The Evolution of Mediation – from “ADR” to “DR”

Twenty years ago, the primary method of resolving disputes between parties was through the traditional adversarial approach of litigation. In some cases, the parties were able to negotiate a settlement prior to trial, but the majority of cases were resolved by working through the steps of the litigation process which ultimately led to trial and in some cases, an appeal of the trial decision. That process was time-consuming, unpredictable and expensive.

In the late 1980s and early 1990s, alternate dispute resolution or “ADR” was becoming the new buzz phrase. Clients were becoming wary of the uncertain outcome of litigation and weary of the lengthy and expensive process involved in getting their case to trial. They were discovering that, in some cases, it was more advantageous to them to compromise on their claim in order to reach an earlier and more economical resolution.

Over the past 20 years, we have seen a transition whereby litigation has become the last resort, and dispute resolution or “DR” has become the resolution tool of choice for most clients, with mediation being the most favoured form of DR. The four benefits that are most commonly attributed to mediation are as follows:

**Voluntary nature of proceeding** – Because the parties agree to resolve their dispute through mediation, it reduces the adversarial nature of the process and gives the parties more control over the outcome. Many disputes occur in the context of ongoing relationships, and a mediated resolution allows the parties to preserve that relationship.

**Successful outcome** – Statistics drawn from a variety of sources and jurisdictions indicate that approximately 80 per cent of disputes that are referred to mediation, settle. Cases that do not settle at the initial mediation often settle following the mediation or at a follow-up mediation. Moreover, parties that have reached their own agreement through mediation are more likely to respect the terms of the settlement, thereby reducing the need for further legal intervention for the purpose of enforcing the terms of the settlement.

**Early and economical resolution** – The traditional litigation process can be very time-consuming. In some jurisdictions, it may take as long as a year or more to be assigned a trial date once all of the pre-trial work has been completed. This can be especially difficult for parties that are trying to maintain an ongoing business relationship in the context of the unresolved litigation. Mediation allows the parties to resolve the dispute early so that they can get past the dispute and resume their business relationship, unencumbered by past issues. The resolution of disputes through mediation has also proven to be more economical since the parties are able to avoid the substantial costs associated with trials that may last several days, weeks, or, in some cases, months.
Confidential nature of proceedings – Unlike court awards, which are readily available to the public, settlements reached through mediation are confidential. This is especially important when the parties’ professional reputations may be at issue in the dispute.

ENCON’s experience
When assessing the best strategy for the early and effective resolution of claims, we have found that mediation is a valuable tool in dispute resolution.

Through the strategic use of mediation, we are able to provide our insureds with the opportunity to actively participate in the resolution of their claims, resolve claims earlier and more economically with minimal disruption to the insured’s business.

It has been our experience that, in the majority of cases, proceeding to trial has become the alternate form of dispute resolution. In fact, only about one per cent of the claims that we manage need to be resolved at trial.

So it seems that the tables have turned and litigation is the new “alternate” dispute resolution.

Reporting claims to ENCON
Over the past months, we have received several notices of claims by email. Please note that at the present time we do not have a general email address to which these notices can be directed. If a notice is sent to an individual email address, we cannot guarantee that it will be received and acknowledged in a timely manner in the event that the addressee is away from the office.

Please note that we are unable to accept notice of claims or potential claims by email. Please advise your clients to direct all notices of claims or potential claims to our office by facsimile at 613-238-7180 or by regular mail to 500-1400 Blair Place, Ottawa, Ontario K1J 9B8.