Conciliation

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The following article answers three questions: what is conciliation, how does it work, and does it have a place in the tool kit of construction lawyers in Canada?

What is conciliation?

"Conciliation" has been used to describe a number of familiar mediation-like processes. Under the *UNCITRAL Model Law on International Commercial Conciliation, 2002*, for example, the term "conciliation" is used in its broadest sense to mean any process whereby a person or a panel of persons assists the parties in their attempt to reach an amicable settlement.[1] This would include conventional construction industry mediation in Canada. Similar rules had been adopted by the International Chamber of Commerce (ICC) in 1988 in their "Rules for Optional Conciliation".

The term "conciliation" is also used in a narrower sense to mean mediation with an adjudicative component. Conciliation in this sense is an industry-driven initiative that guarantees a "deliverable" in the event that the conventional open-ended mediation process fails to produce a settlement.

In 1988, the same year as the ICC published their mediation-like "Rules for Optional Conciliation", the U.K. Institution of Civil Engineers (ICE) put forward a form of Minor Works Contract incorporating a mediation procedure that resulted in a settlement or a binding "recommendation" by the mediator, subject only to subsequent arbitration or litigation.[2] It worked. The uptake was rapid. This closed-ended form of dispute resolution soon became standard and the term "conciliation" acquired a new, more adjudicative meaning.

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[1]The United Nations Commission on International Trade Law (UNCITRAL) has favoured conciliation for almost 30 years. UNCITRAL's formal Conciliation Rules were first adopted by the General Assembly on December 4, 1980.

[2]With the enactment of statutory adjudication by the *Housing and Regeneration Grants Act* in 1996, the binding provisions of the ICE standard forms have since been deleted as redundant. The statutory minimum procedure now reads similar terms into all construction contracts within the scope of the legislation.

The success of this industry-driven conciliation process drew the attention of the Latham Commission, which had been charged with revivifying a moribund, dispute-choked U.K. construction industry, all of which led to the enactment of the *Housing and Regeneration Grants Act* in 1996, and the introduction of statutory adjudication. The U.K.'s statutory adjudication scheme proceeded cautiously at first, excluding residential occupiers among others.[3] In order to bring the benefits of this adjudicative type of dispute resolution process to the residential construction industry, the Society of Construction Law (SCL) adopted a Conciliation Procedure in March of 2003, and launched their Construction Conciliation Group on May 1, 2003.

The SCL Rules for Conciliation provide for a 28-day conciliation process on the *Housing and Regeneration Grants Act* model. The amount of documentation that may be relied upon by the parties at SCL conciliation is sharply limited.[4] Reasons are not required from the conciliator in issuing a "recommendation".[5] Recommendations are to be implemented immediately, and the parties are entitled to summary enforcement of the Conciliator's recommendations, which are binding until finally determined by legal proceedings, arbitration or agreement.[6] Under SCL Rule 8.5 the Conciliator may, but is not obliged to, decide whether any party shall be responsible for paying the conciliator's fees, or the propor-

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[3]Section 106 of the HRGA expressly excludes construction contracts with residential occupiers. There is a recommendation before the Latham Adjudication Task Group to bring residential occupiers and related trades and professionals within the ambit of HRGA adjudication provisions.

[4]Under Rule 3, the party applying for the appointment of a Conciliator has 2 working days from the appointment to send to the other party a "Statement of Case" not exceeding 6 pages and copies of documents upon which they intend to rely not exceeding 25 pages. Under Rule 4, the responding party has a corresponding obligation to deliver to the claimant within 14 days of receiving the claimant's Statement of Case a "Statement of Response" not exceeding 25 pages and copies of documents upon which they intend to rely not exceeding 25 pages.

[5]Under Rule 8, if the Conciliation is terminated, the Conciliator has 7 days to set out for the parties what the Conciliator considers to be appropriate Terms of Settlement. In doing so, the Conciliator does not have to base the recommendation on any principles of contract, or law, or equity. It is mandatory that the recommendation not contain reasons; however, ambiguously, the Conciliator may send the parties a separate document called an "Explanation", which presumably is different than reasons. The difference may relate to the provision that the recommendation need not be grounded in legal principle.

[6]SCL Rules 8.7 and 8.8. By SCL Rule 9.3, following any Recommendation, if any party intends to commence legal proceedings in connection with the dispute, the subject of the conciliation, it shall give notice to the other party or parties within 28 days of the date of the Recommendation and shall issue such proceedings within 3 months of the date of the Recommendation.

tions in which the conciliator's fees should be paid. Any ongoing litigation, arbitration, or adjudication process is continued notwithstanding the conciliation.[7] A roster of qualified conciliators is also provided at www.ccgroup.org.uk. SCL conciliators tend also to be well-known and highly experienced arbitrators. Many are Fellows of the Chartered Institute of Arbitrators. The whole idea is for cost-effective, closed-ended, and "real time" dispute resolution. Ireland has had years of experience with its own version of conciliation.

Ireland's engineers (then IEI, now "Engineer's Ireland", or "EI") put forward standard conciliation provisions in 1995, concurrently with the ICE forms. Ireland undertook a "Strategic Review of the Construction Industry" in 1997.[8] Since 2001, conciliation has been compulsory in most Irish construction contracts and Irish conciliation also involves a binding "recommendation" by the Conciliator.[9]

Most recently, in 2006, the Institute of Arbitrators & Mediators of Australia adopted a set of "Conciliation Rules", in addition to their "Mediation and Conciliation Rules", that defines "conciliation" as a process whereby the parties, assisted by a neutral third party, identify disputed issues, develop options, consider alternatives and endeavour to reach agreement. Under this definition, the conciliator may have an advisory role in regard to the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions or give advice on the terms of settlement.[10] In addition, in 2002, the Department of Consumer Affairs Victoria, established a

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[7]SCL Rule 9.2.

[8]In February of 2001 the Irish Forum for the Construction Industry (FCI), which had been established in 1997 to implement the recommendations of the Strategic Review, published its "Procedural Arrangements for Implementation of the Procurement Recommendations of the Strategic Review Committee on the Construction Industry applicable to Construction Projects with effect from 31 March, 2001". Appendix III contains amendments to the standard form Irish construction contract GSLA 82 Agreement dealing with conciliation. Supplement C to this document is an excellent procedural guide.

[9]Under the FCI procedure, the Conciliator may consult independent third party experts, presumably at the expense of both of the parties (Rule 7). The conciliator endeavours to commit the parties to a mutual settlement, failing which the Conciliator issues a Recommendation within 10 days (Rule 8). If neither party rejects the recommendation within 10 working days after its issuance, it shall be final and binding upon the parties (Rule 9). If either part rejects the Recommendation, a request for arbitration *may* be made (Rule 9).

[10]The Institute of Arbitrators & Mediators Australia Conciliation Rules, CAN 008 520 045, November 2006, Definitions, Rule 1.