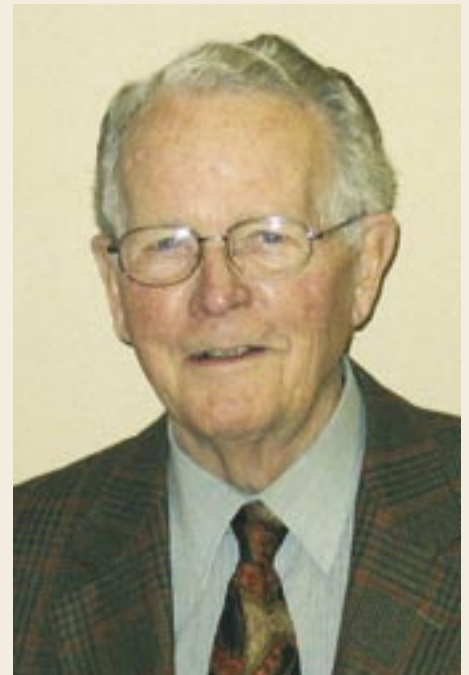


Arbitration, Mediation, and Peer Judging *in Real Estate*



Today's description of Alternative Dispute Resolution (ADR) process takes various forms, some from statute and some from social regulations.

ADR is a desire to solve problems fairly and quickly. This article is about arbitration and mediation in real estate.

A Bit of History

In Britain in the late 1800s, the courts concluded that not all the caseload revolved around the law. Thus, disputes that seemed to be predominately matters of fact could be put before an individual or panel who would be familiar with the subject of dispute. This could reach a "layman's" conclusion that would be honoured in a binding decision.

Eventually the process became widely accepted internationally and, at the time of the formation of our own province's arbitration, was covered by statute. In 1986, British Columbia took a big step in establishing the up-to-date *Commercial Arbitration Act*, which has since been amended.

The Act was designed to regulate Domestic Commercial Arbitration as well as provide for the adoption of the International Rules recognized by the United Nations.

Fundamental to arbitration is that the award is not published and there is no published record.

To be competent in the practice of Dispute Resolution, course training is essential. The very existence of the BC Arbitration and Mediation Institute is to provide baseline training.

As a layman, Realtor, or developer talking to my peers, let me describe some differences in this industry.

Arbitration

Jurisdiction to process a case comes normally from the existence of a clause in a contract describing disputes to be resolved by arbitration. The award is usually binding and final, unless there has been basic error, bias, fraudulent conduct, or undue delay.

Fundamental to arbitration is that the award is not published and there is no published record. Privacy is essential—without it, there is no *juris prudence*.

It is not necessary for the arbitrator to be a lawyer. The arbitrator must be able to *recognize the evidence presented by counsel* for the parties as specific to his profession. Therefore, the roster includes architects, Realtors, developers, contractors, insurance practitioners, accountants, and appraisers—to name several—and lawyers and some BC Notaries!

A private society or group, such as the Real Estate Board, can have the binding award circulated, including evidence, for the information and benefits of the members.

Mediation

With mediation, the process is fundamentally different. While there is a disciplined procedure largely devised from frequent appointments and hearings, there is no overriding statute. Rather the specialist mediator may be guided by various pieces of legislation governing the world of social services or

personal obligations or business intent of the parties, etc.

The hearings are meetings of the parties to discover the issues, the differences, and the potential “give and take” that may be found, but there is no binding award. So, if the parties cannot agree, the file remains with counsel and the dispute may be returned to a court-driven settlement.

The mediator, in case of settlement, may very well be asked to write the parties an outline of the agreed matters.

The appointment of an administrator is a relatively new process for condo disputes, for example, if the business of the strata council is out of control and must be placed in the hands of a court-appointed person similar to a trustee.

Labour arbitrators and mediators are a distinct group, with highly specialized backgrounds and skills.

Peer Judge Process

As a lay person, I endorse the Peer Judge process where councils do their best job of bringing evidence without a courtroom type of presentation. That format is unlikely to bog down because the Peer Judge will recognize and react to persuasive factual evidence not bound up in legal arguments. Law and logic do not necessarily mix. Thus, the Peer Judging process should be more efficient and cost-effective. ▲

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