

Choosing Mediation

Mediation is:

- Simple: Mediation is a simple way to resolve construction industry disputes while preserving business relationships. Mediation is easy. The parties enter into a “mediation agreement” with a skilled intermediary (called a ‘mediator’) who “facilitates” a settlement entered into by the parties themselves. Nothing is “decided” in a mediation. The mediator may comment on the merits of the parties’ positions, but there is no actual determination that one side was “right” or “wrong”. If mediation works, the parties enter into a contract called “Minutes of Settlement” and the settled portion of the dispute is over once and for all. If mediation does not work, the parties have lost nothing except a little time and money and they can carry on with their dispute. Most mediations take a day. Some take two. A complicated case with many parties may take three or more days. Even so, mediation is generally worth the effort.
- Voluntary: Mediation is usually voluntary in the Ontario construction industry. Parties generally cannot be forced to mediate, although there have been Court administered “mandatory mediation” programmes, and there are common contractual provisions that require disputes to be mediated before they can be arbitrated or litigated.

- Non-binding: Unless the parties at a mediation agree otherwise, the fact that the parties mediated their dispute has no effect on the substance of their dispute or any litigation or arbitration they may undertake to resolve that dispute. Disputes can be mediated over and over again, if necessary, until they settle. You can mediate and settle part of a dispute while the rest of the dispute goes through a more formal process.
- Confidential: Most standard mediation agreements provide that everything said and done at a mediation is 100% confidential. Even if they do not, our court system strongly supports the principle of early settlement, and our Courts therefore supports the principle confidentiality of the mediation process. Your mediator cannot be compelled to give evidence in court or in an arbitration about what happened at the mediation, or what was said or done by anyone at the mediation regarding the merits of the underlying dispute. If there is something you want to say to a mediator in a mediation that you do not want the other side to know, you can request that this information be withheld, and it will be.
- Creative: A mediator has unlimited power to challenge parties' views of their own and other's cases and to devise creative settlement options unavailable to courts or arbitrators.

- Popular: Mediation has become the norm in construction disputes in Canada over the past decade or so. Almost all construction disputes will be mediated at some point. Most of them will be mediated successfully. This results in more working capital engaged in revenue generating activity and less engaged in dispute resolution.

Mediation Questions and Answers:

1. Who pays and how much does it cost?

Answer: Generally each side pays ½ of the cost of the mediation and each side is responsible for paying the costs of its own lawyers. The mediator's fee for preparation is usually charged on an hourly basis and the mediator's fee for the mediation session is usually charged on a daily basis. Your mediator will discuss the cost of the mediation with you in advance and the parties and the mediator will agree on a deposit to be required from each side, which is paid before the mediation occurs and is held by the mediator in trust. At the conclusion of the mediation the mediator will bill the parties and deduct his/her bill from the amount in trust. If the mediation is unsuccessful and the case goes to trial or arbitration, you usually cannot recover the costs of the unsuccessful mediation from the other party. They are not considered "costs of the action".

2. What happens in a mediation?

Answer: Prior to the mediation date the parties exchange “mediation briefs” outlining and documenting their core case. On the appointed mediation date the parties get together in one room for introductory remarks by the mediator in what is called a “plenary” session where the parties, or their lawyers, present a very condensed summary of their positions. The mediator then separates the parties into their own rooms for what are called “caucus” sessions. These sessions continue until the dispute is settled or the mediation is terminated. The mediator goes back and forth between the “caucus” rooms to shape the dialogue, elicit constructive solutions from the parties themselves, and find any common ground. The mediator may break the groups into smaller groups, or meet the lawyers separately, or meet senior executives separately. The mediator will do whatever is required to fully explore the settlement option. If the parties reach a settlement, the mediator will bring the parties and their counsel together again to reduce their agreement to writing and get it signed before closing the mediation.

3. Are there any rules that govern mediation?

Answer: The parties are free to make their own rules, but there are some very useful, standard rules for mediation. The Canadian Construction Documents Committee, CCDC, publishes Document 40, Rules for Mediations

and Arbitrations. These are a useful guide. It is up to the mediator and the parties to arrive at a mediation agreement that suits the individual case.

4. A lot seems to depend on the mediator. How do I find a good mediator?

Answer: Most mediators are chosen from lists proposed by one party or the other. Most mediators are named to these lists based on reputation. Over the course of many mediations, mediators develop individual styles. Some mediators tend to be “evaluative” and are chosen for this reason. Evaluative mediators comment on the relative merits of the parties’ positions. This comment will have weight and may be persuasive. Some mediators have been trained to be “facilitative”. Facilitative mediators do not see their job as being one of evaluating relative legal positions and predicting outcomes; they see their job as being one of facilitating an agreement between the parties. Because mediations are completely confidential, you cannot ask a mediator to give you a list of successful or unsuccessful mediations. Your own lawyer, however, will be able to give you an idea about the qualities of individual mediators by making enquiries of colleagues, or from personal experience.

5. Can I mediate if I have a lien claim?

Answer: Yes. You preserve and perfect your lien claim just as you would if you were not mediating. Nothing changes. In fact, the lien Masters in Toronto have set up their own mediation facility so that one Master will mediate a lien claim that will be heard on a reference by another Master.

Mediation is generally defined as the consensual introduction into a negotiation of a third party neutral with limited or no decision making power, who assists the parties in reaching a settlement of some or all of the issues in dispute.¹

Mediation is non-binding and usually voluntary.²

Mediation is often made precursor to arbitration or litigation.

Mediation is conducted in strict confidence and “without prejudice” to the parties’ legal positions.³ The central feature of mediation is full party control over the outcome.

Mediation does not have to follow any set procedures. It is unburdened by legal rules of evidence or other strictures. The parties agree to mediate, choose their mediator and agree on a time and a place to mediate. The parties also agree on a briefing schedule. Mediation sessions often commence in plenary session, but this step can be dispensed with by the parties. Caucus sessions are used to focus parties on their interests. The mediator will usually take responsibility for documenting any settlement reached. If a mediation fails to achieve a settlement, the dispute continues as if the mediation had never taken place. Parties are free to mediate as often as they choose.

Most standard form construction contracts have an alternative dispute resolution component. Canadian Construction Document Committee’s standard form construction

contract (CCDC-2), for example, provides for the appointment of a “Project Mediator” within 30 days of award of a contract.⁴ Disputes that cannot be resolved through negotiation are referred to the Project Mediator. Each party must ensure that individuals with the authority to agree to settlement terms on behalf of the party will be present at the mediation conference, which will be set by the project mediator as soon as possible after the dispute arises. The parties will have 10 days to mediate the dispute with the assistance of the project mediator. Legal representation is permitted. The results of the mediation are kept confidential and any evidence adduced at the mediation cannot be used at a subsequent proceeding. Unless they agree otherwise, the parties share the fees of the mediator mediated. If mediation is unsuccessful, either party may, within 10 days of the completion of the mediation, request binding arbitration. The Canadian Construction Document Committee publishes CCDC40 Rules for Mediation and Arbitration of Construction Disputes for use with its contract forms.⁵ The ADR Institute of Canada has issued standard National Mediation Rules.⁶ American Arbitration Association has developed “Construction Industry Mediation Procedures”.⁷

Notes:

1. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd revised ed. (San Francisco: Jossey-Bass, 2003) at 15.
2. Mediation can be mandatory. See, for example, Ontario Rules of Civil Procedure, Rule 24.1.

3. McLaren & Sanderson, *Innovative Dispute Resolution: The Alternative* (Toronto: Carswell, 2003) at 4-4.
4. CCDC 2 – 1994, GC 8.
5. CCDC 40 – 2005.
6. See <http://www.amic.org/>.
7. See <http://www.adr.org/sp.asp?id=22004#MedProcedures>.