

"Yet another way to get parties to the table"

By Deb Zutter

Courts and legislatures have developed a variety of methods to encourage parties in a court action to participate in mediation. Some of these methods are persuasive, others are mandatory. In 1998, the British Columbia Attorney General introduced the Notice to Mediate (NM).

What is a Notice to Mediate?

The NM is a process by which one party to a civil action may force all other parties in the action to mediate the matters in dispute. Here the term 'party' includes the insurer.

History of the NM

The concept of the NM was first proposed at a meeting of the Alternative Dispute Resolution Section of the Canadian Bar Association in Victoria, British Columbia. The Director of the Dispute Resolution Office of the Attorney General was in attendance at the meeting for the purpose of consulting the members of the section.

The first NM came into force on 14 April 1998 pursuant to a regulation that was enacted under authority of s. 44(1) of the Insurance (Motor Vehicle) Act. All motor vehicle actions commenced in the Supreme Court of British Columbia after 1 January 1999 may use the NM.

Motor vehicle actions were a logical way to introduce the concept. Motor vehicles registered in British Columbia must be insured with the Insurance Corporation of British Columbia (ICBC). ICBC has been participating in the voluntary mediation of personal injury motor vehicle disputes since 1985. About 84 per cent of these mediations settle.

There was, however, a relatively low use of the purely voluntary model. The Attorney General and Courts were concerned that while actions were settling, far too many were settling late in the dispute, often 'on the steps of the courthouse'. The Dispute Resolution Office searched for a form of mandatory mediation that would be acceptable in British Columbia.

Since its introduction, the NM for motor vehicle disputes has been used over 2000 times. All issues were settled in 72 per cent of the actions settling.

Leaky condominiums provided the impetus for the second iteration of the NM. The 1998 recommendations of the Barrett Commission report recognized that the litigation system was not serving the homeowner well; delays and expense were unacceptable to both plaintiffs and defendants. It proposed that an ADR mechanism be available for residential construction disputes.

Following consultation with stakeholders, the Notice to Mediate (residential Construction) Regulation came into force in May 1999. This Notice was authorized by s. 29 of the Homeowner Protection Act. It may be used in any Supreme Court action involving residential construction, regardless of the when the action was commenced.

Most recently, the Law and Equity Act was amended in August 2000 to permit a NM Regulation to apply to all civil disputes, excluding family disputes, commenced in the Supreme Court of British Columbia. The Dispute Resolution Office has developed a proposed regulation and is currently consulting with stakeholders before determining the actual wording of the regulation.

How does the NM work?

A party to an action may serve a NM on all other parties. In the case of a motor vehicle NM, this may be done at any time after the close of pleadings (after the statement of claim and statement of defence have been filed) and no later than 77 days before the date of trial. The residential construction NM may be served at any time after the action has been commenced (by serving a statement of claim on the defendant(s)) and no later than 180 days before the date of trial.

The above differences between the systems are informed by the distinct contexts of the disputes. The concern in the motor vehicle action is that the mediation not occur until the full extent of the plaintiff's injury is known, while the residential construction disputes tend to be complex, involving many parties.

In each NM regulation, specific timelines are set forth within which the parties must agree on the selection of a mediator and must attend the mediation. Where the parties are unable to agree on the mediator, a mediator may be appointed by a roster organization. The only roster organization currently existing is the British Columbia Mediation Roster Society. An elaborate process is in place for the appointment of a mediator.

Motor vehicle personal injury mediations typically involve about one hour of preparation and last for three to four hours. Where all parties in the Residential Construction disputes agree the mediator may hold a 'pre-mediation conference'. The pre-mediation conference is an organizational meeting at which disclosure of documents, the exchange of expert reports and scheduling are discussed. There is little information available about the duration of the pre-mediation conferences or the length of the residential construction mediations.

Mediations held pursuant to a NM are private and settlement in voluntary. The mediator has no decision-making authority. There is no requirement to negotiate in good faith and no mediation model is specified. Lawyers are required to complete and deliver to each participant and to the mediator a Statement of the Facts and Issues at least seven days before the mediation session. Parties must complete a fee declaration, setting forth the fees for the mediation and the agreement of the participants as to how the mediation fees will be apportioned.

The Court may adjourn a mediation commenced by way of NM and it may exempt a party from participation. Should a party refuse to attend a mediation, any party may file a declaration of default with the Court, whereupon the Court can exercise its discretion among a number of powers, including: staying the action until the mediation occurs and making an order of the costs against the defaulting party. The Court will grant an exemption from a NM where a mediation has already been held.

The mediator

The British Columbia Mediation Roster Society was formed in response to the need to establish a designated roster organization from which mediators could be appointed under the NM.

Mediators apply for membership on the roster. They must have a minimum of training and experience and their application must be supported by letters of reference from (former) mediation clients or other persons who can comment on the mediator's collaborative demeanour. There is an annual fee as well as an annual requirement of continuing mediation education. As there is not legislative immunity provided to mediators, mediators are required to have their own professional indemnity insurance. While many roster mediators are lawyers, some have other professional backgrounds such as insurance adjustors and architects.

At the conclusion of the mediation, the mediator must complete a Certificate of Completed Mediation, indicating whether: all issues were resolved; some issues were resolved; the process will not be productive and the parties have advised: or, the mediation is completed and there is no agreement to continue.

Use of the roster is not limited to NM disputes. As the roster is easily accessible on the world wide web and membership on the roster signifies a level of expertise, a practice has arisen whereby lawyers select mediators for a wide variety of disputes from the roster. More information about the mediator roster is available at www.mediator-roster.bc.ca.

Conclusion

Although there has not been the anticipated large increase in mediations since the introduction of the NM, the concept enjoys wide acceptance in British Columbia.

Anecdotal comments suggest that rather than serve a NM, a party's lawyer will advise the other parties of an intention to serve a NM, whereupon the parties often agree to participate in a voluntary mediation. Most mediators listed on the roster have not experienced an increased demand for their services. It appears that mediation referrals continue to be made to a relatively small group of mediators.

The practice of holding pre-mediation conferences focusing on organizational matters has grown out of its application in residential construction disputes and other multi-party, complex commercial disputes. Wider use of pre-mediation conferences is anticipated. The draft Regulation for the Notice to Mediate under Law and Equity Act provides for a pre-mediation conference to be held at the discretion of the mediator.

It is likely that the process for the NM will continue to evolve over time, particularly as new applications are found. More information about the NM is available at <www.ag.gov.bc.ca/dro/>.

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