Mediating Home Warranty Claims
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1. Introduction

Mediation is a cost and time effective method to resolve disputes. It also allows the parties to resolve their dispute without the uncertainty inherent in litigation, and in ways that a court cannot. A negotiated agreement also avoids potentially difficult precedents being created by a decision of a court that may have significant impact beyond the immediate dispute.

A specific advantage to mediating new home warranty claims - as opposed to simply negotiating - is that a homeowner is provided a forum with a neutral third party present to express their views of the matter, or, as we frequently hear, to “tell their story” or “have their day in court”, even though it is not court. This is often an essential part of resolving any dispute. The presence of a neutral third party assists in offsetting what the homeowner might perceive as a power imbalance between themselves and the warranty provider, and provides a process to exchange views on the matter.

The use of mediation in the context of warranty claims is required in BC by the warranty wordings statutorily prescribed by the *Homeowner Protection Act Regulation*. Simply put, if a homeowner disputing anything about their new home warranty claim wants a mediation, they are entitled to have one. If the warranty claim has prompted a lawsuit, any party in the litigation may compel a mediation under the *Notice to Mediate (Residential Construction) Regulation.*

This paper will provide a practical guide to the mediation of warranty claims, with reference to the applicable Regulations.

2. Mediations pursuant to The *Homeowner Protection Act Regulation or the Notice to Mediate (Residential Construction) Regulation*

The warranty terms mandated by the *Homeowner Protection Act Regulation,* include various provisions regarding mediation. The full text of this *Regulation* pertaining to mediation is set out on page 8 of this paper.

The *Notice to Mediate (Residential Construction) Regulation* allows any party to a civil dispute to compel a mediation. A mediation under this regulation offers many of the same advantages to the parties, namely a cost and time effective means of resolving the case.

The *Homeowner Protection Act Regulation* provides, in part:

> (a) that if the warranty provider determines that a claim is not valid or not covered, it must provide a decision in writing, and that this decision must advise the owner of the availability of mediation to resolve the claim;
>
> (b) that if informal negotiation "within a reasonable time" does not resolve the dispute, the owner may, at the owner's sole election, and in writing, require a mediation;
>
> (c) the warranty provider must participate in a mediation requested by an owner; and
>
> (d) other parties who "may be liable" may be invited to attend the mediation by either the owner or the warranty provider.

Both *Regulations* provide for:

> (a) a process for the appointment of a mediator, if the parties are unable to agree;
>
> (b) various procedural rules regarding the conduct of the mediation, including payment of costs of the mediation.

(a) Initiating a mediation

Note that the *Homeowner Protection Act Regulation* only provides for the initiation of a mediation by an owner. This would not prevent, however, a warranty provider from encouraging an owner to mediate, or telling an owner that it would compel a mediation if

the claim escalated to litigation, relying on the provisions of the *Notice to Mediate Regulation.*

The *Homeowner Protection Act Regulation* dictates that a warranty provider must advise a homeowner about the availability of mediation to resolve disputes. Typically, this occurs in a letter denying coverage. In order to promote mediations, warranty providers can use many other touchpoints throughout the claims process to promote them. This practice is encouraged for complex claims, and in situations where the builder is unenthusiastically involved with a claim.

(b) Who should attend the mediation

It is of paramount importance that people with authority to settle the claim attend the mediation. This can sometimes be difficult where the owner is a strata corporation. It is often necessary that the persons attending the mediation return to the council for approval of the settlement. In those cases it is helpful if the persons who attend the mediation are knowledgeable, and the best case scenario is when they arrive with authority to achieve settlement, in compliance with their own bylaws.

Other parties who might attend a mediation under the *Homeowner Protection Act* are parties who “may be liable” for the loss. These parties are not manner defined or restricted in the *Regulation.* They might include sub-trades, design professionals, permitting and inspection authorities, or parties potentially liable on an indemnity or personal guarantee. They could also include insurers, as it is certainly possible that by requesting a party who “may be liable” to attend a mediation that insurance coverage is triggered. Most often, the warranty provider will want to encourage the “builder” – the general contractor or developer or party most directly involved with the construction of the home – to participate in mediation. The purpose is two-fold; the builder should know the most about the component of the home that is allegedly defective, and the warranty provider will want the builder to take responsibility for the problem.

Generally speaking, the only parties usually in attendance at a mediation conducted under the *Notice to Mediate(Residential Construction) Regulation* are the parties in the lawsuit and their insurers.

In some instances, experts should attend mediations. This is a particularly important issue if the success of either party is wholly or in large measure dependent on expert evidence. This should be discussed with the mediator.

(c) Selecting a mediator

There are two schools of thought regarding the selection of a mediator. One says that the background and expertise of the mediator in the subject matter are irrelevant and that the most important consideration is the mediator’s ability to effectively facilitate the parties. The other says that it is preferable to have a mediator with a background and expertise in the subject matter of the dispute. This can be because they have practiced

in the area, or have previously mediated similar disputes. In our view, the ideal candidate will have a foot in both camps: background and expertise in the subject area, and skills as a mediator *per se.* This is often the criteria used by a roster organization when appointing a mediator, in the event the parties are unable to agree upon one.

It is important that the parties have no perception that the mediator is biased. This can sometimes arise because of the mediator's familiarity with counsel, the parties, or sometimes even the venue where the mediation is held.

Remember that warranty providers will have mediation experience. Most homeowners will not have any mediation experience. A few methods to address bias include:

- providing the homeowner with resources to consider their selection of mediator, such as proposing several candidates or referring them to www.mediatebc.com;
- repeatedly advising homeowners that they are entitled to and encouraged to seek independent legal advice; and
- most importantly, warranty providers and their lawyers should not demonstrate casual familiarity or over-friendliness with mediator, regardless of whether they are friendly or have done prior mediations together.

This last point may be critical to the homeowners. Someone who has never done a mediation before, and who is dealing with nerves and pressure and concern about their own home, not only deserves fair treatment, but needs to perceive fairness. A skilled mediator will be alive to the mere possibility of the perception of bias, and deal with any potential issues both up front and throughout the mediation process.

(d) Exchange of documents and information

If the matter is litigated, there will be a formal process for the exchange of documents and information. If it is not, the mediator should create a process for that exchange so that no is surprised at the mediation itself. This process should include expert evidence, if it is a case where that is in play.

(e) Costs of the mediation

Both *Regulations* provide that, absent agreement otherwise, costs of the mediation are to be shared equally between the parties. Mediation costs are often an issue for owners. They have the potential to also become an issue for meditators if an owner is unrepresented, because the mediator may require a retainer that the owner may balk at.

It is the mediator's job to deal with potential fee issues up front, and in a manner that does not risk the mediation not taking place. Most homeowners will have read the relevant portions of their warranty document if they are initiating a mediation and will not be surprised at the provisions regarding fees.

Costs of the mediation are often the subject of negotiation at the mediation itself. Once again, the mediator will be of assistance to the parties with respect to coming to an

agreement regarding costs. With additional parties, costs can be split and the overall expense is lower. This can be a motivating factor when to a homeowner.

The cost of the mediation for homeowners is a fine line. On the one hand, if mediation was free, homeowners may be more inclined to use it for trivial disputes. Cost therefore operates like a deductible. The homeowner is invested in their claim by committing to pay for their share of the mediator's fees. On the other hand, the *Homeowner Protection Act* is, fundamentally, consumer protection legislation. A complex, multi-party mediation can be quite expensive. While warranty providers are not obliged to be benevolent, there are situations where a warranty provider may consider taking on a greater share of a mediator's fee.

(f) Mediation briefs

Both *Regulations* provide for the exchange of mediation briefs. Mediation briefs vary widely in terms of form and content.

Mediation is not litigation. Perhaps because it often takes place in the context of already existing litigation, counsel often approach it with the same adversarial mindset. This is usually not the best way to do things.

Here is what we think makes a good mediation brief:

(i) The brief talks about risk

Cases settle because the parties recognize at least some risk in proceeding further. The risk is associated with losing the dispute in court, and the costs associated with legal proceedings that are substantial whether the case is won or lost. Very few mediation briefs talk about risk or advance arguments based on risk. Instead, many mediation briefs look more like closing submissions at a trial. A good mediation brief will both acknowledge and point out risk.

(ii) The brief is concise

"Concise" depends on the nature of the case. But "If you can't explain it simply, you don't understand it well": Albert Einstein.

(iii) The brief tries to narrow the issues down to what really matters

If your case includes an issue that is minor relative to the central problem, don't spend time trying to prop it up. If the central issue in the claim is why the roof in the strata complex leaks, don't clog up the brief with six arguments as to why $500 worth of landscaping is excluded from coverage. Settlements often take place because parties are able to agree on what they each thought was the big issue, and the rest then falls into place.

(iv) The audience for your brief is the opposing party (not just their lawyer)

Mediation briefs are often the first contrary views of the dispute that an opposing party sees. If a brief is written in a form that the party can read and understand, the brief will be more effective if it will set out a position that the opposing party had not yet appreciated. It is important for lawyers to remember this, and avoid overly technical language and legalese. It is important for warranty providers to remember that they look at the warranty policy and *Homeowner Protection Act* language every day, whereas the homeowner will be more convinced by a brief that is not clogged with jargon.

3. Settlement terms

Both owners and warranty providers need to take care to create settlement agreements that include terms relating to obligations which are to be discharged in the future. Such obligations might include repair work to be conducted by a builder. Issues as to quality, acceptance, approval by inspection authorities, and cost may arise. These all have to be considered when an agreement is being negotiated.

There may also be lingering issues such as indemnities owed. Once again, such issues need to be considered so that the terms of settlement do not impact adversely on steps that might be taken in the future.

If a warranty dispute has gone as far as mediation, the parties may be inclined to end the problem that day (or as soon as a cheque can be delivered). Although agreements for future consultation and repair sometimes make intuitive sense, the parties have to be willing to work together in those types of arrangements.

New home warranty policies have a policy limit. Settlement agreements will chip away at the policy limit, but may not exhaust it entirely. Since warranty policies are attached to homes, and not the owners, parties need to be extremely careful to define the remaining amount of the policy limit after a settlement, and how that will be communicated to a subsequent homeowner. If this is not dealt with, a subsequent homeowner would be able to advance a warranty claim and demand entitlement to the entire value of a policy limit.

4. Effective Mediations

Effective mediations come about because the parties have prepared well, and arrive at the mediation with an open mind as to how the case might resolve.

As a starting point, make sure that the parties with the most knowledge of the claim (for warranty providers, this is often the claims handler, and not the manager attending mediation) have read and understand the brief prior to sending it out. In many cases, the builder or an inspector or expert will have insights into the facts that a lawyer doesn't.

The builder can also be provided with and asked to review the opposing parties' briefs. The builder should hear from the horse's mouth, so to speak, what the owner says about the work that is alleged to be defective. Warranty providers should take care to get permission to disclose an owner's brief to a builder that is not participating in a mediation as the briefs are otherwise privileged and confidential.

Everyone should be encouraged prior to the mediation to remain open to possibility. It is the mediator's job is to get the best positions possible out of the parties. It is then up to the parties to determine whether the position of the opposing party is acceptable. Many things go into determining what is acceptable, and the amount of money involved is only one of them. A party will only be open to possibility if it doesn't have fixed expectations. Expectations are resentments waiting to happen, and never more so than at a mediation.

Parties attending a mediation should be prepared to answer questions and discuss the issues. While lawyers usually take the lead, effective communication often starts with parties expressing their interests in their own words. It may be the first opportunity for the claims person to speak about the position being taken. It is one thing to copy or type warranty terms into a letter to a homeowner. It is quite another to sit across the table and explain your theory of resultant damages or how rainscreen cladding works.

Finally, make sure that the parties with the necessary authority to settle the case are in attendance. If the authority of someone not at the mediation is required to settle, make sure you know that before the mediation starts and how to deal with it. If the issue is problematic, involve the mediator before the mediation.

5. Conclusion

It is often difficult for a warranty provider to win the sympathy of a court. A homeowner, who put their life savings into their home, only to be disappointed and live with a defect on a daily basis, is a sympathetic litigant. Mediation is an alternative to the win or loss paradigm inherent in the courts. Because mediation is statutorily mandated, a warranty provider can act in good faith and demonstrate upstanding business practice while avoiding the risk of an adverse, precedent-setting ruling from a court.

***Homeowner Protection Act Regulation*-Schedule 2**

Mediation

1 (1) In this section:

"mediation" means a collaborative process in which 2 or more parties meet and attempt, with the assistance of a mediator, to resolve issues in dispute between them;

"mediation session" means a meeting between 2 or more parties to a dispute during which they are engaged in mediation;

"mediator" means a neutral and impartial facilitator with no decision making power who assists parties in negotiating a mutually acceptable settlement of issues in dispute between them;

"roster organization" means any body designated by the Attorney General to select mediators for the purpose of this regulation.

(2) If a dispute between a warranty provider and an owner arising under home warranty insurance cannot be resolved by informal negotiation within a reasonable time, the owner may, at the owner's sole election, require that the dispute be referred to mediation by delivering to the warranty provider a written request to mediate.

(3) If the owner delivers a request to mediate under subsection (2), the warranty provider and the owner must attend a mediation session in relation to the dispute.

(4) In addition to the requirements of subsection (3), a warranty provider or an owner may invite to participate in the mediation any other party to the dispute who may be liable.

(5) Within 21 days after the owner has delivered a request to mediate under subsection (2), the parties must, directly or with the assistance of an independent, neutral person or organization, jointly appoint a mutually acceptable mediator.

(6) If the parties do not jointly appoint a mutually acceptable mediator within the time required by subsection (5), the owner may apply to a roster organization which must appoint a mediator taking into account

(a) the need for the mediator to be neutral and independent,

(b) the qualifications of the mediator,

(c) the mediator's fees,

(d) the mediator's availability, and

(e) any other consideration likely to result in the selection of an impartial, competent and effective mediator.

(7) Promptly after a roster organization selects the mediator under subsection (6), the roster organization must notify the parties in writing of that selection.

(8) The mediator selected by a roster organization is deemed to be appointed by the parties effective the date of the notice sent under subsection (7).

(9) The date, time and place of the first mediation session must be scheduled by the mediator, and the first mediation session must occur within 21 days of the appointment of the mediator.

(10) Despite subsection (3), a party may attend a mediation session by representative if

(a) the party is under legal disability and the representative is that party's guardian ad litem,

(b) the party is not an individual, or

(c) the party is a resident of a jurisdiction other than British Columbia and will not be in British Columbia at the time of the mediation session.

(11) A representative who attends a mediation session in the place of a party referred to in subsection (10)

(a) must be familiar with all relevant facts on which the party, on whose behalf the representative attends, intends to rely, and

(b) must have full authority to settle, or have immediate access to a person who has full authority to settle, on behalf of the party on whose behalf the representative attends.

(12) A party or a representative who attends the mediation session may be accompanied by counsel.

(13) Any other person may attend a mediation session if that attendance is with the consent of all parties or their representatives.

(14) At least 7 days before the first mediation session is to be held, each party must deliver to the mediator a statement briefly setting out

(a) the facts on which the party intends to rely, and

(b) the matters in dispute.

(15) Promptly after receipt of all of the statements required to be delivered under subsection (14), the mediator must send each party's statement to each of the other parties.

(16) Before the first mediation session, the parties must enter into a retainer with the mediator which must

(a) disclose the cost of the mediation services, and

(b) provide that the cost of the mediation will be paid

(i) equally by the parties, or

(ii) on any other specified basis agreed by the parties.

(17) The mediator may conduct the mediation in any manner he or she considers appropriate to assist the parties to reach a resolution that is timely, fair and cost-effective.

(18) A person must not disclose, or be compelled to disclose, in any proceeding oral or written information acquired or an opinion formed, including, without limitation, any offer or admission made in anticipation of or during a mediation session.

(19) Nothing in subsection (18) precludes a party from introducing into evidence in a proceeding any information or records produced in the course of the mediation that are otherwise producible or compellable in those proceedings.

(20) A mediation session is concluded when

(a) all issues are resolved,

(b) the mediator determines that the process will not be productive and so advises the parties or their representatives, or

(c) the mediation session is completed and there is no agreement to continue.

(21) If the mediation resolves some but not all issues, then at the request of all parties the mediator may complete a report setting out any agreements that the parties to the mediation have made as a result of the mediation, including, without limitation, any agreements made by the parties on any of the following:

(a) facts;

(b) issues;

(c) future procedural steps.