MEDIATION OF COMPENSATION CLAIMS

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British Columbia Expropriation Association

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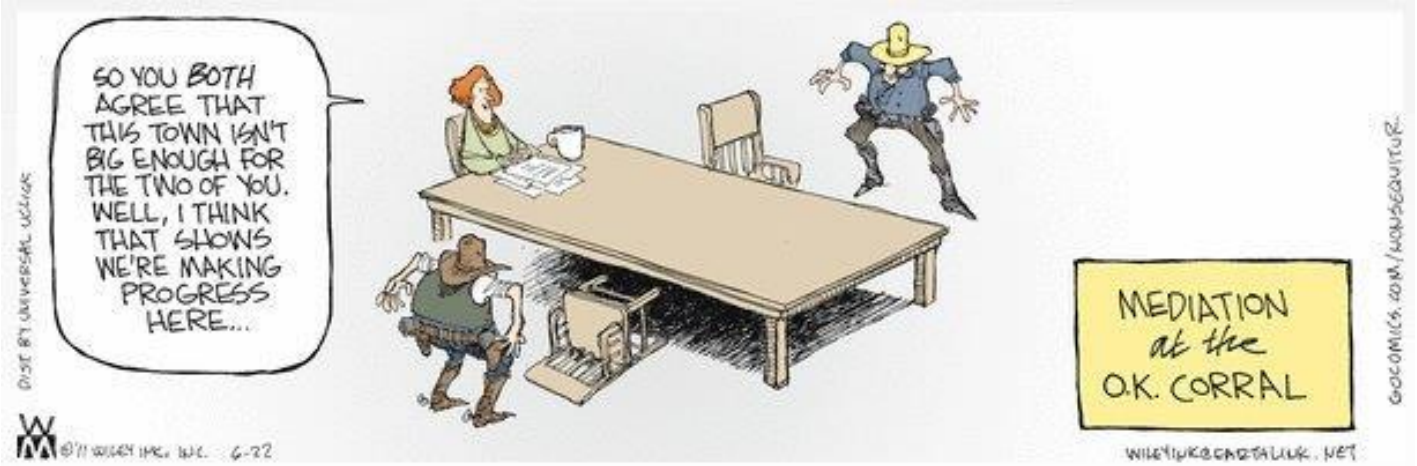
OUTLINE

- **Why Choose Mediation?**
- **Background Legislation – *Expropriation* Act RSBC 1996 Ch. 125**
- **Preparing For and Attending at a Mediation**

WHY CHOOSE MEDIATION?



Why Choose Mediation?

- **High Success Rate**

  a) Various studies confirm a settlement rate well in excess of 50%

  b) More recently, mediation programs in provinces which have tracked results confirm settlements in 70 to 80% of those cases which were mediated

- **Reduced Costs**

- **Speedier Resolutions**

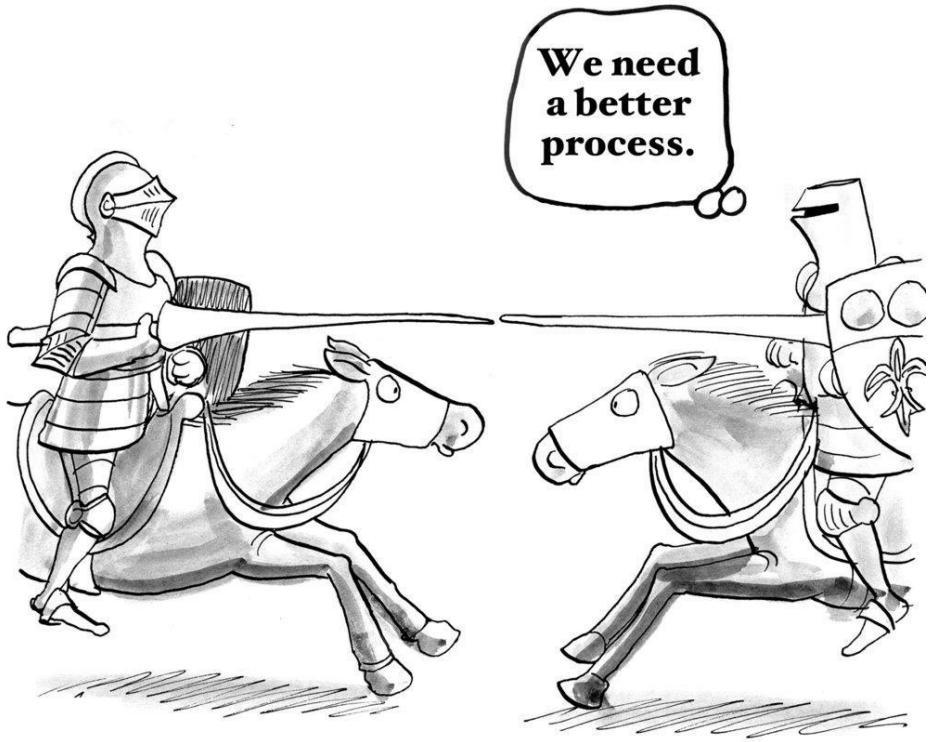
Why Choose Mediation?

- **Mediation can allow the parties to express more personal points of view than might otherwise be the case in court. Some facts may be considered to be irrelevant to the formal litigation process, but those facts might still be important to one or both of the parties.**

- **Parties can fashion a more creative remedy at times than that which the court might be able to provide. For example, an apology can form part of a mediated settlement and this can be a key point in achieving resolution (*Apology Act* [SBC 2006] Chapter 19).**

- **Confidentiality.**

BACKGROUND LEGISLATION



Background Legislation
Expropriation Act, RSBC 1996 Ch. 125

- **Requires BC Supreme Court to Determine Compensation for Expropriations (s.26)**

- **Confirms the Landowner's right to compensation and the basic formula for determining compensation (market value of expropriated land plus reasonable damages for disturbance) (ss. 30 and 31)**

PREPARING FOR AND ATTENDING AT A MEDIATION

Giraffe mediator breaks ice with lame joke.

Preparing for a Mediation

- **Give some thought to your choice of Mediator – e.g. "Facilitative" vs. "Evaluative" style.**
- **The parties need to focus on achieving resolution. They should understand counsel will not be engaged in "saber rattling". The time for "battle" is at trial.**
- **The parties should understand that the mediation process is confidential and conducted entirely on a "without prejudice" basis.**

Preparing for a Mediation

- **Confirm (at the pre-mediation conference) what the mediator's process is for communicating with each party – for example, the mediator's default position may be that he/she will only communicate something said by one party in caucus to the other party if counsel has given express permission to do so.**

- **Briefs will be read by clients and counsel – again – an adversarial approach is likely not the best one.**

- **Parties should be told how the mediator's fees will be paid.**

Preparing for a Mediation

- **The Parties should have a true understanding of the merits/risks of their case. A case is seldom a "slam dunk". Take the time to discuss the strengths and weaknesses of the case in advance of the mediation. Parties need to fully understand their litigation risk.**

- **All parties should have an accurate understanding of the expense going forward if the mediation is not successful. The *Expropriation Act* differs from the Supreme Court Rules in its treatment of Costs.**

Preparing for a Mediation

BRIEFS

A considered brief is a thing of beauty. Counsel should try to get past the usual summary of facts and arguments on case law. In many cases, the law is settled, it's the facts that need consideration – clearly address those issues that warrant attention and lighten up on those that don't. In addition to setting out the relevant facts, issues and law, consider:

a) describing the parties' positions;

b) set out the negotiations to date detailing any offers made;

Preparing for a Mediation

BRIEFS (cont'd)

c) **deal with any weaknesses in your case upfront;**

d) **consider making concessions in the Brief – remember, this is a "without prejudice" exercise;**

e) **consider the order of how the issues might be addressed (start with some easy ones where resolution should be achieved with minimal effort in order to build momentum); and**

f) **suggest a reasonable settlement proposal.**

Preparing for Mediation

- **Thorough preparation is key – there is a high likelihood that the litigation will end at the mediation.**

- **The Parties' representatives need to have the authority to settle at the mediation. Having to "call back to the head office" is cumbersome and ultimately not helpful.**

Preparing for a Mediation

- **Anticipate that the mediation might make for a long day – the participants need to be ready for this.**

Preparing for a Mediation

- **Consider whether opening statements will be made by counsel or the parties themselves. It may not be necessary if the Briefs have been properly prepared. Statements in some cases may also actually alienate the other side further. While opening statements can be useful, litigation counsel tend to default to the idea of presenting arguments. Remember, mediation is not a trial.**

- **Consider "open" vs. "caucus" procedural issues and ensure all participants are familiar with these concepts.**

Preparing for a Mediation

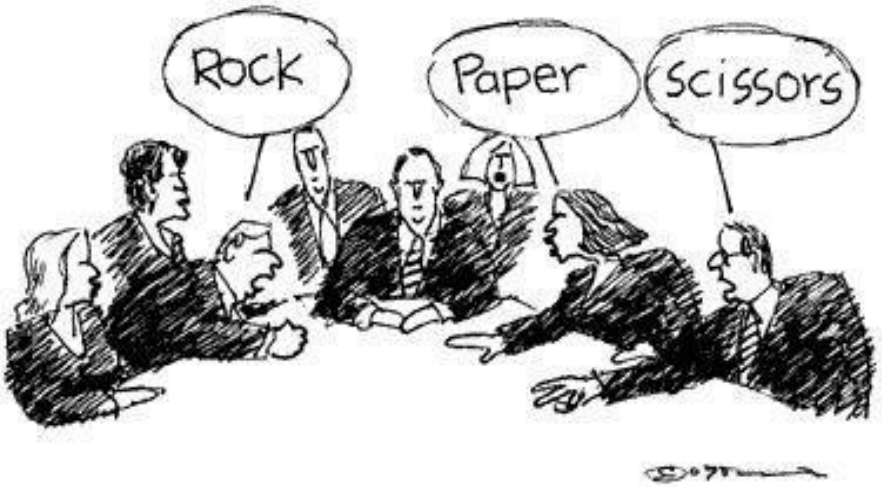
Consider experts' involvement –

- **Will their reports be utilized?**
- **Will they attend for all or part of the mediation?**
- **How will they participate at the mediation?**

Preparing for a Mediation – Last Thoughts

THINK "OUTSIDE" THE BOX

- "ZOPA"
- "Best Offer"
- Settlement of specific issues vs overall settlement
- Leaving an Offer open



Jameson, the mediator, uses his last remaining negotiating tool in an effort to break the stalemate.

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Bill is a senior mediator and litigator who combines a deep understanding of the law with a wealth of strategic experience in assisting our clients on a range of business issues. With a successful track record of 35+ years in resolving commercial disputes, Bill sees all sides of an issue t help our clients find the best solution to their case whether in or out of the courtroom.

His extensive understanding of these disputes and advanced mediation training in BC and at Harvard Law have provided Bill with a deep platform from which he operates as a highly effective mediator. Bill is equally comfortable working as a facilitative or evaluative mediator, but with counsels' agreement prefers the latter approach.