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# SOCIAL JUSTICE, AND WHY ADR IS PREFERABLE ON THE MAJORITY OF FILES

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# CURRENT TRENDS IN LITIGATION
## *PHENOMENA OF SOCIAL JUSTICE AND WHY ADR IS PREFERABLE ON THE MAJORITY OF FILES*

**Introduction**

Litigating lawsuits in the courts is becoming more expensive and time-consuming than ever. Civil trials booked in the Vancouver Registry of the British Columbia Supreme Court are, on average, significantly longer than they were only a few years ago. Most actions cannot be brought to trial for at least 18 to 20 months from the time the trial date is first reserved, and usually longer if the trial is scheduled to last longer than 10 days.

Moreover, the time available for the hearing of a trial is fixed. If a case does not complete within the time allotted, the judge's schedule may not permit him or her to continue, with the result that the case is "split". This eventuality requires counsel to prepare for trial twice and sometimes even more.

Still further, in most cases there is a delay in obtaining Reasons for Judgment following trial. Often judges will "reserve" their decision for several months.

In light of the delays and expense associated with the trial process, sophisticated litigants seek alternate ways to resolve their disputes. Alternate Dispute Resolution ("ADR") has proven to be an effective means by which cases can be brought to conclusion faster and more inexpensively than proceeding through a conventional trial.

**What is ADR?**

ADR is a method of dispute resolution that bypasses the courts, though not necessarily altogether. Most ADR processes operate in the "shadow of a lawsuit". That is, a court action is usually underway, and the parties agree to seek a resolution of the matter without proceeding through a conventional trial. The two most common types of ADR are Arbitration and Mediation. This presentation focuses on mediation.

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## What is Mediation?

Mediation has been defined as follows:

> *The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.*

Another simpler definition is:

> *A process in which the parties to a dispute meet with an impartial third person, a mediator, who helps them settle their differences.*

A mediation is a forum that fosters courteous, respectful communications between the parties and prompts the parties to be creative in trying to resolve their dispute. A mediator, though, unlike an arbitrator or a court, has no decision-making power and cannot impose a result or settlement on the parties.

## How is a Mediation Invoked?

Parties to a lawsuit can either agree to proceed to mediation or, in some types of cases, one party can deliver a Notice to Mediate and thereby compel the other parties to participate in the mediation process.

British Columbia introduced its Notice to Mediate regulation for personal injury claims under the Insurance (Motor Vehicle) Act in April, 1998, for residential construction claims under the Homeowner Protection Act in May, 1999 and for general litigation under the Law and Equity Act in February of 2001.

The Notice to Mediate is a powerful tool in that even a "minor player" in a lawsuit can force all parties to the "settlement table".

## Why is Mediation Preferable to Trial in Many Cases?

The following are some reasons why mediation is preferable to trial in many cases:

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**Timing and Certainty**

As mentioned above, the Vancouver Registry of the British Columbia Supreme Court is generally unable to give parties trial dates for at least 18 months from the time the trial date is first booked. A mediation date can usually be obtained much sooner.

Also, when parties seek to resolve cases by trial, there remains the possibility that a judge will be unavailable when the trial date finally arrives. The Vancouver Registry of the British Columbia Supreme Court rarely "bounces" trials because of the unavailability of a trial judge but the possibility is ever-present. The Civil Trial Coordinator at the Vancouver Law Courts advises that the Registry overbooks at the rate of approximately 1000%.

**Early Disclosure of Information**

Mediation forces parties to disclose information about the case they intend to advance at trial. For example, Section 10(1) of the Notice to Mediate (Residential Construction) Regulation says:

> *At least 14 days before a mediation session is to be held, each participant must, if requested to do so by the mediator, deliver to the mediator a Statement of Facts and Issues in Form 2 setting out*
>
> *(a) the facts on which the participant intends to rely, and*
> *(b) the matters in issue in the action.*

In practice, mediators usually set milestone dates leading up to the mediation for the delivery of expert reports and mediation summaries on which the parties will rely at the mediation.

As well, mediation provides an opportunity for one to ask questions of the opposing party without proceeding through a formal examination for discovery. For example, on a bodily injury case a defendant might elect to simply ask questions of the plaintiff about the extent of the plaintiff's injuries, before discussing possible settlement of the case.

Mediation is also beneficial in that solvency or insurance coverage problems are usually raised at this time.

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**Procedural Flexibility**

Mediation is a highly flexible dispute resolution process. It can be conducted in a variety of settings and the procedure can be negotiated and adapted to meet the needs of the parties involved. In many construction disputes involving numerous parties, for example, two mediators are used to expedite the mediation process.

Litigation, by contrast, has a more rigid structure and there are established rules and procedures which parties must comply with.

Another important difference between mediation and litigation relates to what information and evidence can be used, and how it can be presented and tested. In litigation this is regulated by evidential and procedural rules on relevance and reliability. In mediation there are no rules of evidence and there is no scope for cross-examination and procedural point-taking. There are only loose protocols for speaking and interacting. Parties are allowed to tell their stories as they see fit.

**Choice of Decision-Maker**

In a mediation, the mediator is agreed-upon in advance by all of the parties. This allows parties to select a mediator that meets the needs of a specific case. For example the parties can select, say, an engineer if technical expertise is required, or a retired judge if the parties would benefit from knowing how a court would likely decide a legal question.

Mediators are sometimes described as being "process oriented" or "results oriented". Process-oriented mediators focus on ensuring that all participants feel involved and empowered by the mediation process whereas results-oriented mediators generally focus on bringing about a compromise settlement and are more inclined to share their views as to what an appropriate result might be.

**Party Participation**

The mediation process allows the parties with a stake in the outcome of the case to communicate directly with one another. It may also permit settlements to be reached more efficiently than in the conventional litigation setting, since a claims examiner attending at a mediation and armed with sufficient authority will be able to commit to a settlement, without the necessity of lawyers having to go away and "take instructions" from their clients on a settlement proposal.

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**Privacy and Confidentiality**

The mediation process is private and confidential. Steps taken to ensure privacy include:

a) the mediation is conducted behind closed doors;
b) outsiders can only observe proceedings with the parties' consent;
c) no recording and transcript is kept;
d) there is no external publicity on what transpired at the mediation; and
e) any disclosure of the settlement terms is a matter which can be negotiated between the participants.

Mediations are also conducted on a "without prejudice" basis, which precludes the parties at a subsequent court hearing from leading evidence as to what was said. Moreover, the mediation participants and the mediator are usually bound by a confidentiality agreement. These features are conducive to frank and open negotiations, and are beneficial to parties who may not wish their affairs to be publicized to business competitors, etc.

For example, where a defendant admits liability and pays some amount in damages, there is no public precedent which might invite or encourage further lawsuits against that defendant.

The privacy and confidentiality of mediations contribute to finality in the dispute, as there is little evidence on which to seek a review or otherwise impeach the outcome.

**Cost**

Resolving cases by way of mediation is much less expensive than proceeding through trial. Consider that most "leaky condominium" cases involve ten or more defendants, and the trials of those actions are usually scheduled to take at least twenty-five trial days.

A mediation of a leaky condominium lawsuit, on the other hand, usually only takes one or two days. The cost-savings to all parties is obvious.

Moreover, the lead-up to a mediation can be made intentionally abbreviated. For example, some mediators will suggest that parties conduct short examinations for discovery prior to mediation, but retain the right to conduct more thorough examinations if the matter doesn't settle and proceeds to trial.

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**Strategic Benefits**

There are many other strategic reasons to use mediation to attempt to resolve cases. For example, if one has a weak witness who will be forced to testify at trial, it may be worthwhile to attempt mediation, since at mediation the witness, if he or she attends at all, will not be subjected to the rigours of cross-examination.

A mediation allows one to identify weaknesses in one's own case. Often, if a mediation does not result in settlement, it reveals the tack the opposition intends to take in the case, and provides one with the opportunity to "shore up" one's case before trial.

In many cases, even if a mediation does not end with the parties having reached a settlement, sufficient progress has been made that parties can thereafter "re-think" settlement and possibly continue negotiations.

Sometimes, there is a non-monetary barrier to settlement. For instance, an opposing party might be more concerned with receiving an apology than recovering a judgment amount. In such a case, mediation is an excellent forum for parties to express what they need in order to put a dispute behind them.

Lastly, since a mediator cannot impose a judgment or settlement on the participants, a party can always "walk away" and resort to the conventional litigation process to resolve the dispute.

**Conclusion**

The average length of trials is on the increase and the cost of litigation is increasing correspondingly. In these circumstances parties (particularly insurers which manage large volumes of litigation) should consider alternate methods to resolve lawsuits.

Mediation is an effective alternative to the conventional trial since:

- a) there is a regulatory framework within which to compel mediation of certain types of actions;
- b) there are numerous strategic reasons for participating in a mediation; and
- c) mediation itself is comparatively quick, flexible, confidential and inexpensive.