

JUDICIAL MEDIATION IN THE NOVA SCOTIA COURT OF APPEAL

The purpose of this pamphlet is to provide additional information about the judicial mediation program offered by the Court of Appeal.

Why Offer Judicial Mediation of a Litigated Case

Most disputes, legal or otherwise, are resolved by negotiation. When parties cannot resolve their disputes on their own, they must seek the assistance of a third party process to do so. The third party process can be an adjudicative one, involving binding arbitration or litigation. The arbitrator or the Court imposes a solution to end the dispute. One or other or both of the parties may not be happy with the solution imposed in the adjudicative process. If the adjudicative process involves a tribunal or a court, there is usually a right of appeal.

Beginning in 2005, the Court undertook a review of the availability and structure of judicial mediation programs for appellate courts. The programs are widely available in the United States at both the federal and state appellate court levels. In Canada there are five provinces where the courts offer a formal mediation or judicial dispute resolution program for parties who have a pending appeal deemed suitable.

The rationale for instituting mediation programs at the appellate level range from a need to address lengthy backlog of cases to simply improving the quality of justice by assisting the parties in reaching their own resolution of their dispute, frequently with significant cost savings to the parties.

Who Would Want to Participate?

Experience has shown that there is really no stereotype as to what type of litigant would want to participate in judicial mediation at the appellate court level. Having said that, litigants who will have or should have an ongoing relationship whatever the outcome of the appeal would benefit. These may include family law litigants, estate matters, shareholders disputes, or parties who have

an ongoing business relationship.

Both sides must consent to the judicial mediation process. However, the Court reserves the right to choose which cases will be approved for judicial mediation. Matters which will be excluded are criminal cases, those raising constitutional questions, and any case where there are allegations of domestic violence.

When Is It Available?

Once appeal proceedings are initiated by the filing of a notice of appeal, the parties may request participation in the judicial mediation program. In addition, the Chambers judge, when setting the appeal down for hearing, may suggest to the parties that they consider participation in a mediation process. The earlier the request for participation in a mediation process is made, the greater potential benefit to the parties, but the request may be made at any time during the appeal process. Once made, any filing deadlines and other appeal requirements will be suspended.

Where Will Mediation Take Place?

Meeting rooms at the Law Courts at 1815 Upper Water Street will be made available at no charge to the parties.

What Will the Mediation Process Look Like?

It is important to understand that mediation is simply negotiation that is facilitated by a third party. In this case, the third party is a judge of the Nova Scotia Court of Appeal. Acting as a mediator, the judge has no power to impose a settlement or try to ‘arm-twist’ one or both of the parties to agree to a resolution of their dispute. The mediator provides an opportunity for the parties to communicate constructively, focusing on their issues and interests, assisting the parties to explore options to resolve their dispute based on their underlying interests. The judge conducting the mediation can recommend solutions but never force the parties to accept terms of settlement. Whenever a dispute is resolved, there will be a cooling off period permitting each of the parties to reflect on the draft agreement achieved before it is finally executed.

Do I need a lawyer to participate?

If one or more of the parties to an appeal are self represented this will not automatically exclude them from the program. However, normally parties to any mediation process are represented. The Canadian Bar Association (Nova Scotia Branch) has agreed to make available free legal advice to self represented litigants who may wish to participate in the mediation program before the Nova Scotia Court of Appeal, and representation at mediation.

What Is Involved In the Mediation?

The judge conducting the mediation will contact the lawyers representing the parties, or the parties directly.

The ground rules and procedure for the pending mediation session will be agreed upon. Time lines will be set for the filing of materials so that the judge conducting the mediation session is fully aware of the relationship and issues between the parties prior to the mediation session. During the mediation session the judge may wish to meet separately with the parties to try to better understand the impediments to a resolution of the dispute. One or both of the parties to the dispute may withdraw from the mediation at any time.

What Is Meant By Confidentiality Of The Proceedings?

It is crucial for the success of mediation proceedings that they be strictly confidential. This is reinforced in the joint request for mediation. It means that any written or oral communications to the Court or to each other may not be disclosed by the Court or by the parties that participate in the mediation.

The mediation is not held in a courtroom. There is no recording or transcript made of any of the mediation sessions, and any notes taken by the judicial mediator will eventually be shredded. If the parties are unsuccessful in resolving their dispute, the judge who conducted the mediation will not sit on the panel that will eventually hear the appeal and will not disclose any aspect of the mediation process to the judges assigned to hear the appeal.