

BCAMI  
Mediation and Arbitration in the Construction Industry  
Prepared for the Southern Interior Construction Association

**SAVE MONEY, FINISH ON TIME AND KEEP YOUR CLIENTS –**  
How Mediation and Arbitration Can Help You Do All This!

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**Why do I need to know this stuff?**

Disputes are inevitable in any business. Mistakes happen. Misunderstandings happen. You cannot please everyone all the time. If you have been involved in a litigated dispute you will have noticed that it can be expensive, time consuming and out of your direct control. You may have been told that your case is good but that even winning through litigation will be too expensive. Maybe you didn't litigate the dispute and it just went unresolved. You didn't get paid, didn't get the job finished, lost a customer or paid someone else to do the work again.

**What is mediation?**

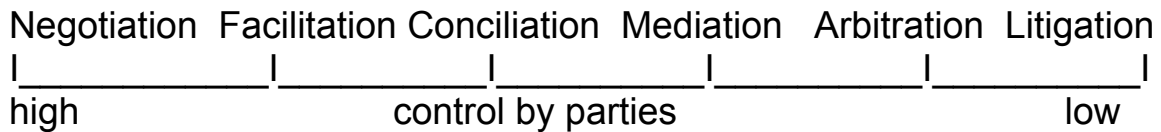
Mediation is assisted, face to face negotiation. Mediators are independent, neutral third parties who help the parties reach an agreement. Mediators have no power to make decisions. The process is confidential and information disclosed cannot be subsequently used in court. Agreements reached through mediation are contracts. If a party breaches the agreement you would have to sue to enforce it. Parties are more likely to adhere to a settlement agreement that they had a hand in creating.

**What is arbitration?**

Arbitration is a process in which a neutral, independent third party reviews the evidence and arguments of each party, makes findings of fact and renders a binding decision. The process may include a hearing and "taking a view". Arbitrators' decisions can be filed in court and enforced the same way as a court order. Arbitrators' decisions are final and usually cannot be appealed. A breach of natural justice can be grounds for appeal – e.g. bias or failing to hear the evidence of one party.

**What is ADR?**

Alternate Dispute Resolution refers to dispute resolution procedures other than litigation. Many hybrid processes exist and it is important to discuss your needs with the ADR professional.



### When do I use which process?

**Mediation** is a collaborative process that can help preserve the parties' relationship. This is important if you plan to work together in the future. Mediation permits creativity in the result that is often not available in arbitration or litigation. e.g. future consideration. A drawback to mediation is that an agreement is not guaranteed.

**Arbitration** is an adversarial, adjudicative process. There will be a winner and a loser. There will be a decision and that is attractive to many parties. Especially since it is final, binding and can be filed and enforced through the courts.

**Med/Arb** – a hybrid process is offered by some professionals. You can combine the benefits of both by attempting settlement through mediation and switching to arbitration if it is not successful.

### Can I force the other side to mediate or arbitrate?

Yes, if it is a term of the contract or applicable legislation.

If you are involved in residential litigation you can require the other party to mediate by issuing a Notice to Mediate. They need a Court Order to refuse to mediate.

### Notice to Mediate (Residential Construction) Regulation

In June 1998 [\*The Commission of Inquiry into the Quality of Condominium Construction in British Columbia: The Renewal of Trust in Residential Construction\*](#) (the Barrett Report) observed that the traditional adversarial process has not worked well in complex residential construction disputes.

The litigation system does not serve the homeowner well....The delays and expense are detrimental to defendants as well as plaintiffs.

Every [court] case the commission was told about had taken much longer than the parties wanted - and was still unresolved. Legal expenses were another serious problem for strata councils and condo owners. In many cases the legal bills appeared to be as onerous as the estimated cost of repairs.

The commission recommended that the proposed *Homeowner Protection Act* make available an alternative dispute resolution option for disputes arising from problems surrounding residential construction. The Notice to Mediate (Residential Construction) [Regulation](#), [28KB] B.C. Reg. 152/99, came into force in May 1999. It provides that "any party to a residential construction action may initiate mediation in that action"

### **Can I do ADR on my own?**

You can become a collaborative negotiator who doesn't always require the help of third parties. Many people who have been through the mediation process learn ways to handle disputes themselves. Communication skills and negotiation skills can be taught, practiced and mastered.

### **What if my lawyer finds out?**

Mediation and Arbitration do not necessarily exclude the involvement of your lawyer or the litigation process.

Lawyers can be involved at any stage in the mediation or arbitration process. Mediation and arbitration can be accessed from the litigation process. Sometimes legal representation throughout will be appropriate. Sometimes none is required and sometimes lawyers can help clients prepare for the process or review a mediated agreement before signing.

### **CCDC 2 and CCA 1? (See timeframe attached)**

Part 8 of each contract deals with dispute resolution. The process follows good faith negotiation between the parties, assisted negotiation using the "project mediator" and, if no settlement and if notice is given in time (8.2.6), binding arbitration. If notice is not given and the parties do not agree to arbitrate then litigation is available. (8.2.7) There is a prescribed set of rules to apply to mediations and arbitrations under the CCDC 2 found in **CCDC-40**. You can obtain a copy from the SICA office.

### **What about Builders' Liens?**

Nothing in the process of negotiating, mediating or arbitrating affects a party's rights or responsibilities under the Builders' Lien Act.

### **How do I start a mediation or arbitration?**

Call the BCAMI toll free number. Make sure you tell them that you are a SICA member if you want the preferred rate. There are other mediators and arbitrators available at their regular rates. 1-877-332-2264

Contact a BCAMI arbitrator or mediator through the rosters posted on the SICA website. Tell them you are a SICA member for the preferred rate. Once you have selected a mediator or arbitrator call BCAMI.

**Summary**

Educate yourself about the potential benefits of ADR and you may save money, preserve business relationships and resolve disputes more quickly than traditional litigation alone.