



What to Expect in Mediation

April 13, 2009

All actions commenced in Toronto are currently subject to mandatory mediation before trial. Regular civil actions must be mediated at the stage at which the parties agree that it is most likely to be effective and, in any event, within 90 days after a trial date is established.

Wrongful dismissal cases and all claims brought under the simplified rules (primarily cases involving claims of \$50,000 or less) must be mediated within 150 days after the parties have outlined their respective position through the exchange of pleadings, which generally includes a Statement of Claim, Statement of Defence (which may also include a counterclaim) and a Reply (which may also include a defence to any counterclaim). Regardless of when the mediation takes place, the process is essentially the same.

What is Mediation

Unlike arbitration, which is essentially a private trial where some person is empowered to decide the issues in dispute, the goal of mediation is to assist the parties in negotiating a mutually acceptable resolution. The mediator does not have the power to make any orders or force the parties to resolve the dispute. Most settlements require both sides to make compromises, with the result that neither side is entirely happy with the outcome, which is often considered a hallmark of a good settlement.

While mediators vary greatly in terms of their individual style, they are generally there to facilitate the negotiation process by remaining entirely neutral and assisting the parties (and their lawyers) in communicating with one another. This does not mean that the mediator will not share his/her views and may even be prepared to discuss what he/she perceives as the likely outcome of the case. While the parties are wise to consider the views of the mediator, particularly if he/she has some expertise in the relevant area of law, the parties are, of course, free to reject the mediator's view of the case and must always rely on their own counsel for legal advice.

The mediation process is confidential and entirely without prejudice. This means that the parties are free to discuss the case openly and make compromises, with the knowledge that the other party cannot later rely in court upon the fact that something was said or agreed to in mediation. The parties are also generally not permitted to call the mediator as a witness or obtain copies of any notes made by the mediator.

While the parties are encouraged to speak openly, the fact that the mediation is without prejudice

does not mean that the opposing party cannot later try to independently prove something which it may have discovered during mediation. Accordingly, while the primary goal may be settlement, mediation may also provide an opportunity to get more information about your opponent's case, especially in wrongful dismissal and simplified rules cases where the mediation takes place early in the litigation process.

Who is the Mediator

There are essentially two choices in this regard. First, the parties can elect to have the court (through the office of the mediation coordinator) randomly appoint a mediator from a roster of approved mediators. Roster mediators come from a wide variety of industries and backgrounds and are not necessarily lawyers (although many of them are). However, there is no guarantee that the mediator appointed will have any particular expertise in the area of law in which the dispute has arisen.

The second option is that the parties may agree upon and appoint a private mediator. This can be someone who also happens to be on the roster of mediators, but can also be any other individual the parties agree on to mediate the dispute. Experienced lawyers and retired judges often make themselves available as mediators and can sometimes offer insight which will assist the parties in resolving their differences. With a privately appointed mediator, the parties will have the ability to select a mediator with expertise in dealing with the specific type of dispute.

Time and Cost

One of the major benefits of using a court appointed mediator is that the fee for the mandatory portion of the session (the first three hours) is fixed by regulations made under the Ontario Rules of Civil Procedure.

The maximum fee which can be charged by the mediator is \$600.00, plus GST, for a 2 party mediation and the fee increases slightly if more separately represented parties are involved (to a maximum of \$825.00 for a mediation with 5 or more parties). Unless the parties agree otherwise, the mediator's fee is to be shared equally by the parties.

After the first three hours, the parties and the mediator may agree to continue the mediation, but additional fees will be incurred based on the mediator's usual hourly rate, which can range from \$300.00 to \$500.00 for each additional hour.

If the parties elect to appoint a private mediator, they should expect to pay the mediator's hourly rate for all time spent on the mediation. However, some "private" mediators may offer a slightly discounted fixed rate for the first three hours of mediation. Even so, the cost will likely exceed the regulated fees for court appointed mediators and sometimes significantly so. Once again, the mediator's usual hourly rates will generally apply after the first three hours if the parties elect to continue the mediation.

In addition to the mediator's fee, there may be a rental fee for the use of the mediator's boardroom

facilities, which can sometimes be overcome by conducting the mediation in the offices of one of the party's lawyers. Of course, each party will also incur legal fees for the time their own lawyer spends preparing for and participating in the mediation.

While the total costs are not insignificant, it is certainly much less expensive than proceeding to trial, especially where the mediation takes place prior to discoveries, and eliminates the risk and uncertainty inherent in all litigation.

Who Attends the Mediation

As a general rule, the parties and their lawyers attend the mediation and, of course, the appointed or selected mediator will also be present. When a party is a corporation, at least one representative of the corporation will attend. However, it is quite common to have two or more corporate representatives attend if more than one individual has knowledge of the issues in dispute, or is required for the purpose of resolving it. The bottom line is that all persons necessary for the resolution of the dispute should be prepared to participate in person or, in the case of a corporation, at least be available by telephone throughout the mediation session to provide instructions and authorization with respect to settlement.

How Does it Work

Mediation is generally a fairly informal process, at least when compared to a courtroom setting. The session will take place in a boardroom or other meeting room, often at the offices of the lawyer for one of the parties or at the mediator's own offices.

The mediation will generally commence with all of the participants in a single room where the mediator will review the ground rules and expectations. The basic rules are that all discussions are without prejudice and that the parties (and their lawyers) will treat one another professionally and with respect throughout the mediation process regardless of their differences.

While every mediation unfolds slightly differently (often based on the nature of the dispute and the relationship of the parties) most sessions start by giving the parties an opportunity to make an "opening statement" in which their view of the case and/or settlement objectives can be outlined for the opposing party and the mediator. While the lawyers will generally make the opening statement, the parties themselves are certainly permitted, and even encouraged, to add information and insight which may assist the opposing party or the mediator in better understanding the dispute.

While neither side is under any obligation to answer questions or disclose specific information during mediation, it is quite common (especially where the mediation takes place early in the litigation process) to share information and relevant documents with the opposing party in an attempt to facilitate settlement. Unlike a trial, the parties have the ability to control the process and should be prepared to participate.

After the initial joint session, the parties will usually be separated into breakout rooms and the mediator will shuttle back and forth between rooms to discuss the matter with one side at a time and, hopefully, assist such party in devising settlement offers to be presented to the opposing party. This process will generally continue for as long as progress is being made, or until a settlement is reached. It is common for mediation to last longer than the three hour mandatory session and all participants should be prepared to stay for as long as necessary.

If a settlement is reached, the lawyers will typically prepare Minutes of Settlement recording the basic terms of the deal. The settlement will usually be signed by the parties before the mediation concludes to avoid the risk of one party backing out of the deal, which sometimes happens when the settlement is left to be documented at a later date.

Preparation

The information available, particularly information about the opponent's case, will vary depending on what stage the litigation has reached when the mediation occurs. When the mediation occurs early on in the process, the parties, particularly a plaintiff, should still be prepared to justify their position and provide some rationale for the calculation of damages.

In mandatory mediation, the parties, through their lawyers, are required to prepare a mediation brief prior to the mediation and provide a copy of it to the opposing party and the mediator. The brief will contain a statement setting out the issues in dispute and include an overview of the party's position, interests and objectives. The brief should also include copies of all of the significant documents, especially where the mediation takes place before the documentary discovery process has been completed.

Conclusion

While the nature of some disputes makes successful mediation unlikely, in the vast majority of cases it can provide the parties with a cost effective and risk free mechanism for resolving the litigation. In some cases this can include creative settlements which are beneficial to both sides and which may be beyond the jurisdiction of the court to impose if the matter proceeds to trial.

For more information, please contact:

David Bleiwas at 416-306-1813 or dbleiwas@beardwinter.com.

The information contained in this article is for general information only and is not intended as legal advice or opinion. Should you require any advice or assistance with this or any other issue affecting your business, then please do not hesitate to contact us.