Any party can compel mediation under new family dispute process

By Susanna Jani

Thanks to a recent step by the provincial government, some of British Columbia's families have a new option when it comes to resolving their family disputes.

As of Nov. 1, B.C.'s Ministry of Attorney General began piloting a notice to mediate process for family law proceedings in the Nanaimo registry of the Supreme Court. The process enables any party to a family law proceeding in the Supreme Court to compel all other parties to mediate the matters in dispute.

This long-awaited move is one for which there has been growing support in the province. Among the supporters is the British Columbia Mediator Roster Society, which formally endorsed a notice to mediate for family matters in 2003. The Provincial Council of the Canadian Bar Association, B.C. Branch, signalled its support in 2000 when it passed a resolution in favour of the notice to mediate process being expanded to appropriate family matters.

Support for a notice to mediate process for family matters stems in part from the proven track record of the notice to mediate process. An original "home grown" product of B.C., the process was first introduced as a dispute resolution option for motor vehicle personal injury actions in 1998. Its effectiveness was verified through an independent evaluation in 1999. The process was subsequently expanded, enabling parties to a wide range of actions in the Supreme Court to require the other parties to attend a mediation session.

In the nine years since its introduction, the notice to mediate process has gained wide acceptance in B.C. It has been used in more than 20,000 actions and has become an integral part of the province's dispute resolution landscape.

Equally important in creating support for a notice to mediate process for family matters has been the cautious approach taken in the development of the notice to mediate (family) regulation. While unmistakably related to its predecessors, this regulation includes several special features which address the particular nature of family disputes. Safety concerns have, for example, been dealt with by providing an exemption to the requirement to attend a pre-mediation meeting and mediation session in cases where a party has obtained a restraining order against the other party.

The regulation also requires mediators to hold a separate pre-mediation meeting with each party. In these pre-mediation meetings, mediators must screen for power imbalances, domestic violence and abuse. They must also discuss with the parties the importance of independent legal advice. Following the pre-mediation meeting mediators may end the mediation process if, in their assessment, mediation would not be appropriate or the mediation process would not be productive under the circumstances.

The degree to which the notice to mediate (family) regulation anticipates and addresses various practical realities of family law disputes has helped win further support for the process. It recognizes, for example, that requiring parties to attend a pre-mediation meeting and mediation session in person may create financial hardship, and provides that they may attend by telephone or other communications medium if authorized to do so by the mediator.

In a similarly helpful vein, the regulation addresses possible obstacles to the smooth flow of the process. It follows in the path of the previous notice to mediate regulations by using many of the same key provisions, including one which provides that when parties are unable to agree on a mediator, any party may apply to a roster organization designated by the attorney general to appoint the mediator.

As with the other regulations, the British Columbia Mediator Roster Society, which maintains a list of qualified civil and family mediators, has been designated as a roster organization for the purpose of appointing a mediator under the notice to mediate (family) regulation.

In spite of the broad support for the notice to mediate process for family matters, it remains to be seen whether it will be expanded province-wide. At this point, the Ministry of Attorney General has committed only to taking one small step at a time.

The pilot project will run for one year and an evaluation of the process will be conducted during that time. The results of that evaluation will be studied before the government decides whether it will take the next, bigger step of expanding the process to other registries. If the ministry continues to take the same cautious approach it has taken to date, it could be quite some time before British Columbians see any further significant developments relating to the notice to mediate process.

In the meantime, families in Nanaimo who wish to resolve their disputes have one more option than they've had in the past. And that, in itself, is a giant leap in the right direction.

Susanna Jani has been the roster administrator for the British Columbia Mediator Roster Society for the past nine years.

Mediators must discuss process when managing multi-party matters

By David Stark

Many cases that come to mediation involve multiple parties — multiple plaintiffs, multiple defendants or both. Litigation involving a single plaintiff and a single defendant is increasingly rare.

A slightly different reality faces parties and mediators in multi-party mediation. The increased number of parties changes the dynamics and process of mediation, as well as the way parties interact, the way a mediator handles the process, and the way parties see themselves in respect to other parties.

In multi-party situations, mediators should spend time discussing process. They should talk to the parties, either as a group or as plaintiffs or defendants, about the process the parties want in order to move the file to a successful conclusion. Some topics to discuss include the following:

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• Mediators should discuss, in the group, whether there have been offers from any of the parties, and if so, what they are.

Some of the offers may be all in numbers, some may be offers with costs and some may be offers plus interest and costs. The discussion will help the parties understand where they are with respect to numbers, and help to make sure that all the offers are understood, properly communicated and put in a comparable format. The group discussion avoids miscommunication.

• There should be a discussion on any agreements on damages. If none exist, parties can consider expert reports, and ensure they have been circulated and reviewed.

If the number of defendants is small and there is a recognized expert in the particular area, the defendants may wish to retain a joint expert.

If an agreement on damages is not possible, parties can work on a formula that can be fleshed out and followed in the mediation.

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