successful, with about 70 percent of survey respondents reporting that all issues were resolved at the mediation. The Notice procedure has now been adapted to cases in Small Claims Court that exceed \$10,000 but that are less than the \$25,000 Small Claims Court cap that came into effect in September 2005.

Voluntary Approach

As use of mandatory and *quasi*-mandatory mediation grows, people are seeing how mediation can help settle

disputes quicker and with less financial and emotional cost than litigation.

Indeed, much of the advantage of the above rule-based mediations may lie in their ability to effect an attitudinal shift toward a culture that looks *first* to mediation to resolve disputes, rather than as an afterthought to litigation. Thus contracting parties now often put provisions into their agreements that require them to mediate before invoking adjudicative processes like arbitration or litigation.

Such clauses—which can be incorporated, for example, into agreements for purchase and sale—can be quite detailed. They may include names of pre-approved mediators or of roster organizations that can choose the mediator.

Even where there is no written contract, parties in long-term relationships—purchasers and suppliers of goods and services, employers and employees, residential or commercial neighbours, and so on—are thinking more about reaching mediated solutions to their disputes, all of which bodes well for the continued development of a sophisticated and balanced approach to mediation in British Columbia. ▲

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