

A Guide to
MEDIATION AT THE ENVIRONMENTAL COMMISSION

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INTRODUCTION

Mediation is the preferred form of Alternative Dispute Resolution at the Environmental Commission

The Environmental Management Act, 2000 at section 84(3) mandates the Environmental Commission to encourage and promote alternative dispute resolution, being any mechanism for resolving disputes other than by way of litigation. The Commission has identified mediation as the preferred method of alternative dispute resolution and the practice and procedure with respect to mediation is set out in Rule 10 of the Environmental Commission Rules of Practice and Procedure 2001.

The Commission on its own initiative or at the request of the parties may at any time before or during the proceedings schedule a mediation session. The purpose of a mediation session is to attempt to resolve as many issues, whether substantive or procedural, as possible.

ENVIRONMENTAL COMMISSION MEDIATION RESOURCES

In mediation sessions fixed by the Environmental Commission, the mediator will either be a member of the Commission, Commission staff or a person appointed by the Commission.

DEFINITIONS

Alternative Dispute Resolution (ADR) describes a variety of informal processes for resolving conflicts that emphasize collaborative problem solving and differ from traditional adjudication methods such as litigation. ADR offers the parties the opportunity for an early, informal resolution of disputes, in a mutually satisfactory fashion. ADR methods include conciliation, mediation and early neutral evaluation. ADR can present an opportunity for savings in cost and time as compared to litigation.

Mediation has been identified as the preferred ADR process for disputes before the Environmental Commission because it can be used to resolve disputes quickly and to the satisfaction of all the parties involved. Mediation involves the intervention in a dispute of an impartial third party who assists by controlling the negotiation process but has no decision-making authority. The objective is to assist the parties to voluntarily reach an acceptable resolution by facilitation dialogue between the parties about the issues in dispute. Mediation works best early in the dispute process but there are often opportunities for mediation at any time before litigation is concluded.

FORMAL RIGHTS AND MEDIATION

Participating in mediation does not amount to a waiver of a party's right to proceed with litigation before the Commission. If mediation is unsuccessful, the matter will proceed to litigation.

When the matter is referred to mediation, the proceedings will usually stand adjourned to enable the mediation to be conducted. It is however important to note that unless the Commission orders otherwise, even though a dispute has been referred to mediation, parties are still expected to comply with all timelines with respect to litigation set out by the Commission, the legislation and the Rules of Practice and Procedure, 2001.

PARTICIPATION IN MEDIATION

Parties may apply to the Commission for referral to mediation of a matter arising in proceedings at any time after the proceedings are commenced (by filing the relevant Notice of Proceedings) including during the hearing of the matter. Participation in mediation is strictly voluntary for all parties involved. At the mediation session a party can be represented either by himself or by a representative having authority to settle the matter. Other persons can attend the session only with the leave of the parties and the mediator.

WHAT TO EXPECT FROM MEDIATION

- The mediation process allows parties to engage in joint problem-solving.
- One of the goals of mediation is to develop an agreement that resolves the dispute without litigation.
- Mediation is not an adversarial process where parties each make a case to a third party who decides who is right.
- Mediation is not a part of the legal proceedings, so normal courtroom rules do not apply.
- Mediators will guide the process so it is productive, facilitates conversation and breaks for separate meetings when necessary.
- During a mediation session, parties are entitled to consult with their representatives.
- Mediation sessions can vary greatly in length of time depending on the complexity of the issues involved.

CONFIDENTIALITY

Confidentiality is key to the success of mediation. Parties are more willing to discuss the issues and options for resolving the matter when the discussions are not part of a record that can affect litigation.

- Any notes taken by the mediator will remain confidential and are destroyed when mediation is completed. The only documentation from mediation would be a

settlement agreement, if such an agreement is reached, and formal communication from the mediator informing the Commission that the mediation has been concluded. The mediator cannot disclose to the Commission the details of the mediation or any agreement arrived at therein. Only the parties can disclose the terms of the agreement to the Commission.

- Information gained during mediation cannot be used at later formal proceedings. Any documents submitted or statements made remain confidential and without prejudice. Such documents will not be considered to be filed in the proceedings or to be part of the record and shall not be accessible to the public.

ROLES

- Mediators have no decision-making authority in the matter being mediated.
- Mediators are neutral third-parties who facilitate negotiations between the disputing parties.
- Mediators do not provide legal advice or counsel to any party.
- Mediators assist the parties in generating options for settlement.
- Mediators assist the parties in their negotiations.
- Mediators act as “agents of reality” for the parties, drawing their attention to unrealistic expectations and encouraging alternative perspectives.

SETTLEMENT AGREEMENTS

The settlement agreement, if reached, is binding on all parties. The parties need not bring the settlement agreement to the attention of the Commission but are free to do so. Rule 10.9 of the Environmental Commission Rules of Practice and Procedure, 2001 provides that the parties may advise the Commission of the terms agreed between them, of any agreement or arrangement arrived at arising out of a mediation session.

When a settlement agreement resolving the substantive issues of the matter has been reached, the parties have two options to end the formal proceedings. The first is for the parties to discontinue the matter. The second option is to seek a Consent Order of the court in the same terms as the settlement agreement. The Commission will usually enter such an Order by Consent provided that the court is satisfied that the terms of the settlement agreement are in accordance with all relevant provisions of the law and are just in all the circumstances.

COMMONLY ASKED QUESTIONS & ANSWERS

1. Why should I consider mediation?

Litigation is adversarial, time-consuming and expensive. Parties often take a combative stance to defend their respective positions. This can prejudice any future relations between the parties. Mediation allows the parties to take a collaborative approach to solving the issues between them, thereby preserving the goodwill between them.

2. When does mediation work best?

Mediation can resolve disputes quickly and to the satisfaction of all parties involved. It works best early in the dispute process, before parties develop strong attachments to their positions. Mediation works best when:

- a. relationships between the parties will likely continue in the future. The parties might wish to avoid damaging a relationship that may preclude them from working together in the future.
- b. misunderstandings exist between the parties. A skilled mediator can often facilitate communication between the parties to improve understanding.
- c. strong emotions are present. The parties could benefit from the presence of a neutral third party who guides the communication flow and can change the interpersonal dynamics. This creates a better climate for dispute resolution.
- d. the parties are flexible. The parties are willing to talk and re-evaluate their position, deferring litigation.
- e. confidentiality is important. Fewer individuals are involved with a mediated settlement as compared to a litigated settlement.
- f. cost savings are considerable. Mediation involves direct negotiations between the parties to the dispute, so even if legal advisors are present, costs are generally much lower with mediation than with litigation. Additionally, if the mediation is conducted by a member of the Commission or Commission staff, the parties do not have to pay for the services of the mediator.
- g. parties want greater flexibility in developing settlement alternatives. Mediation offers more flexibility allowing the parties to address relationships, and procedural and substantive issues that go beyond those available in traditional litigation proceedings.
- h. parties interested in retaining control over the case. As a voluntary participant, a party has at least three options during mediation: to settle all of the issues in the matter, to settle some of the issues, or not to settle any of them.
- i. parties desire to keep decision-making authority with the people who know the problem best. The parties retain all decision-making authority throughout the voluntary process. The mediator cannot impose any settlement on the parties.
- j. the dispute involves factual issues rather than legal issues.
- k. time is important. Mediation is designed to be time-efficient. Mediations tend to take significantly less time than litigation.
- l. the parties might benefit from reality testing. Mediators act as “agents of reality” for the parties, drawing their attention to unrealistic expectations and encouraging alternative perspectives.
- m. the disputed issue is not worth the high litigation cost. The issue does not require the costly and timely disruptions that litigation would require.

- n. the dispute does not involve setting precedent.
- o. Mediation offers a “no risk” option. If the matter is not resolved through mediation, the parties may pursue the matter before the Commission.
- p. there is a potential power imbalance. Mediation reduces the power imbalance often found between the disputing parties.

3. When is mediation not appropriate?

In limited cases, mediation may not be the best option for the parties. In these situations, the Environmental Commission will evaluate the mediation request more closely. The decision not to offer mediation will only occur after the matter receives a full evaluation from the Commission. Mediation may not be appropriate under certain circumstances;

- a. definitive resolution of the matter is required. It may be important to litigate the case to establish clear legal precedent.
- b. the matter significantly affects other parties, who are not part of the mediation process.
- c. A full public record of the proceedings is important.

4. What advantage does a party have if he decides to have a dispute mediated?

Mediation provides customized, creative, and equitable solutions that are tailored to the specific needs of the parties. Mediation can include all relevant issues, and usually result in a more comprehensive resolution of all issues. Because mediation is completely voluntary, any settlement reached will be one that is acceptable to the parties.

5. Is mediation the only kind of ADR that is offered?

Mediation is the preferred form of ADR at the Environmental Commission because it allows the parties to come together, have a constructive conversation about the issues affecting them, and work toward developing a resolution themselves. The mediator functions as a neutral participant, and is thus independent, impartial and confidential. However, there are other forms of ADR which the Environmental Commission can pursue.

6. How does mediation protect relationships?

Mediation generally results in a settlement that both parties can accept and support. The process promotes better communication between the parties and encourages a respectful and co-operative relationship.

7. Will mediation work in my case?

Thus far, most matters filed with the Commission have been resolved by mediation. Even when mediation does not result in an agreement, the process tends to narrow the issues, making litigation more manageable.

8. What happens if a case is settled through mediation?

The settlement agreement will be binding on the parties and will be enforceable by either of them.

9. How does mediation save money?

Both parties will save money by avoiding the significant costs associated with litigation.

10. Is there a fee for using mediation?

If the mediator is a member of the Commission or Commission staff, there is no fee for using mediation.

11. What is the mediator's role?

The mediator's role is to facilitate a constructive conversation where the parties exchange views, identify ways of addressing their concerns and resolve the conflict. A mediator does not weigh the law and evidence and then tell the party who is right or wrong. Mediators do not give parties advice, nor do they serve as advocates.

12. When will the mediation begin?

Mediation will begin at a date fixed by the Commission or the mediator.

13. How long does mediation last?

The length of the mediation depends on the complexity of the matter. Some cases can be completed in one session while others require multiple sessions. The mediation can continue as long as the parties are negotiating in good faith and the mediator has determined that additional discussion may still be productive.

14. Who can represent a party in mediation?

Parties can represent themselves in mediation or be represented by a person with authority to settle the matter. A party's choice of representative depends on the complexity and nature of the case as well as the parties' own

communication skills. Thus in some cases an attorney may be appropriate, while in others a representative with a technical background might be a better choice. In other cases a party might choose to be represented by a multi-disciplinary team so that all the issues in a matter could be dealt with.

15. Who selects the mediator/

The Commission will assign the case to a trained mediator who will either be a member of the Commission, Commission staff or another person. The parties are also at liberty to choose their own mediator independently of the Commission.

16. Where does the mediation take place?

The mediator will work with the parties to set the time and location of the mediation. If the mediator is a member of the Commission or Commission staff, mediation will usually take place at the offices of the Environmental Commission.

17. Is the mediation session private?

Yes. Only the parties directly involved and their representatives may attend the mediation session. Other persons may only attend with the consent of all the parties and the mediator.

18. Will the parties have to take an oath to tell the truth?

No. By agreeing to mediation, the parties are committing to act in good faith and not to mislead the other party or misstate, or obscure the facts at issue.

19. Who has the “burden of proof” during mediation?

No one. The burden of proof is a legal concept used for litigation. Mediation precludes the need to prove a case since the emphasis is on resolution, not blame or recognition of culpability.

20. Is there a record of the mediation?

The only records of the mediation are:

- a. the Order or Directions of the Commission that the matter be referred to mediation;
- b. correspondence from the mediator to the Commission advising that the mediation has been concluded;
- c. the settlement agreement, if the parties request that it be made an order of the Court.

Mediation sessions emphasize confidentiality. Records received from a party during the mediation session are returned or destroyed by the mediator at the end of the mediation.

21. Is it faster to have a dispute go to court or use mediation?

Generally, using mediation is the fastest route possible. Court proceedings are cumbersome and can sometimes be lengthy. The mediation process can take significantly less time than litigation to complete.

22. If a party has several matters before the Environmental Commission or several parties have the same type of matter before the Environmental Commission, can they be mediated together?

Each request for mediation is evaluated based on its own fact pattern. Cases can be combined or mediated separately depending on the complexity of the issues and commonality of the issues and the parties to the dispute.

23. Can the mediator terminate the mediation?

Yes. If it appears that resolution of the dispute is unlikely, the mediator has the authority to terminate the mediation session. A party can also inform the mediator that he wishes to terminate the mediation.

24. If mediation is unsuccessful, can the parties still pursue litigation?

Yes. If mediation is unsuccessful, the parties can proceed with litigation.

25. What happens if only some of the issues are settled during mediation?

The settlement agreement will be enforceable for the issues that are settled. The remaining issues will be adjudicated upon by the Commission.