Questions to Ask Yourself

Mediation of Environmental Disputes

By Stephen R. Morrison

A look at the issues that counsel should pay careful attention to when organizing, preparing for, and participating in a successful mediation effort.

By definition, environmental contamination disputes, like litigation, can be a dirty business. But even when the parties manage to engage in a clean fight, that fight can be expensive and time-consuming. There is a better way—a facilitated negotiation with the assistance of a mediator occurring before or after the institution of an action.

Environmental disputes are ideally suited to resolution through mediation since, in many cases, the needs and interests of at least one of the parties will involve the redevelopment of a property and will not be amenable to the lengthy delay associated with protracted litigation, including appeals. Moreover, the settlement of environmental disputes may often require more than just the payment of a sum of money and may necessitate ongoing cooperative efforts between the parties, something that courts are not well-equipped to order, but which can be thoroughly explored and resolved through mediation. Finally, the privacy afforded by mediation may be of particular benefit to one or more parties to a dispute, where it may not be desirable to alert other neighbouring landowners to issues of concern.

Most mediations are successful in resolving disputes. Indeed, although there is no firm empirical data in support of this contention, there is anecdotal support for the belief that the overwhelming majority of mediation efforts are successful when the parties come to the process willingly, rather than as a result of mandatory mediation procedures required by court rules as a prerequisite for getting to trial. The successful mediation of a dispute requires careful attention to the following issues:

Selection of the Right Mediator

For many years, the ranks of mediators were largely filled by retired judges looking for something to do on a part-time basis to keep themselves busy and supplement their pension incomes. More recently, and especially since the adoption of mandatory mediation under the rules of court in many jurisdictions, the ranks have been further swelled by a great many lawyers at or nearing retirement age who have decided to hold themselves out as mediators with a view to supplementing their

■ A senior partner in Cassels Brock & Blackwell LLP's Real Estate Development Industry Group in Toronto, Stephen R. Morrison provides advice and advocacy to the development industry. In addition to his service as counsel, he serves regularly as a neutral mediator and arbitrator of commercial disputes with a primary focus on construction and development matters, fashioning practical and imaginative resolutions to complex disputes. Mr. Morrison has been recognized by the ADR Institute of Canada with the designations Chartered Mediator and Chartered Arbitrator.

existing litigation practice and finding an activity that they can continue after they leave practice. As is the case with retired judges, some of these individuals make excellent mediators. Unfortunately, many lack the experience, training, and temperament to add much value to what is a demanding process.

Since mediation usually represents the last and best chance to avoid an expensive and stressful trial process, very careful consideration should go into the selection of an appropriate mediator. Because clients rarely have access to the necessary information to make this decision, the task is usually left to legal counsel. Clients, however, can ask relevant questions concerning the knowledge, experience, and training of the proposed mediator. Although it is not necessary to consider only individuals who have made a full-time commitment to this activity, great care should be taken before retaining a mediator who is merely dabbling in the area.

Do mediators need to have knowledge of and experience in environmental law? Good mediators can generally mediate any kind of dispute, but familiarity with a particular field of endeavour or enterprise can often facilitate a successful outcome. For example, mediators who have an in-depth knowledge and understanding of soil and groundwater contamination issues, in addition to their legal training, may, as a result of that knowledge, be able to speak the language of the parties and their consultants, and thereby gain their trust and confidence.

This knowledge will often allow the mediator to get to the root of the issue without requiring a lot of time to be taken up with detailed explanations related to the factual matrix of the underlying dispute. It can save a lot of time if the parties do not have to explain acronyms like VOCs, DNAPL, and BTEX or the mechanics of permeable barrier walls, soil vapour extraction, bioremediation, or permanganate injection, to cite a few examples. Finally, industry knowledge may allow the mediator to participate more thoroughly in the process of generating creative suggestions that might not occur to an individual lacking that familiarity. Again, however, acknowledged expertise in an area is no substitute for superb mediation skills. Since mediation is usually the earliest and least expensive opportunity to settle a dispute, careful research should be undertaken to find a highly skilled mediator with solid industry knowledge.

Regrettably, mediator selection is too often based on availability and cost. Given the importance of the exercise, this is a mistake. No one would choose a heart surgeon based on these criteria. It is worth waiting for the right mediator, and, since the cost is generally divided equally between the parties, a slightly higher hourly or daily rate should not be seen as a significant impediment to hiring the right person for the job. Of all of the factors identified in this article, mediator selection is the most important.

Who Must and Should Attend the Mediation?

It is of the utmost importance that individuals on each side of the dispute attend the mediation with full and unfettered authority to enter into a binding settlement. Attendance by an individual with limited authority will often be fatal to the process. When mediations fail, it is not uncommon that one of the party representatives in attendance has been given limited authority and cannot exceed that authority without obtaining further permission from someone who may or may not be accessible during the process. Even if the person with ultimate authority is available by telephone, this is rarely a substitute for that person's physical presence at the mediation session.

Mediation is a dynamic process, and it is essential that the mediator have direct face-to-face access to the ultimate decision-makers on both sides of the dispute. Only in this way can the mediator implement his or her particular skill set on individuals who are critical to the settlement process. Doing this through the proxy of a party representative with limited authority is no substitute. The mediator has no opportunity to observe the personality of the ultimate decision-maker, and that person, in turn, has no opportunity to observe what he might be up against in terms of the credibility and resolve of the opposing party and its legal counsel. The mediator will have no opportunity to explore creative ideas with one or more of the people who might be in the very best position to turn those ideas into solutions. Nor will the mediator have an opportunity to impress directly on this person the enormous risks and costs of allowing the matter to go forward to trial.

When it is not possible for the ultimate authority to attend in person, it is imperative that the representative who does attend should have the full faith and confidence of the person he or she is representing. It is inappropriate to send a representative to a mediation with anchored positions such as, "We will not pay a penny higher than..." or "We won't accept a nickel less than...". Rather, the representative should be told:

> I trust your judgment. Get the best deal that you can. Try to get the case settled on reasonable terms. Feel free to consult with me by telephone, if you are uncertain. Whatever you do, I will not second-guess you.

Mediation is a dynamic process, and it is essential that the mediator have direct face-to-face access to the ultimate decision-makers on both sides of the dispute.

Although many mediation agreements require the attendance of an individual with authority, the mediator generally has little control over who attends a mediation session. Because of the importance of this issue, however, the lawyers representing each party should require from the other party a firm commitment that the appropriate individuals will attend in person as a condition of proceeding with the mediation. Too much time and money is invested in this exercise to leave this aspect of the process to chance. Clients also have a responsibility to ensure that they send the right representative and to require that the other disputant also be properly represented.

While the attendance of individuals with authority is of paramount impor-

tance, this is not the end of the story. Where an insurer is involved on behalf of a defendant or third-party, local procedural rules may mandate the attendance of an insurance company representative as a requirement for a valid mandatory mediation. In the case of a corporate party, the individual with ultimate authority to settle the case should be accompanied by senior personnel concerned with environmental issues and compliance.

> **Where outside consultants** are involved, their participation in the mediation process can be enormously helpful in exploring potential and creative solutions.

Finally, where outside consultants are involved, their participation in the mediation process can be enormously helpful in exploring potential and creative solutions. This is especially true in situations where the resolution may involve more than the simple payment of money. Where ongoing remediation efforts may be involved, it will be important to have knowledgeable people at the mediation session to provide direction and guidance with respect to viable alternative strategies and the likelihood of achieving regulatory approval.

Commitment to Compromise

The need for a commitment to settle by both parties as a prerequisite to a successful mediation is often stressed by commentators. This, however, is an oversimplification. Most parties to a dispute will say that they have come to the mediation with a view to reaching a settlement. They will say that they understand that the achievement of this objective will require compromise. But, when their initial positions are explored, either through the briefs that are filed on their behalf or in their opening statements to the mediator, it quickly becomes apparent that they intend most of the compromising to come from the other side. When both parties come to mediation with this attitude, the mediator's work becomes infinitely more challenging, and the opportunity for a successful outcome is often lost.

In many disputes, especially those that have progressed to the stage of litigation, the parties present exaggerated and unrealistic demands to each other. They hope that by asking for more than they truly expect to be awarded, they will end up with what they think they are entitled to receive. When it comes time to mediate, their idea of compromise is to give up the surplus demand and settle for what they hoped to achieve through litigation. Unfortunately, reality is rarely this convenient. The other party starts from a polar opposite position and is well aware of the "slush" in the other party's demands, just as their own position may represent an understatement of what they expect to pay. Real settlements rarely occur when parties are only prepared to give up that to which they were never entitled.

Real compromise means taking less than you honestly believe you are owed or paying more than you think you are liable to pay. Real compromise involves overpaying or under-receiving in exchange for buying peace and avoiding future legal costs, stress, and all of the risks inherent in the arbitration or litigation process. Real compromise is the cost of being able to close the book on a very unpleasant chapter in your business or personal life and to wake up the next morning realizing that this is a dispute that you no longer have to think about. Real compromise is difficult and can be excruciatingly painful, especially when parties have invested significant financial and emotional capital in achieving a positive outcome.

A commitment to settlement is meaningless without a commitment to make real sacrifice. Parties involved in a dispute should come to the mediation table having thought carefully about the other side's point of view and determining truly how far they can go, if necessary, to achieve a settlement. Of course, each side's bottom line need not be communicated at too early a stage in the process, but it is essential that each party rid itself of unrealistic expectations before coming to mediation.

Not all mediation efforts are, in the truest sense, voluntary. Sometimes a provision in a contract or certain legislation requires the parties to attempt mediation before moving on to litigation or arbitration. In many jurisdictions, the rules of court require mediation before a matter can move on to the trial stage. Even in these situations, however, wise parties will recognize this as an opportunity to resolve the dispute without incurring enormous further legal costs, stress, and risk. Whether the mediation effort is truly a voluntary exercise or one mandated by law, essential to a successful outcome is a commitment by both parties to engage in a process of real compromise.

Avoiding Confusion About the Process and the Role of the Mediator

From an early age, people tend to be very focused on their rights. Observe the complaint of a five-year-old child when his three-year-old sibling takes a toy off the shelf that the older child has not touched in months. Despite his lack of current "interest" in the toy, the older child may be outraged that his "rights" of ownership have been infringed. As much as people think that they grow out of these feelings as they mature, the difficulty in resolving many disputes is rooted in a way of looking at a situation based on an assessment of legal rights and entitlements, rather than from the perspective of interests and needs.

The difference between "interests-based" and "rights-based" approaches to dispute resolution can be illustrated through the following example. Imagine two cooks fighting over possession of an orange. Each claims it as their own and demands exclusive possession. In methods of dispute resolution that are primarily rights-based, such as arbitration or litigation, the relevant question is, "Who has the stronger legal claim to the orange?" There will be a winner and a loser. Only one cook will end up with the whole orange at the end of the process, regardless of why it is wanted or needed. In typical rights-based methods of dispute resolution, there is little to no room to explore the interests of each party or to craft creative solutions that will meet the needs of both parties.

Interests-based dispute resolution processes, like negotiation and mediation, allow the parties to design creative solutions based on their individual best interests and needs. In this example, a creative solution could flow from an exploration of *why* each of the cooks wants the orange. It may be discovered that one wants to use the zest of the orange peel to make a carrot cake, while the other wants only the fruit for a salad. Obviously, the interests and needs of both parties can easily be met by giving one the peel and the fruit to the other. Unlike the win-lose outcome achieved through rights-based methods, interests-based solutions can result in win-win outcomes. Everyone goes home happy!

In the case of mediation, it is important that all participants not become confused with respect to the nature of the process and the role of the mediator. There are several areas of confusion in the minds of both legal counsel and their clients that often lead to failure in mediation. The first, and most important, mistake which frequently occurs, especially in the minds of the parties themselves, is to confuse the role of a mediator with that of an arbitrator. An arbitrator, like a judge in a courtroom, is empowered to make final and binding decisions regarding a dispute based on the evidence and argument presented. A mediator has no such power and is merely a facilitator selected by the parties to assist them in their process of negotiation. Despite this important difference, it is not uncommon to find parties, and sometimes their legal counsel, spending a great deal of time in their written materials and oral presentations at the mediation session attempting to persuade the mediator of the rightness of their position, based on the facts and the law as they see it.

This approach to mediation is either based on a misunderstanding of the mediator's role or arises from the misguided belief that, if one party to a dispute can persuade the mediator that their position is correct, the mediator will then persuade the other side on their behalf. It is important for the mediator to have an understanding of the issues in dispute and the basic positions of each party, together with some understanding of the evidence in support of those positions, so that he can point out to each side the strengths of the other side's case and the potential frailties of their own. But valuable time will be wasted if the parties lose sight of the fact that the mediator is not there in an adjudicative role. A far better use of the parties' time and energies would be to help the mediator do what mediators do best, that is to assist the parties in creatively exploring potential areas of individual and mutual needs, interests and compromise.

Having made this observation, however, there is one situation where legal counsel often attempt to rely on a mediator's tacit authority. While it is generally a waste of time for counsel to try to badger the opposing party or counsel into submission based on a "rights" assessment of the case, counsel often find that a mediator can be useful in providing a reality check to their own client. When counsel have a difficult message to deliver to their own client, they often prefer to have that message delivered by a respected third-party, especially if they have an over-confident client who has been inclined to disregard the good advice they have received from their own lawyer. In these situations, it is important for the lawyer to make sure that the mediator has an understanding of this objective. An effective mediator can often fulfill this role while, at the same time, enhancing the credibility of legal counsel.

The other common mistake that often hinders successful mediation is the belief that the settlement process begins with the opening of the mediation session. It is ironic that parties facing a trial or arbitration date commonly negotiate around the clock to avoid the costs and risks of an adjudicative process, yet it is not uncommon that immediately after parties to a dispute schedule a mediation session, they stop negotiating. Instead of continuing with a process that most lawyers do extremely well on behalf of their clients, the lawyers discontinue settlement negotiations in the belief that they will leave that task to the mediator.

This is an unfortunate mistake and represents a missed opportunity. As noted above, there is usually a wide expectation gap between the parties in the early stages of a dispute. If the parties come to mediation with their expectations fully entrenched, the mediator's task is made all the more difficult, and success may be impossible. For example, if one party expects to receive $5 million and the other only intends to pay $500,000, the remaining $4.5 million gap may be too large to bridge at mediation. If, on the other hand, the parties have engaged in meaningful negotiations and have outstanding offers to settle on the table whereby the plaintiff has agreed to accept $3.5 million and the defendant has agreed to pay $1.5 million, the mediator will have a much greater chance of success in bridging the remaining $2 million gap.

Real compromise means taking less than you honestly believe you are owed or paying more than you think you are liable to pay.

Attention to the Mediation Brief

Confusion with respect to the nature of the process and the role of the mediator is often reflected in the mediation briefs themselves. If they are merely advocacy documents similar to what is filed with the court, they add almost nothing to the process. Parties that fail to properly understand the process, often produce mediation briefs that are indistinguishable from the pleadings in the case. They do not promote a successful outcome.

A mediation brief should give the mediator an overview of what the case is about, set out the essential factual matrix, and provide a brief statement of the legal position that the party relies upon. An good mediation brief, however, will also attempt to communicate to the mediator and to the opposing party that there is an appreciation of the other side's case and perspective and give some indication of the range within which compromise may occur and settlement may be achieved. An excellent mediation brief will also show a real appreciation of the below the surface issues

and may explore those issues in a non-contentious or even helpful way. For example, if a plaintiff is aware that the defendant has no insurance or is inadequately insured, it can be helpful to acknowledge this fact and thereby demonstrate that you are aware of the limitations that may constrain the ultimate outcome. Finally, a superb mediation brief will do all of the above and may, in addition, make admissions against interest or acknowledge some of the weaknesses in your own case, before going on to propose some creative alternatives for resolving the case.

Parties who misconceive the mediation process are often afraid to be creative in their mediation briefs for fear of showing weakness or lack of resolve.

Parties may fear that admissions against interest or acknowledgements of weakness contained in a mediation brief may be counterintuitive or that they may be used against them in subsequent proceedings. Dealing with the second concern first, like everything else associated with the mediation process, mediation briefs are "without prejudice" documents and are protected from disclosure in subsequent proceedings. They may not be used for any purpose whatsoever outside of the mediation process. As to the idea that making admissions is counterintuitive, it is important to remember that mediation is not an adversarial process. First of all, an opponent has probably already figured out the things that one is going to admit or acknowledge, but willingness to admit or acknowledge them may go a long way to encouraging the opponent to do the same. This is more likely to set the stage for a fruitful negotiation than will be the case if both parties maintain intransigent positions.

Parties who misconceive the mediation process are often afraid to be creative in their mediation briefs for fear of showing weakness or lack of resolve. This is a mistake. While it is true that it is a waste of time trying to convince the mediator of the strength of your case, it is enormously helpful to let the mediator know that you are coming to the mediation with the right attitude and approach. Mediators, being human, naturally want to help parties that are trying to help them do their job effectively. Accordingly, if one party comes to a mediation demonstrating a clear understanding of the process and a desire to compromise and the other comes presenting a belligerent and uncompromising attitude, most mediators will be naturally inclined to lean more heavily on the party that is seen to be a barrier to resolution.

Written mediation briefs exchanged several days or more before the scheduled mediation date provide an excellent opportunity to let the other side know that you are coming to the process with the right attitude, an appreciation of your opponent's needs and interests, and a commitment to compromise. When both parties adopt this approach in their written materials, it can significantly enhance the likelihood of success.

Timing

There are many views regarding the right time to proceed to mediation. It is often said that parties are unwise if they mediate too early and before they have a clear understanding of the allegations against them and the evidence that they will have to face, if the matter goes to trial. Lawyers often say that it is too early to mediate, since the parties do not have a proper understanding of the other side's case. While in certain kinds of disputes this may be true, what is perhaps being said is that the lawyers themselves have not yet acquired a sufficient understanding of their own client's case, not to mention that of the other side, to be effective advocates for their client's position.

The parties themselves probably have an excellent understanding of the situation, since they have lived through it. While they may not have a comprehensive understanding of the governing law, they certainly know what happened and probably have a reasonably good command of the relevant facts. What the parties are looking for is a cost-effective method of resolving their dispute, and it is the lawyers' job to get them there at the earliest possible opportunity. It must be remembered that it is not always necessary to have the same comprehensive knowledge of the facts and evidence surrounding the case that is needed to take it to trial in order to conduct a very satisfactory and successful mediation.

Sometimes, mediations conducted too early fail because one or both of the parties are still too angry about the underlying cause of the dispute to consider meaningful compromise. In these situations, the aggrieved party may still be out for blood, while the offending party may not yet be prepared to own up to its own responsibility for what has occurred. Time may be necessary to allow for some degree of emotional resolution to occur. This process is often assisted when parties come to grips with the costs of the litigation process. Getting even feels good, but it is usually expensive. Some lawyers believe that mediation will not be effective until the parties have been softened up or worn down a little by the costs of the process, both in terms of financial and other resources.

The flipside of the coin are those mediations which occur too late in the process, after tens or even hundreds of thousands of dollars have already been spent by the parties on legal fees during the preliminary stages of litigation. It is, unfortunately, all too common that by the time parties get to mediation, the two sides have collectively spent in legal fees more than the amount originally in dispute, and far more than the amount that they would have been prepared to compromise at much earlier in the process. Regrettably, by this time, however, they are far too invested, both financially and emotionally, to find an effective zone of compromise. A common plaintiff's complaint heard at these late mediations is, "How can I accept that amount? It doesn't even cover my legal fees!" By contrast, the defendant says, "I wish I could offer you more, but I have already spent a fortune in legal fees."

In these situations the mediation fails, not because the amount offered was unreasonable or unrealistic, but rather because the parties' ability to settle has been eroded by their financial investments in the lawsuit and, in some cases, their emotional

Environmental, continued on page 90

Environmental, from page 36

entrenchment in protecting that investment. The best time to mediate a dispute is as soon as possible after things have settled down a bit, the lawyers have a basic understanding of the underlying facts and evidence, the parties have a clear understanding of what lies ahead both in terms of cost and commitment, if they take their case further, but well before the incurred costs have escalated beyond the point of no return.

Conclusion

As noted at the outset, well-managed mediations can be extremely effective at settling environmental disputes, in whole or in part. Summarizing the highlights of this article, legal counsel will ask the following questions in organizing, preparing for, and participating in a successful mediation effort:

- Is this the right time for a mediation?
- Have we selected a skilled mediator with requisite industry knowledge of environmental issues?
- Have steps been taken to ensure that all of the necessary parties on *both* sides participate? Counsel should not leave it to chance that opposing counsel will ensure that all necessary participants are at the mediation.
- Have I prepared my own client to come to the mediation with the requisite readiness to compromise?
- Have I explained to my own client the nature of the process and how it is different from litigation?
- Have I ensured that my client has an accurate understanding of the mediator's role?
- Have I explained the confidentiality of the process to my client so he or she feels free to participate openly?
- Have the parties exchanged all of the necessary documents and materials to ensure that there is no knowledge deficit that will impede a successful outcome?
- What efforts have been made to narrow the gap before the mediation?
- Is my mediation brief more than a simple restatement of my pleading? Have I used it as an effective tool to educate the mediator and to show the opposing party that I have an understanding of its point of view and a willingness to compromise?

Despite everyone's best efforts, mediations do not always succeed on the day of the mediation session. It is sometimes necessary for one or more of the parties to have some time to reflect on and absorb the day's efforts. Some mediators make it a practice to follow-up with the parties' counsel following a failed mediation, after a few days have passed, in an attempt to move the settlement process forward. In other instances, while the mediation does not result in a complete resolution of the issues, it can sometimes resolve the matter between two or more parties in a multiparty dispute. And, finally, even when none of the issues can be settled, a mediator may be able to assist the parties in designing a more cost efficient and time effective dispute resolution process than protracted litigation. FD