# MEDIATION IN EXPROPRIATION CASES
# NOTES FROM A MEDIATOR'S PERSPECTIVE

**1. When should I consider mediation in expropriation files?**
The data indicates that mediation works to settle all issues most of the time faster and cheaper than any of the other alternatives. Study after study indicates that the following do **NOT** affect chances of settlement:

- Complexity of issues
- Number of issues
- Number of parties
- Amount at stake
- Length of anticipated hearing
- Apparent intransigence of the parties
- Type of case

*The most important negative impact on the chance of settlement appears to be the attitude of lawyers to the process.*

- Timing will change things. Cases that go into mediation before even rudimentary levels of formal disclosure have occurred will still settle 40% of the time. Most of those cases that don't settle all issues at this stage will settle some of them and vastly narrow the range of issues remaining contentious. (Upwards of 90%). Cases which use mediators as case managers are far more likely to settle earlier than those left to Counsel's own management.

*The data indicates that if mediation is used as a file management tool the case will be less complex, take less time, cost less, and resolve earlier than if mediation is not used.* The data also indicates that mediated settlements track judicial awards so the risk to the payor appears small.

Since the cost of mediation (lawyer's hourly rates) is a relatively small outlay in most litigation files, and since the advantages to the clients are so obvious, the better question might be: *Why would I not use it?*

**2. How do I start a mediation?**
Ask the other side if they would be willing to try it.

Mediation is without prejudice and confidential. Disclosure goes as far as the parties can agree it should go. Agreements are only binding if the parties agree to be bound. The parties can choose their mediator and the timing of the mediation. They can also work with the mediator to let them know what they want the mediator to do – how interventionist does they want them to be? Do they simply want a discussion facilitator or do they want a settlement negotiator or anything in between. Do they agree that if the settlement discussions at first produce no agreement that it would be helpful to meet again at the call of the mediator and to charge the mediator with responsibility for keeping momentum going around agreed upon dates and deadlines?

**3. Who pays for mediation?**
The parties decide. Usually it is so cost effective that it is worth it for one party to agree to pay the whole shot. (This can be renegotiated as part of the settlement terms.)

**4. If the other side wants me to mediate, how do I decide whether to participate?**

See question 1 &2. Ask what is your hesitation based upon? If you are concerned that you might not know everything yet, relax. You can make an educated guess and so can the other side. And in the end the experts often give ranges anyway. Good mediators always work within ranges. Is the job of Counsel to explore every possible angle or is it to assist the client to get a resolution to the dispute? If you think you can do better in another forum then walk away from any settlement that day. Or tell the other side what you think your upside gain is and why you are unconcerned about your downside risk and be prepared to listen to their response. Perhaps they know something about the case you do not as you have after all seen it from only one side. I have rarely had parties in mediation with me who have not learned anything about their case once they have heard the other side's perspective! *The worst that will happen is that you will learn something!*

**5. Should I bring experts to mediation?**
*Absolutely,* if you have them, or even if you might be using them. *Mediation is risk analysis.* If you want to evaluate an offer you will be more able to do so if you have the benefit of expert advice on the risks of accepting and refusing the offer from the other side. In the words of Ted Hanman

> "Lots of times the appraisers or property negotiators know more than the lawyer does and they end up saving or trying to save day".

It is common in my experience to be able to shift lawyers from a role of "great white knight" to problem solver. The same thing can happen with experts. When engineers and appraisers are invited to work together to find a way through the problem which works for both of their clients they are often the best people to do that and since this is collaborative work they tend to like doing it!

**6. What attitude works best in mediation?**
Good mediators are able to work with any attitude. However one of the things they will try to do is to help everyone present to see the lack of settlement as a problem to be solved. *The task becomes finding a solution which everyone can live with* rather than taking a position which makes the other side into the villain or the ignoramus or the victim or the oppressive taker. But even when people come into mediation with these negative (or from their perspective realistic) views, mediation produces settlements most of the time.

**7. What does the process look like? What happens in a mediation?**
Every case is different and a good mediator will engage the clients in process design but here is a sample of what might happen

Step 1 The parties agree to try mediation; a mediator is identified.

| | |
|---|---|
| Step 2 | The mediator will likely want to talk to at least Counsel for each side separately and should be given a brief summary of the issues and the law in the area. |
| Step 3 | Site visit perhaps; formal meeting with all to establish agreement to mediate terms and conditions and perhaps identify issues, agree on process for exploring issues (experts etc.) if early in process |
| Step 4 | List of issues developed and each issue discussed – this is an opportunity for the people involved to talk about the impact of the taking on them. |
| Step 5 | Exploration of what a good settlement would look like from each parties' perspective. (Develop list of criteria. |
| Step 6 | Exploration of various options proposed by parties, experts and counsel. |
| Step 7 | Matching of options to settlement criteria |

These steps can and often are compacted – Step 2 is sometimes done by phone. There may be no site visit and the rest can, and often do, occur on the same day.

**8. What should I do if I start a mediation and I don't like what is happening?**
Talk to the mediator. Good mediators are excellent listeners but even the best of us cannot read minds. Let us know what you like and don't like and we can change the process to be more helpful.

**9. What preparation should I do?**
Ask the mediator? This can be the subject of a preliminary meeting with the other side and the mediator or the mediator may want a simple (two pages max) brief of issues and to be pointed to the major cases you think assist you. Is it important to enter mediation prepared to do risk analysis. You can't do this if you are not well prepared. But if you come in early before you CAN know all there is to know about a file there is an excellent chance that the case will settle or be made more manageable. Ask yourself what help you might need on your side of the table to be able to do good risk analysis. Maybe this means bringing your engineer or an engineer or appraiser to allow them to give you a quick view of the case from their perspective. Probably it means knowing the law in the area. Sometimes it will be helpful to have a break after the first session to allow your side to do risk analysis. Often this is unnecessary if you are either properly prepared before hand or you walk in with the tools and resources you are going to need to do risk analysis once you understand the case from the other side's perspective.

**10. More about risk analysis**
Probably the most helpful form of preparation is realistic assessment of your costs of using another forum, your chances of winning and the costs associated with that, and your chances of losing and the costs associated with that. It is extremely helpful to use numbers and percentages as this allows you to perform risk analysis and make an educated decision as to whether to settle.

Example: Suppose you think that on your best day in front of the Expropriation Board you will get $100,000. This will take 1 year to achieve. Non-recoverable costs will be in the range of $20,000.

- Your client will have to spend 400 hours of his time and will allocate an additional equivalent of 3 weeks personal time vexing about it. He will therefore see his children less and have less time to devote to the baseball team at school win lose or draw. What is that worth to him? This is stuff you will get blamed for at the end of the day especially if you lose. Help him to factor it in!

- If your client is a corporation, help the people with whom you will work to factor in lost managerial and field staff time in processing the case and factor in the community/circle of influence credibility issues which go along with their position.

- On the authority side, get your client to factor in the risks of agreeing to an award which they think is too high without being ordered to do so and ask them how they will manage that risk. Ask them to factor in being drawn away from other responsibilities and the community credibility issues which may result from not settling.
- *All of this is quantifiable.*

Using the first example, suppose the client says that he is prepared to coach baseball less but only to a point and he is not prepared to see less of his children so he will take time off work to be with them. Let's say he estimates 5 lost days of work for this (none of which is recoverable) and other 5 for the hearing. (Some of which is recoverable.

Translate this into dollars it will cost the client.

Then give a percentage estimate of winning. (Never higher than 75% as insurance against your own lack of distance from the file. Remember you have not heard the other side. If it was that sure the other side would see it your way!)

Lets say you give it a 70% chance.

That means that an offer of $70,000 today with all costs to date covered is a very good deal and your client should jump at it! Indeed anything above $50,000 today is a very good deal because at the end of this if he only gets $70,000 he still has to pay out $20,000 in non-recoverable costs.

This is why mediation is more properly thought about as being about risk analysis rather than fairness. $50,000 today might not feel fair but it *is still better than even odds on what your client will get in a year and that's with no risk to his relationship with his children*!

**11. Where do I find a good mediator?**
The Mediation Roster Society is set up by the Attorney General to provide lists of qualified mediators. Log onto the web site (www.mediator-roster.bc.ca) for a list of mediators by area of expertise, credentials, experience and location. Or phone a colleague who you know uses mediators.

*Client information sheet: Client* _____

*Transaction costs analysis*

| Normal transaction costs of filing and proceeding with expropriation claim or its defence | Applicable to me Y/N | Est.$ value Best case | Est.$ value worst case | Risk Tolerance 1=low; 10 = high | Applicable to them Y/N | Est.$ value Best case | Est.$ value worst case | Risk Tolerance 1=low; 10 = high | Notes ? For |
|---|---|---|---|---|---|---|---|---|---|
| 1. ...years of personal stress and uncertainty | | | | | | | | | |
| 2.... years of stress on ... family members | | | | | | | | | |
| 3. ....years of stress on others and on my work associates | | | | | | | | | |
| 4. ...weeks absent from work | | | | | | | | | |
| 5. ....weeks of lost employee time preparing for hearing | | | | | | | | | |
| 6. ....years of lost concentration and focus at work | | | | | | | | | |
| 7. Business on hold for ....years/cost of ...years of less innovation | | | | | | | | | |
| 8. Cost of not doing other things | | | | | | | | | |
| 9.Inability to get on with life for .....years | | | | | | | | | |
| 10. Impact on me when witnesses subpoenaed | | | | | | | | | |
| 11. Negative publicity | | | | | | | | | |
| 12. Non recoverable legal costs | | | | | | | | | |
| 13. Non recoverable expert costs | | | | | | | | | |
| 14. Possible costs against me | | | | | | | | | |
| 15. Interest lost on money received later rather than sooner | | | | | | | | | |
| 16. Emotional costs in my life if I lose | | | | | | | | | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 17. Loss of relationships if I lose | | | | | | | | | |
| 18. Loss of flexibility in decision making I have now which I may lose if I wait | | | | | | | | | |
| 19. Cost of recriminations if I win | | | | | | | | | |
| 20. Cost of all of the above repeated if there is an appeal | | | | | | | | | |
| **Estimated total of transaction costs** | | | | | | | | | |
| | | | | | | | | | |

NB. These costs are rough estimates. All these figures will fluctuate up and down as the case develops and more facts and factors emerge.

Once you have filled out this sheet, turn to the "Hearing Risk Analysis' Sheet and complete for a better overview of the costs of proceeding and to develop a realistic idea of what a sensible settlement will be in mediation.

## LITIGATION RISK ANALYSIS

Client Name: _____

Transaction cost amount $_____

| Sensible decision making | Number viewed as "fair" | Best day award | Worst Day award | %chance that Board will accept 100% my view of the facts | %chance that Board will accept 100% my view of the law | Discount to "reasonable number" = % chance discount plus costs in risk analysis sheet |
|---|---|---|---|---|---|---|
| Example | 300,000 | 500,000 | 100,000 | 70% | 70% | 300,000*70% -transaction costs I will not have to pay because I am settling now. |
| | | | | | | |
| | | | | | | |

Date: _____-

Client _____

# MEDIATION

# AND

# EXPROPRIATION

# Case 1: HANK AND SUE

- TAKING OCCURRED THROUGH MIDDLE OF HAL AND MARY'S LAND
- 5 YEARS LATER NO RESOLUTION
- MARRIAGE ENDED
- MEDIATION SICKNESS SET IN
- HEARING SET FOR A MONTH

# HANK AND SUE (cont)

- Two issues:
- Did taking cause flooding?
- Was replacement construction sufficient?
- Extent of damage – and land values.
- Prov. AG policy in favour of mediation
- Lawyers on all sides overloaded
- No-one had any real hope that the case wld settle.

# HANK AND SUE (process)

- Site visit
- Meetings with counsel
- 3 days of mediation
- Included engineers and municipal officials
- Settled all issues
- Estimated savings to the taxpayer:???

# Case 2: Family business

- Taking took major client from family business – gravel pit went out of business.
- Issue: extent of damage to business and valuation
- 1.5 days of mediation
- Settled (no need for 2 week hearing).

# Case 3: FOREST CO LAND

- Taking of tracts of land owned by forest co.
- 1 day mediation
- Estimated 15 days of hearing

# Mediation's track record

- Fast
- Efficient
- Cheap
- Results in settlement most of the time
- Clients satisfied
- 92% happy
- With courts/hearings 92%unhappy

# WHAT IS MEDIATION?

- Assisted negotiation; educated risk analysis
- Mediator:
- Structures process which intends to facilitate settlement
- Manages and contains tendency towards reactivity and conflict escalation
- Engages experts in problem solving: "How to make this work for everyone?"
- What do you need? What does the other side need?

# STEPS

- Assessment to begin process design
- Agreement to mediate (confidentiality, fees)
- Talk about facts as each person knows them
- Identifying needs
- Identifying barriers to agreement getting
- Engaging parties in removing barriers"What would it take?" Risk analysis

# Ok – if its so great why isn't it used more?

- Huge advantages to expropriated: quick, cheap, problem solving, future focussed, etc.
- They do not run the process
- Huge advantages to taxpayer – not present in decision making.
- Not understood by plaintiff's counsel
- Not understood by AG's Counsel
- History shows that once lawyers use it they come back for more!
- Not understood by taking agency
- Decision making is risky for people in agencies.

# Managing risk to users of mediation

- Make it mandatory – no responsibility for choice
- Data shows no difference in settlement or satisfaction rates
- ICBC manages risk to adjusters by:
  - Setting limits and requiring authorization to go beyond
  - Sending adjuster and lawyer to most mediations of any size claim
  - Measuring trends so focus of corporation is on overall picture rather than individual cases.

# ICBC

- Since January 1999, 2300 cases using "notice to mediate" provision in legislation
- 40% settling within 60 days of filing of statement of defence; additional settlement rates take total to 70% with no discovery of any form
- Mediated agreements mirror court awards
- Savings are in costs of litigation process

# At what point to use mediation in expropriation cases?

## 1.Early is good!

- Data indicates early use most advantageous- almost 50% will settle with no expert evidence or discoveries of any kind.
- Worth a shot!

# 2. Mediator as process guardian

- Increased use of mediator in complex cases as process guardian. Keeps parties focussed on identifying issues important to each party, setting and keeping timelines, identifying next steps and identifying and mandating common experts rather than opposing ones

# 3. After expert reports in and evidence known

- Data clear that those that have not settled to this point will likely settle here.
- Most cases settle anyway.
- Mediation in the shadow of a hearing allows the most informed risk analysis (and is the most expensive option) but since will probably save having the hearing, is worth it. (Settlement rates here come in at between 80 and 100% depending on the study).

# 4. At any point thereafter

- Quite common in other cases to adjourn to attempt mediation. No reason for this to be any different. Lots of reasons to think it would be the same results.
- Ontario study found no impact on settlement rates of
  - Amount at stake
  - Complexity of issues
  - Hostility between parties
  - The only factor that made any difference at all was **attitude of Counsel.**

# QUESTIONS TO ASK IN RISK ANALYSIS

- What degree of frustration is the client up for? (Corporate staff, individuals, impact on people of the process.)
- If there are expert reports what are the key differences?
- What are the percentage chances that the Board will give your client or side what they want? (Different from winning)
- What are the costs to your client or side of winning?

# Costs

- Mediators need to have some content knowledge or to be prepared to learn it quickly
- Go for process experts over content experts
- Those who are both are in high demand – charge $200-$300 an hour –
- Costs: $1,000-$5,000 plus prep. time for counsel

# The future

- Compared to time and fees of hearing and experts, data is clear that if it is not mandatory, it won't be used.
- Given the high satisfaction rates and high settlement rates, some would say mediation is not a deal the taxpayer can afford to have you ignore, given the high chance of success. (Ontario, BC experience)
- Opportunity now to use it voluntarily and design it to meet your needs
- Risks exist for individuals trying new things but they can be managed.