

# OPTIONS FOR RESOLVING RESIDENTIAL CONSTRUCTION DISPUTES



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Dispute Resolution Office, Ministry of Attorney General.

## RESIDENTIAL CONSTRUCTION DISPUTES

There are many types of residential construction disputes. While this guide was written primarily from a homeowner's perspective, the information provided can also be of use to parties in the residential construction industry involved in construction disputes.

A residential construction dispute, from the owner's perspective, is a situation in which a home requires repairs or further work because of faulty materials, design or construction in the building or renovating process, and the homeowner believes the repairs should be paid for by the responsible party. There may, however, be many responsible parties. A typical residential construction dispute, for example, may involve homeowners, strata councils, the municipality, architects, engineers, developers, contractors, subcontractors and warranty providers. It is the large number of parties typically involved that makes residential construction disputes so complex, and their complexity that makes them unique.

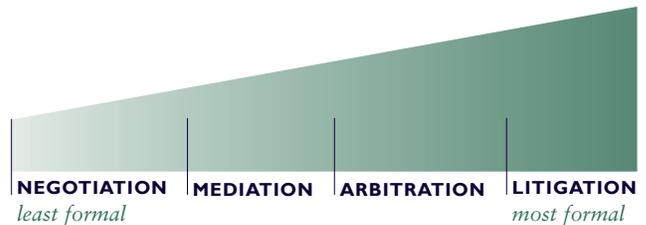
Because of this complexity, resolving residential construction disputes through the traditional method of going to court (litigation) is an extremely lengthy and expensive process.

This guide is an introduction to dispute resolution options for people involved in residential construction disputes. It includes:

- general information on negotiation, mediation, arbitration and litigation
- information on the Notice to Mediate (Residential Construction) Regulation and the *Homeowner Protection Act* Regulation, and
- a list of resources for more information on any of these topics.

## DISPUTE RESOLUTION OPTIONS

Disputes can be resolved in many different ways. Some are more formal than others. It helps to think of dispute resolution options as existing on a scale from less to more formal.



The least formal way of resolving a dispute is through **negotiation** directly between the parties involved. A more formal version of this process is to have each party represented by a lawyer who negotiates on their behalf.

When people are unable to resolve a dispute through negotiation, they may decide to involve an impartial third party. **Mediation** is an increasingly popular dispute resolution process in which the parties agree to meet with a mediator who can help them settle the matter. A mediator helps the parties to reach a settlement, but does not have any decision-making power.

A more formal option is **arbitration**. In arbitration, the impartial third party is a decision-maker appointed by contract or statute, or chosen by the parties. The arbitrator makes a final and binding decision—that is, a decision that can be enforced legally and cannot easily be appealed.

The most formal dispute resolution option is **litigation**, in which the matter is decided for the parties by the court system.

Each of these dispute resolution options has advantages and disadvantages (see table 1). When choosing the most appropriate option for resolving a dispute, you will need to consider the advantages and disadvantages of each option, as well as the details of the dispute. However, a general guideline is to start with the least formal option (negotiation), and use increasingly formal options only if the less formal options are unsuccessful.

**TABLE I**

OPTION	ADVANTAGES	DISADVANTAGES
<b>Less formal</b> <ul style="list-style-type: none"> <li>• negotiation</li> <li>• mediation</li> </ul>	<ul style="list-style-type: none"> <li>• can be faster and simpler</li> <li>• can be less expensive</li> <li>• parties have control over both the process and the outcome</li> <li>• occurs in private</li> <li>• results are confidential</li> <li>• parties can make settlements that might not be possible in a courtroom</li> </ul>	<ul style="list-style-type: none"> <li>• dependent on the cooperation of all parties</li> <li>• agreements are not binding unless parties take steps to make them so</li> </ul>
<b>More formal</b> <ul style="list-style-type: none"> <li>• arbitration</li> </ul>	<ul style="list-style-type: none"> <li>• can be faster and simpler</li> <li>• can be less expensive</li> <li>• parties have more control over the process than in litigation</li> <li>• occurs in private</li> <li>• results are usually confidential</li> <li>• not dependent on the cooperation of all parties</li> <li>• decisions are usually binding</li> </ul>	<ul style="list-style-type: none"> <li>• decisions usually cannot be appealed</li> </ul>
<b>Most formal</b> <ul style="list-style-type: none"> <li>• litigation</li> </ul>	<ul style="list-style-type: none"> <li>• not dependent on the cooperation of all parties</li> <li>• will inevitably result in a final decision</li> <li>• provides processes that increase the likelihood of full disclosure of all relevant information and test the honesty of the parties or the accuracy of evidence</li> </ul>	<ul style="list-style-type: none"> <li>• can be more costly, time-consuming and complicated</li> <li>• occurs in public</li> <li>• results are not confidential</li> <li>• parties have limited control over the process or the outcome</li> </ul>

## NEGOTIATION

The first and least formal way to resolve a dispute is to negotiate. This means sitting down with the other party or parties and trying to come to an agreement that satisfies everyone's needs, or at least satisfies them in a way that is preferable to what they could achieve without negotiating.

### FOCUS ON INTERESTS

One of the most important principles of any kind of negotiation is to focus on **interests** rather than **positions**. Each party in a dispute has needs, desires and

concerns. These are **interests**. A **position** is something a party has decided on as a way to satisfy its interests. Behind the opposed positions in a dispute lie a range of both shared and conflicting interests.

### PREPARING FOR NEGOTIATION

Before entering into negotiations with the other party or parties, ask yourself:

- What are your own interests (needs, desires, concerns)?
- Which of these interests are most important to you?
- What do you think the interests of the other party or parties might be?

- What is the best solution you could achieve **without** negotiating?

Once you have answered these questions for yourself, try to come up with some solutions that would satisfy as many of your own interests and those of the other party or parties as possible.

Before the negotiation begins, discuss the process itself with the other party or parties. Decide ahead of time where and when to meet, who can attend, and so on. It is useful to put the details in writing.

### **DURING THE NEGOTIATION**

Another important principle of negotiating is to **separate the people from the problem**. Deal with the people problems—the emotions and behaviours of people on all sides—directly. Don't try to solve them by making concessions in the substance of the dispute.

Clear communication is essential. Make your points as clearly as you can. Listen actively to the other party or parties, and make sure you understand their points—repeat them in your own terms, so that your understanding can be confirmed and any misunderstandings cleared up right away.

Express negative emotions by referring to the impact something has had on you, rather than by referring to what you think the other party or parties intended by their action. By doing this you are focusing on something you know, rather than on something you don't know and can therefore be challenged on.

Always look for ways to satisfy interests on all sides. When a solution is proposed, assess it in terms of how well it serves your interests. Compare it to the best solution you could achieve without negotiating, to make sure that the proposed solution is actually better.

### **COMPLETING THE NEGOTIATION**

Before finalizing an agreement, carefully assess it against:

- all of your interests, to ensure that your interests are being served; and
- the best solution you could achieve without negotiating, to ensure that the agreement is not actually harmful to you in some way.

Make sure that the agreement can actually be implemented by all parties. If one party requires the approval or cooperation of someone else, for example, don't finalize the agreement until this condition has been met.

Put all details of the agreement in writing, make copies for all parties, and have all parties sign each copy.

#### **NEGOTIATION STEP BY STEP**

1. Prepare for negotiation by identifying your interests, the interests of the other parties, the best solution you could achieve **without** negotiating, and some solutions that will satisfy as many of your needs and those of other party or parties as possible.
2. Discuss with the other parties the details of the negotiation process, including where and when you will meet, who will attend, and a time frame. Put these details in writing.
3. During the negotiation, separate the people from the problem itself, communicate clearly, listen actively, and always be looking for ways to satisfy the interests of all parties.
4. Assess each proposed solution—especially the one that could become a final agreement—carefully against your interests and the best solution you could achieve without negotiating.
5. Make sure that a final agreement can actually be implemented by all parties. If one party requires the approval of someone else, for example, don't finalize the agreement until approval has been given.
6. Put the agreement in writing and have all parties sign it.

## MEDIATION

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### WHAT IS MEDIATION?

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Traditionally, people have relied on the courts to resolve their disagreements. Mediation is an alternative to going to court. In mediation, all parties involved in a dispute meet and try to settle the matter with the help of an impartial mediator. The mediator is trained to help people settle conflicts collaboratively and has no decision-making power.

The mediation takes place in a private, informal setting with a non-confrontational atmosphere. The parties participate in the negotiation and design of a settlement. The dispute is settled only if all of the parties agree to the settlement.

Mediation focuses on interests, which means it is concerned more with the needs, desires and concerns of the parties than with their specific legal rights. (However, the legal rights of the parties can serve as a reference point for the mediation process.)

### ADVANTAGES OF MEDIATION

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- **Speed**—A mediation can be arranged in a relatively short period of time and gets settlement negotiations underway quickly.
- **Cost**—By resolving a dispute quickly, people can save time and money and reduce emotional stress.
- **Privacy**—Mediation takes place in private. Details of the dispute and resolution need not be publicly disclosed.
- **Control**—The parties involved in a dispute control the resolution by designing the settlement and agreeing to live by it only if it is acceptable to them.
- **Informal atmosphere**—The informal setting and atmosphere of mediation can improve communication between the parties. Many of the tensions and stresses of an adversarial process are avoided.
- **Separating the people from the problem** —In disputes, personal feelings or emotions often become confused with the legal issues. The mediator helps to separate the personal dimension from the issues in dispute, reducing tension and making settlement more likely.

- **Preserving relationships**—Often, people involved in a dispute must continue to deal with one another, either in business or otherwise, after the dispute is resolved. Because mediators try to avoid polarizing the parties, mediation can help to preserve working relationships.

### Costs of Mediation

The cost of mediating a residential construction dispute will depend on the mediator and how long the mediation takes.

Experienced, legally trained mediators typically charge from \$125 to \$275 an hour. These rates are sometimes negotiable. Private mediation service providers will offer a full range of services, including setting up, planning and carrying out mediations. Other costs of mediation may include pre-mediation sessions, facility rental, travel and food.

Depending upon the complexity of the dispute, mediations may be completed in a single session or in several sessions over a period of weeks.

The cost of mediation is typically shared equally by the parties participating in the mediation, but the agreement to mediate can provide for any other arrangement. Sometimes other arrangements are negotiable as part of the final settlement.

If lawyers attend the mediation, they will usually charge for preparation time as well as any time spent at the mediation, unless they are working on a contingency basis (where their fee depends on the outcome of the mediation). The precise amount of the lawyer's fee will depend on the hourly rate.

### WHEN TO MEDIATE

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Mediation cannot solve all disputes, but it can be helpful in many cases.

There are no set rules about what can or cannot be mediated. However, mediation is more appropriate in some situations than others. Consider mediation for a residential construction dispute when:

- the parties want a flexible and informal process
- none of the parties can get away with simply ignoring the problem
- other options for resolving the dispute are unacceptable or problematic
- each party needs something from the other
- the dispute involves more than two people or businesses
- the case is complex and requires a creative solution
- the parties would prefer to settle the dispute in private.

Mediation is probably not appropriate for a residential construction dispute if:

- a party is challenging the validity of a law
- an issue of law needs to be settled to serve as a legal precedent
- people not directly involved in the dispute may be unreasonably affected by the outcome.

You need not be confident that a dispute will be settled in order to go to mediation. Settlement rates are quite high in mediation. Disputes are often settled even when parties are far apart and feel pessimistic about resolving the dispute outside of court.

### Voluntary Mediation

If you are considering mediation as a way to resolve a residential construction dispute, you should first make sure that:

- you understand the differences between mediation and other kinds of dispute resolution
- the dispute is appropriate for mediation.

If you need more information about mediation, contact any qualified mediator, or look at the Web sites of the Ministry of Attorney General's Dispute Resolution Office (see "Resources") and other mediation organizations and service providers.

Next, you will need to see if the other parties are interested. Don't be surprised or discouraged if the other people involved in the dispute aren't enthusiastic about the idea of mediation at first. Mediation is a relatively new process and it is not always well understood.

If everyone involved in the dispute agrees to try mediation, the next step is to agree on the selection of a mediator. The mediator will then work with everyone to reach an agreement on how the process will happen. Everyone will need to agree on the ground rules and payment of the mediator's fees.

### NOTICE TO MEDIATE

The provisions of the *Homeowner Protection Act* give the government the ability to make regulations for using mediation and arbitration to resolve residential construction disputes. As a result, the Notice to Mediate (Residential Construction) Regulation has been established. (See "Resources" for information on how to get a copy of the regulation, which includes all of the required forms.)

If a Supreme Court action has been commenced, any party to a residential construction dispute can require the other parties involved to participate in a structured mediation process by using the Notice to Mediate (Residential Construction) Regulation. This regulation is retroactive.

The regulation provides that:

- Any party involved in the lawsuit may deliver a Notice to Mediate (form 1 in the regulation) to all other parties at any time up to 180 days before the Supreme Court trial date.
- The parties must jointly appoint a mutually acceptable mediator within 21 days of the Notice to Mediate being delivered to all parties.
- If the parties are unable to agree on the selection of a mediator, any party may apply to the B.C. Mediator Roster Society, which will select the mediator. (See "Resources" for contact information.)
- The mediator must hold a pre-mediation conference within 60 days of being appointed, to discuss organizational matters with all of the parties.
- All parties must participate in one mediation session within 150 days of the mediator being appointed.
- The cost of the mediation will be shared equally by the parties, unless they agree to other arrangements.
- Exemptions and adjournments to the Notice to Mediate process are possible with the agreement of all parties, or on application to a judge.

- If a party fails to comply with a provision of the Notice to Mediate (Residential Construction) Regulation, any other party may file a Declaration of Default (form 4 in the regulation) with the court. The court will then have a wide range of powers, including ordering that a mediation session occur on any terms that it considers appropriate, and making any order it considers appropriate with respect to costs.
- Mediation is concluded when the dispute has been resolved, the mediator determines the process will not be productive, or the mediation session is complete and there has been no agreement to continue.

#### **MEDIATION OF DISPUTES BETWEEN HOMEOWNERS AND HOME WARRANTY PROVIDERS**

Under the *Homeowner Protection Act*, homeowners can initiate mandatory mediation with BC Financial Services Authority (BCFSA) – approved home warranty providers for any home built with a building permit applied for on or after **July 1, 1999**. Home-owners need not have commenced any legal action to initiate mandatory mediation with warranty providers.

The *Homeowner Protection Act* Regulation provides that:

- If a dispute can't be resolved within a reasonable time, the homeowner may deliver to the warranty provider a written request to mediate.
- Once the homeowner delivers the request to mediate, both the homeowner and the warranty provider must attend mediation.
- While the dispute must be between the homeowner and the warranty provider, only the homeowner can compel the warranty provider to mediate.
- The homeowner or the warranty provider may invite any other party to the dispute to participate in the mediation.
- The parties must jointly appoint a mutually acceptable mediator within 21 days of the homeowner delivering the request to mediate.
- If the parties are unable to agree on a mutually acceptable mediator within 21 days, the homeowner may apply to the B.C. Mediator Roster Society, which will select a mediator. (See “Resources” for contact information.)
- The mediator must schedule the date, time and place of the first mediation session within 21 days of being appointed.

- Each party must give the mediator a statement briefly setting out the matters in dispute and the facts on which they intend to rely, at least 21 days before the first mediation session. The mediator must then send each party's statement to each of the other parties.
- Before the mediation, an agreement must be reached between the mediator and the parties as to how much the mediation services will cost and how the costs will be divided.
- Mediation is concluded when the dispute has been resolved, the mediator determines the process will not be productive, or the mediation session is complete and there is no agreement to continue.

#### **THE MEDIATOR**

Mediators are trained to help people work together to resolve a dispute in a way that is acceptable to everyone involved. Mediators come from many different backgrounds; a legal background is not required. There are as yet no universally accepted certification programs for mediators. However, all mediators on the B.C. Mediator Roster (see “Finding a Mediator”) have met a minimum level of training and experience, and have agreed to follow a code of conduct.

Mediators are impartial and unbiased. They do not have the power to make decisions about the case or impose a resolution. Instead, their role is to ensure that the discussion remains focused, organized and respectful. They are experts in making negotiations work.

A mediator:

- establishes ground rules for respectful conduct
- structures and manages the mediation process
- helps clarify the facts and issues
- helps the parties determine what they need out of a resolution and help them to generate options for resolving their dispute
- keeps lines of communication open and discussions on track
- is a sounding board, innovator and reality-tester.

#### **Finding a Mediator**

If you are considering mediation as a way to resolve a residential construction dispute, you can find a qualified mediator through a variety of means.

The British Columbia Mediator Roster Society has been incorporated to establish and administer a

province-wide mediator roster. The B.C. Mediator Roster is a list of trained and experienced mediators. The mediators currently on the roster are most likely to have experience in mediation of civil/non-family cases, including commercial legal disputes and residential construction disputes, that would otherwise go the B.C. Supreme Court. If you are mediating under the Notice to Mediate (Residential Construction) Regulation or the *Homeowner Protection Act* regulations for homeowners and BCFSA-approved warranty providers, you can—but are not required to—use a mediator from the B.C. Mediator Roster. (See “Resources” for contact information.)

You can also get the names of mediators through:

- a private mediation service provider (most advertise in the Yellow Pages) or mediation organization, such as the B.C. Arbitration and Mediation Institute or the Mediation Development Association of B.C.
- the Canadian Bar Association, B.C. Branch, Lawyer Referral Service—for lawyers who practise mediation
- personal referrals
- your lawyer.

Mediators should be able to provide you with information about their training and experience. Feel free to ask for résumés and references and to contact more than one mediator in order to make an informed choice.

The mediator must not have any personal or business involvement with any of the parties involved in the dispute. It is very helpful if the mediator has expertise in the subject matter of the dispute.

#### KEY QUESTIONS TO ASK MEDIATORS DURING THE SELECTION PROCESS

- What training have you received? (Training should be through a well-recognized institution, university, or professional or legal organization.)
- How long have you been doing mediation? How many cases and what types of cases have you mediated?
- What standards of conduct do you abide by? (Mediators on the B.C. Mediation Roster agree to adhere to the roster’s own code of conduct, and mediators who belong to professional organizations are bound by other codes of conduct.)

- What do you charge and what is included in your fee?  
How is travel, administrative and clerical time handled?  
Do you charge for an initial consultation?

#### PREPARING FOR MEDIATION

It is important to be well prepared for mediation.

Gather together any documents you need to help resolve the dispute, including statements, invoices or photographs. Make copies to give to the mediator and each of the parties. Take the copies and the original documents to the mediation.

The mediator may arrange to exchange information before the first mediation session so that everyone has a chance to become familiar with it. This will make the mediation more efficient.

Sometimes you will be asked to provide the mediator with a short summary report before the first session.

It would include:

- the facts or circumstances that led to the dispute
- what you think needs to be resolved
- what you and the other parties agree about and what you disagree about
- what has already been done to try to settle the dispute (e.g., any court proceedings, negotiations or settlement proposals)
- what you are seeking as a favourable outcome.

#### Who Can Participate in the Mediation

The mediator and all of the parties involved in the dispute must attend the mediation. It is important to ensure that each party has the authority to reach an agreement. For example, if any of the parties involved in the dispute is an incorporated company, then the person attending the mediation on the company’s behalf must have the authority to settle the case on behalf of the company. (A person has the authority to settle if that person can agree to a proposed resolution without first getting approval from someone else.)

All parties should agree about who else can attend before beginning the mediation. For example, some parties may wish to have an expert make a presentation on a technical issue. They may also want to have their lawyers involved.

## Lawyers and Mediation

You do not need to have a lawyer to mediate. However, it can be helpful to consult with a lawyer before, during and after the mediation. Or you may choose to have your lawyer attend the mediation, particularly when:

- a Supreme Court action has been commenced
- you feel the other parties have more power or experience than you have
- the other parties involved in the dispute will have their lawyers attend
- the financial or other stakes are high.

## Agreement to Mediate

Once the people involved in a dispute agree to mediate, a written agreement is usually made between the mediator and the parties, setting out the rules and procedures to be followed in the mediation. The mediator and the parties usually sign the agreement to mediate before or at the first mediation session.

Individual mediators often have their own form of agreement, but most agreements include:

- the names of everyone involved in the dispute
- a very general statement of the issues
- a statement about what the parties are trying to accomplish in mediation
- confirmation of the role of the mediator as neutral and impartial
- a statement about confidentiality
- provisions for disclosure of relevant information in the mediation
- an agreement about how much the mediator will be paid, what other costs will be, and who will pay.

### NOTICE TO MEDIATE: THE PRE-MEDIATION CONFERENCE

People participating in mediation through the Notice to Mediate (Residential Construction) Regulation will attend a pre-mediation conference, or organizational meeting, within 60 days of a mediator being appointed, unless the pre-mediation conference is waived by agreement of all parties and the agreement is confirmed by the mediator in writing.

## THE MEDIATION

Most mediations are conducted informally in an office setting. Sessions may be scheduled for a few hours or for several days at time. Everyone involved in the dispute sits around a table with the mediator.

The process often includes these steps:

- The mediator makes a short opening statement explaining the process, reviewing ground rules and the agreement to mediate, and describing his or her own role.
- The mediator gives each party an opportunity to describe what they think needs to be resolved.
- The mediator works with the parties to clearly identify the issues that are in dispute.
- The mediator helps the parties to develop goals for the mediation, incorporating the needs and interests of the parties.
- The parties discuss the issues one at a time and identify options for resolving them. The mediator helps to assess and analyze the options, but does not take sides.
- At some points during the mediation, the mediator may want to meet separately with individual parties for a private “caucus.” Parties can take a break at any time to talk to their lawyers or someone else.

You are never forced to agree to anything in mediation. To give the mediation process a fair chance of success, you should continue as long as the mediator thinks it is worthwhile.

If you are unable to reach agreement, the mediator will end the mediation. The dispute must then be resolved some other way, usually through arbitration or the court system.

## AFTER THE MEDIATION

If some or all of the issues in dispute are settled in the mediation, those issues will be formalized in a written and signed agreement. If a court action has been commenced, the agreement may also be formalized in a consent order. A consent order sets out the terms of the settlement agreement and is signed by a judge and all parties, making the agreement enforceable by the court.

If some or all of the issues in dispute are *not* settled through mediation, the issues that have not been settled can go either to arbitration or through the court process. Even if mediation has not settled all the issues in dispute, it may be helpful in making arbitration or a trial shorter and less complicated.

If your dispute ends up in court, the parties or lawyers for either party may advise the judge of any agreement made in mediation, but neither will disclose anything said during the mediation.

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**VOLUNTARY MEDIATION STEP BY STEP**

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1. If you want to resolve a residential construction dispute through voluntary mediation, approach the other parties to see if they are interested. You may need to give them some information on mediation before they will agree.
2. If everyone agrees to mediate, find a mutually acceptable mediator. Mediators can be found through the B.C. Mediator Roster, private mediation organizations, your lawyer or personal referrals. (See “Resources” for contact information.)
3. Prepare for mediation by gathering all relevant documents and making copies for the mediator and each of the other parties. The mediator may want to exchange information before the first mediation session. Sometimes the mediator will also ask for a short summary report about the dispute before the first mediation session.
4. Before the mediation begins, all parties and the mediator make and sign an agreement to mediate, which sets out the rules and procedures to be followed during the mediation.
5. The mediation process continues until all of the issues are resolved, or until some or no issues are resolved and the mediator feels that it will not be productive to continue.
6. If some or all of the issues in dispute are settled, formalize them in either a written and signed agreement or, if an action has been commenced in court, a consent order signed by a judge. If some or all of the issues in dispute are not settled, the parties can try to settle the remaining issues using the more formal dispute resolution options, arbitration or litigation.

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**NOTICE TO MEDIATE—STEP BY STEP**

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1. If an action has been commenced in Supreme Court, and you wish to use the process set out in the Notice to Mediate (Residential Construction) Regulation, complete a Notice to Mediate (form 1 in the regulation), and deliver it to all other parties any time up to 180 days before the trial date. (See “Resources” for information on how to get a copy of the regulation, which includes all of the required forms.)
2. Appoint a mutually acceptable mediator within 21 days of delivering the Notice to Mediate. If the parties are unable to agree on a mediator, any party may apply to the B.C. Mediator Roster Society, which will select the mediator. (See “Resources” for contact information.)
3. Attend a pre-mediation conference within 60 days of the mediator being appointed. The mediator will discuss organizational matters with all of the parties, including the exchange of documents, preparation of a summary report, scheduling and time limits. Before or at the pre-mediation conference, the parties complete a Mediation Fee Declaration (form 3 in the regulation), setting out the cost of the mediation and the payment arrangements agreed upon by the parties.
4. If requested to do so by the mediator, complete and deliver to the mediator a Statement of Facts and Issues (form 2 in the regulation) at least 14 days before the mediation session is to be held. The mediator will then send each party’s statement to each other party.

5. Participate in the mediation session within 150 days of the mediator being appointed.
6. Continue the mediation process until all of the issues are resolved, some or none of the issues are resolved and the mediator feels it will not be productive to continue, or all parties agree to stop the mediation.
7. The mediator delivers a Certificate of Completed Mediation (form 5 in the regulation) to each party that requests it.
8. If a party doesn't comply with the Notice to Mediate provisions, any other party can file a Declaration of Default (form 4 in the regulation) with the court. The court will then have a wide range of powers, including ordering that a mediation session occur on any terms that it considers appropriate, and making any order it considers appropriate with respect to costs.

#### **MEDIATION OF DISPUTES BETWEEN HOMEOWNERS AND HOME WARRANTY PROVIDERS—STEP BY STEP**

1. If a homeowner has a dispute with a BC Financial Services Authority (BCFSA) – approved home warranty provider concerning any home built with a building permit applied for on or after July 1, 1999, and you are unable to resolve the dispute within a reasonable time, the homeowner may deliver a written request for mediation to the warranty provider.
2. Appoint a mutually acceptable mediator within 21 days of delivering the request to mediate. Mediators can be found through the B.C. Mediator Roster, private mediation organizations, your lawyer or personal referrals. If you and the warranty provider are unable to agree on a mutually acceptable mediator, you may apply to the B.C. Mediator Roster Society, which will select a mediator. (See “Resources” for contact information.)
3. At least 21 days before the first mediation session scheduled by the mediator, give the mediator a statement briefly setting out the matters in dispute and the facts on which you intend to rely. The mediator will give you a copy of the other party's statement.
4. Before the mediation begins, the mediator and both parties must reach an agreement about the cost of the mediation and how the cost will be shared by the parties.
5. The mediation process continues until all of the issues are resolved, or until some or no issues are resolved and the mediator feels that it will not be productive to continue.
6. If some or all of the issues in dispute are settled during the mediation session, formalize them in a written and signed agreement. If some or all of the issues in dispute are not settled, you can try to settle the remaining issues using the more formal dispute resolution options, arbitration or litigation.

## **ARBITRATION**

### **WHAT IS ARBITRATION?**

Arbitration is a process in which a neutral and independent third party hears evidence and arguments from the parties involved in a dispute, and settles the dispute by making a binding decision.

Arbitration is a more formal dispute resolution process than mediation. While mediators have no decision-making powers and assist parties in negotiating a mutually acceptable settlement of the issues in dispute,

arbitrators are adjudicators who make decisions based on the legal rights of the parties. In this sense, arbitration is more like litigation, although it is less formal than litigation.

Unlike mediation, which focuses on interests, arbitration focuses on rights—that is, it is concerned with establishing the legal rights of the parties.

When parties agree to arbitrate, they agree to accept the decision (also called the “award”) of an arbitrator as final and binding. There are very limited grounds for appealing an arbitrator's decision. Once parties agree

to arbitrate, they cannot have the same dispute heard again by the courts. Like decisions made by a judge, an arbitrator's decision is legally enforceable.

#### ADVANTAGES OF ARBITRATION

- **Flexibility**—Arbitration can accommodate the needs of the parties. Because the details and circumstances of every dispute differ, arbitration allows parties to design their own procedure or agree to use an established set of rules. Parties are consulted on the format that will be used for the hearing. When deciding when and where a hearing will be held, arbitrators can take into consideration the convenience of the parties. If required, an arbitrator may visit a location connected to the dispute, such as a construction site.
- **Efficiency and economy**—Because arbitration is less formal than litigation, the hearing is usually shorter than a court case would be. Also, an arbitration hearing can be scheduled much sooner than a court date. The savings in time can be reflected in lower overall costs to the parties.
- **Certainty**—Arbitration results in a final and binding decision that can be enforced like a court order.
- **Expertise**—Parties have the option of selecting the person who will decide their case. For example, they can select an arbitrator who has technical expertise in a particular field or business area.
- **Control**—Parties provide input on when, where and how the arbitration will proceed. This gives them greater control than in litigation, where court rules are inflexible and time frames depend on the availability of court resources.
- **Informal atmosphere**—Although arbitration is an adversarial process in which each side tries to win its case, the flexibility of the process and the opportunity for the parties to design and participate in the hearing contribute to a less antagonistic atmosphere, which in turn helps reduce stress and encourages cooperation. This can be a particular advantage if the parties continue a business relationship after their dispute is resolved.
- **Confidentiality**—In the arbitration of a commercial dispute, matters remain between the parties and the arbitrator. Hearings are closed and the arbitrator's decision is not normally a matter of public record.

- **Structure**—Arbitration allows the parties as much control and decision-making as they are prepared to manage. Parties are free to use the rules of any organization or design their own procedure. A number of organizations and service providers administer arbitration programs and have their own arbitration rules (See “Arbitration Rules”).

#### Costs of Arbitration

Costs of arbitration include:

- the arbitrator's fees
- any fees charged by a neutral administrative body to oversee the process
- any fees charged by expert witnesses, if used, and
- any other expenses incurred for such things as meeting room rental, photocopies, faxing, long distance, travel costs, etc.

Most arbitrators charge by the hour. An arbitrator's hourly rate will depend on experience and qualifications. Some arbitrators have a negotiable hourly rate that depends on the complexity of the case, the number of parties involved, and the time estimated to prepare for and hear the dispute, and prepare the decision.

The arbitrator may ask each party to contribute an equal amount of money as a deposit against the anticipated cost of the arbitration, including the arbitrator's fees and expenses.

The arbitrator can decide how costs are divided between the parties, as part of the decision. The successful party may be reimbursed for some or all of their costs associated with the arbitration.

Parties are usually required to pay their own legal fees. However, a party can ask the arbitrator for reimbursement by the other parties for this expense as well.

#### WHEN TO ARBITRATE

Generally, arbitration is used only after other, less formal dispute resolution options (such as negotiation or mediation) have been considered or attempted.

With residential construction disputes, the parties may agree to arbitrate voluntarily, if negotiation and mediation

have been unsuccessful or appear unlikely to be successful, and the parties want a binding decision made by a neutral third party other than a judge. Alternately, the parties may have an alternative dispute resolution clause in their contract(s) stating that any dispute arising under the contract will be resolved using arbitration. (Some clauses specify mediation or arbitration, while others specify a progression through negotiation, mediation and arbitration.) When there is an arbitration clause in a contract, parties involved in a dispute may still have the option of trying to settle the dispute through negotiation or mediation before going to arbitration.

Arbitration may be appropriate for a residential construction dispute when:

- other, less formal dispute resolution options have been unsuccessful in resolving all of the issues in the dispute
- parties want a flexible process that is less formal than litigation
- parties would prefer to settle the dispute in private
- parties want to settle the dispute with a binding decision.

Arbitration is probably not appropriate when:

- a party is challenging the validity of a law
- an issue of law needs to be settled to govern future legal cases or serve as a legal precedent
- the dispute involves public policy
- people not directly involved in the dispute may be unreasonably affected by the outcome.

It is important to understand that once parties undertake arbitration, they cannot withdraw from the process.

In B.C., the arbitration process for residential construction disputes is governed by the *Commercial Arbitration Act*. (See “Resources” for information on how to get a copy of this act.)

## THE ARBITRATOR

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While mediators are experts in negotiating and in helping others to negotiate effectively, arbitrators are experts in adjudication. An arbitrator:

- looks at the evidence and listens to the arguments put forward by each of the parties
- assesses the evidence
- makes findings of fact
- applies the law, and
- makes a decision that resolves the dispute.

Parties can agree to have a dispute heard and decided by a single arbitrator or by a panel of more than one arbitrator—an odd number, usually three.

### Deciding How Many Arbitrators are Needed

An experienced single arbitrator is usually sufficient to provide a fair and reasoned decision. However, a particularly complex dispute may benefit from being heard by a panel of people with different technical expertise (e.g., law, residential construction, engineering, architecture or insurance).

Advantages of a panel are the mix of expertise and the fact that three minds deliberating together are less likely to miss anything or make a mistake.

Disadvantages are the increased cost and the added complexity of working around two other schedules, which can result in significant delays.

If the parties involved in a dispute have not specifically stated otherwise, the *Commercial Arbitration Act* calls for a single arbitrator.

## PREPARING FOR ARBITRATION

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### Submission to Arbitrate

Once the parties have agreed to arbitrate, either voluntarily or through an alternative dispute resolution clause in their contract(s), they should complete a submission to arbitrate. This is a simple agreement that should:

- identify the parties
- identify the issues to be arbitrated
- state the number of arbitrators required and how the arbitrator(s) will be appointed, and
- be signed by each party.

### Appointing an Arbitrator

Technically, any impartial person can act as an arbitrator. But remember—the arbitrator’s decision is final and binding. It is therefore recommended that parties select

someone with experience as an arbitrator, as well as expertise in the subject matter of the dispute. (Even where the parties consider the dispute to be “factual,” the arbitrator should be familiar with the applicable law.) Most importantly, the person appointed should be someone in whom all parties have confidence.

Many professional arbitrators and arbitration organizations advertise in the Yellow Pages or industry publications. You can also get names of potential arbitrators through:

- personal referrals
- British Columbia International Commercial Arbitration Centre
- British Columbia Arbitration and Mediation Institute
- the Canadian Bar Association, B.C. Branch, Lawyer Referral Service—for lawyers who practise arbitration.

You can contact potential arbitrators to request information about them, but you must not discuss the details of a particular dispute with a potential arbitrator. It is a good idea to request information from a potential arbitrator in writing and to provide a copy of the correspondence to the other parties.

#### WHEN CHOOSING AN ARBITRATOR, CONSIDER:

- **Experience**—how many arbitrations the prospective arbitrator has performed and the types of disputes arbitrated
- **Expertise**—whether the prospective arbitrator has any training or other background in residential construction
- **Impartiality**—there should be nothing about the prospective arbitrator’s background or current activities that could lead one of the parties to conclude that the arbitrator would not be a neutral decision-maker.

During the selection process, be sure to ask for the arbitrator’s résumé, fee schedule and availability.

The parties must agree on the choice of arbitrator. An arbitration clause in a contract may give a neutral

organization the authority to appoint the arbitrator. If this is not the case and the parties cannot agree among themselves on the selection of an arbitrator, neutral organizations or service providers can help them with the selection process, using their own lists of qualified arbitrators. (See “Resources” for a partial list of arbitration organizations.) The parties can also apply to the court to have an arbitrator appointed.

#### Arbitration Rules

One of the first things the parties must do in preparing for arbitration is to choose the rules that will govern the arbitration. Arbitration rules include how and when documents should be exchanged, and how the arbitrator will communicate with the parties. Exchanging documents before the hearing ensures that each party knows the claim the other is making and has an opportunity to prepare a response. Because the arbitrator is a neutral adjudicator, parties cannot discuss details about the issues or evidence directly with the arbitrator unless the other parties to the dispute are present.

Some arbitration organizations have developed their own arbitration rules, which the parties may agree to adopt. All arbitration rules have common procedures that reflect the principles of:

- **neutrality**—arbitrators must be impartial and have no bias in favour of either a particular party or any specific outcome
- **independence**—arbitrators are independent decision-makers (i.e., no person or agency can influence his or her decision)
- **the right to know the claim**—all parties have the right to know the details of the case against them, the right to refute adverse evidence, and the right to present their own evidence.

Arbitrators must follow these principles to ensure that the arbitration process is fair.

If the parties have not agreed to use specific rules or procedures, the *Commercial Arbitration Act* provides that the Rules of Procedure of the British Columbia International Commercial Arbitration Centre (BCICAC) apply. These rules are much less rigid than the rules of court, but provide the arbitration process with stability

and direction. They are available from the BCICAC (see “Resources”).

It is essential that the arbitration rules chosen by the parties are documented in writing (see “Arbitration Agreement”).

### Lawyers and Arbitration

You do not have to hire a lawyer to represent you in arbitration. However, most parties find the advice and skills of a lawyer to be helpful.

Lawyers are trained to research and prepare a case. They advise on legal rights and responsibilities and provide objective opinions. Also, they often know of expert witnesses who can be called upon to support a case.

Sometimes meeting with a lawyer for a short consultation will help you to decide whether or not to hire legal counsel for your arbitration hearing.

#### IN DECIDING WHETHER OR NOT TO HIRE A LAWYER, ASK YOURSELF:

- Do I have the time and skills to research and prepare my own case?
- Does the value of the dispute warrant the cost of hiring a lawyer?
- Will hiring a lawyer increase my chances of a successful outcome?
- Are the other parties represented by a lawyer?

### Arbitration Agreement

Once appointed, an arbitrator may arrange a preliminary meeting to discuss the details of the arbitration process with all of the parties, and document them in a written arbitration agreement, in order to avoid misunderstandings later on. (Even if a preliminary meeting is not held, details of the process should be documented in an arbitration agreement.)

Issues that should be decided at the preliminary meeting and documented in the arbitration agreement, in addition to the arbitration rules that will apply to the process, include:

- dates for the exchange of information
- whether evidence will be presented orally or in writing
- the use of lawyers and experts
- how the fees of the arbitrator and other expenses will be paid.

### THE ARBITRATION

The arbitrator notifies each party about when the arbitration hearing will take place. If the issues are complex, more than one session may be required. The arbitration hearing takes place in a location selected by the parties. The parties sit at a table with the arbitrator. Each party presents its case to the arbitrator, supporting its arguments with evidence and sometimes with witnesses. The person with the problem usually goes first. The arbitrator controls the process and has the power to decide what evidence will be accepted (it must be relevant to the case), when witnesses can be called, when the other party can ask questions, and so on. The arbitrator may ask questions of the parties or the witnesses to clarify issues. All parties have an opportunity to summarize their cases at the end of the hearing.

The arbitrator considers the evidence and arguments made by all parties and makes a decision that takes into account the legal rights of the parties. Generally the decision is made in writing, and it may include the arbitrator’s reasons for making the decision.

The arbitrator no longer has any jurisdiction in the matter once the decision has been made. In the majority of cases, parties abide by the arbitrator’s decision. However, if necessary, a party can apply to the court and receive an order to enforce the decision.

#### ARBITRATION STEP BY STEP

1. If you want to resolve a residential construction dispute through arbitration, having already considered or attempted negotiation and mediation, approach the other parties to get their agreement. (If you have a contract with a contractor, check to see if it includes an alternative dispute resolution or arbitration clause.)

2. If everyone agrees to arbitrate, write a submission to arbitrate, a simple agreement that identifies the parties, the issues to be arbitrated, the number of arbitrators required, and how they will be appointed, and have each party sign it.
3. Appoint a mutually acceptable arbitrator or panel of arbitrators. Arbitrators can be found through arbitration organizations, your lawyer, the Canadian Bar Association (for lawyers who practise arbitration), and personal referrals. If the parties are unable to agree on an arbitrator, an arbitration organization or service provider may be able to help with the selection process. The parties may also apply to the court to have an arbitrator appointed.
4. Choose the arbitration rules that will guide the arbitration process. Under the *Commercial Arbitration Act*, unless the parties choose otherwise, the rules of the B.C. International Commercial Arbitration Centre (BCICAC) apply. (See “Resources” for contact information.)
5. The arbitrator(s) may call a preliminary meeting to decide on the details of the arbitration process. A signed arbitration agreement documents the various details, including the arbitration rules to be used.
6. At the arbitration hearing(s), the arbitrator(s) hears the evidence and arguments of each of the parties.
7. The arbitrator(s) issues a final and binding decision, usually in writing.
8. If necessary, the successful party may apply to the court for an order enforcing the decision.

## LITIGATION

This section sets out the litigation process in general terms. It refers to litigation in the B.C. Supreme Court only. The information contained here is not necessarily complete and is not legal advice. Every dispute is different, and legal advice should be sought in each case.

### WHAT IS LITIGATION?

Litigation is a formal process for resolving disputes in court, based on the rights of the parties involved. It is by nature an adversarial process. It is governed by extensive rules that are designed to increase the likelihood that all of the relevant facts are known by all parties.

If you believe your rights have been infringed by someone else, you have a **cause of action** against that person or group of people. (An **action** is a lawsuit brought against another person.) As the complaining party (normally called the **plaintiff**), you have to prove the facts behind your cause of action. The other party or parties (normally called the **defendant**) try to either show that those facts do not exist, or prove other facts that show that you should not be given what you seek.

Each party puts its best arguments forward and a judge determines which party is responsible and should pay to remedy the problem. The court recognizes certain rights and will only allow the plaintiff to succeed if one or more of those rights have clearly been infringed by the other parties.

### ADVANTAGES OF LITIGATION

- **Mandatory**—Litigation does not rely on the cooperation of all parties. Litigation requires all parties to participate, and has strict and extensive rules to govern participants’ actions throughout the process.
- **Disclosure**—Litigation provides processes that ensure full disclosure of all relevant information, and that test the honesty of the parties and the accuracy of the evidence.
- **Certainty**—Litigation inevitably results in a final decision that can be enforced by the court.

### Costs

The costs of litigation can be extremely high, and being the successful party does not necessarily mean you will recover those costs. Costs include the lawyer’s fees—usually called “legal fees”—and various other fees and expenses, or “disbursements.”

Lawyers normally charge on an hourly basis, with rates varying from as low as \$50 to \$75 an hour for law students to \$350 or more an hour for senior lawyers. It is also common for more than one lawyer to work for a party in a residential construction dispute. While it is difficult to estimate legal fees, you should ask your lawyer for a budget of anticipated legal fees.

Disbursements include everything else—for example, any expenses incurred by the lawyer while working for you (telephone, fax, couriers), fees for filing writs and other court documents, and fees for expert reports, transcripts and so on. Over the course of a lengthy court case, disbursements can be very costly.

The unsuccessful party in a court action is usually required by the trial judge to pay the costs of the successful party. The specific amount to be paid is based on a tariff set by the court rules. Only very rarely does the successful party recover all of its costs; a more common amount would be only 20 percent of legal fees and disbursements.

When selecting a lawyer, ask about the fee structure such as hourly rates, retainer requirements and anticipated timing of any payments required. Some lawyers will provide an initial consultation at no cost or at a nominal fee.

## FINDING A LAWYER

For residential construction disputes, select a lawyer who specializes in construction law and has a good working knowledge of the *Condominium Act* and the new *Strata Property Act*. If you are trying to recover costs from other parties through the court system, you may also need a litigator. A litigator is also known as a trial lawyer or barrister.

You can get referrals from others who have gone through similar disputes. Find out if they were pleased with the final results. The Lawyer Referral Service can provide you with names of lawyers with the appropriate expertise. (See “Resources” for contact information.)

Refer to publications that include ratings of lawyers by their area of specialty such as Martindale & Hubbell and L’Expert. Call your local library for guidance in locating these publications.

Don’t make your selection based on unrelated work a lawyer did for you or someone else (like a divorce or will).

Develop a shortlist of the lawyers that appear best qualified to provide the services you require, and with whom you are comfortable. Meet the candidates, ask questions, then make a selection.

## Selecting a Lawyer

It is important to know the experience and qualifications of the lawyers you consider.

Let the candidates know if you are representing a strata corporation or yourself. If representing a strata corporation, provide your strata corporation plan number.

During your selection process, determine the following:

- What experience does the lawyer have working with residential construction issues? How long has the lawyer worked in construction law? How many related cases has the lawyer worked on and in what capacity? What were the outcomes of these actions?
- Ask if there might be any conflicts of interest.
- Ask for references from others who recovered costs from other parties.
- If representing a strata corporation, would the lawyer be willing to attend strata corporation meetings to explain issues and respond to questions from the owners?

## First Steps

Litigation is always the result of a person discovering a problem for which another person or group of people may be responsible. In a residential construction dispute, this is typically when a homeowner or strata corporation discovers that there is a construction deficiency.

On discovering the problem, take whatever emergency action is necessary to avoid further problems. For example, if you have a leaking roof, you should move quickly to at least stop the leaking temporarily so that there will not be further damage to the structure or contents of the home. After taking emergency action, seek legal advice before undertaking any further repairs. If no emergency action is required, but you suspect that you may have a cause of action based on the problem, seek legal advice before undertaking any repairs.

Note: If your building has any existing home warranty coverage, make sure any action you take to temporarily stop leaks does not invalidate your warranty.

## Consulting a Lawyer

When consulting a lawyer, take all relevant documents and information with you, including the names and addresses of the parties you believe have been involved in creating the problem. You should be able to describe the nature of the problem as fully as possible, and explain why you think the parties you have identified may be responsible.

At an initial consultation, or after the lawyer has done a preliminary investigation and review, the lawyer should be able to advise you on:

- whether the problem you have discovered is likely to give rise to a valid cause of action
- whether the dispute involves complex or simple issues
- which parties, generally, *might* be at least partially responsible for the problem
- what further steps need to be taken to determine the best way to proceed.

### Collecting and Organizing the Facts

Once involved, the lawyer should guide the investigative process, since one of the primary concerns will be whether there are sufficient facts to establish a valid cause of action against other parties.

A thorough review of the documents you have provided, as well as interviews with people who have been involved in any of the issues giving rise to the dispute, will help the lawyer to:

- determine which matters require further investigation, and
- identify the parties against which an action should be commenced.

### Expert Advice

Obtaining expert advice on matters that others cannot properly give opinions on in court is another key part of the fact-finding process. When the matters are technical or complex, experts are needed to review and assess the facts and physical evidence. Their advice and evidence are used initially in discovering the nature of the problems and eventually in proving the plaintiff's case against the defendants. Expert advice can also be useful

in identifying the parties against which an action will likely be successful, as well as the merits of the defense and the expert opinions put forth by other parties.

In residential construction disputes, expert opinions are often required to establish why a particular design or construction method caused a failure of some important element of the building, such as the building envelope. An architectural or engineering expert can also provide a useful opinion on the professional standards of care; proper and appropriate architectural or engineering plans, specifications and drawings, or even inspections. In addition to providing opinions on what factors initially caused the problem, experts can also guide repair efforts.

Experts are best retained through a lawyer, or at least with the involvement of a lawyer.

### Assessing the Law

While collecting and reviewing the facts, the lawyer is also assessing the legal issues required to establish the cause of action. These processes—discovering the relevant facts and identifying the issues and applicable law—progress at the same time. The legal issues help to define which facts are most relevant, and the facts show which legal issues are in play.

The lawyer assesses the law by looking at past cases that had similar facts. Reviewing the decisions of the courts helps the lawyer to determine the strength of a cause of action and which facts are most important. Assessing the law and the legal issues also helps the lawyer to identify the parties against which an action should be commenced.

## BEFORE THE TRIAL

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### Limitation Periods

A cause of action must be commenced within a certain time period. If you don't commence an action in court before the relevant **limitation period** expires, you lose the right to sue.

In construction disputes, the limitation period is either two years or six years from when the right to sue arose, depending on the specific facts. It is crucial to consult a lawyer as soon as possible after discovering a problem so that the lawyer can determine the applicable limitation period and commence an action within that time frame. If a city, municipality or regional district is a potential party in an action, a very short limitation period of two months applies.

### Commencing an Action

Once the lawyer understands the relevant facts and knows what law and legal issues apply to the dispute, an action can be commenced. In B.C., actions are commenced by filing two documents with the court and serving them on the defendants. These documents are the **Writ of Summons** and the **Statement of Claim**.

The Writ of Summons tells the defendants that an action has been commenced against them, and that if they fail to respond to it in the proceedings, judgment will be taken against them.

In the Statement of Claim, the plaintiff sets out the facts that establish the cause of action brought against the defendants. The Statement of Claim is extremely important, because it defines which matters are important in the case. This allows the defendants to know how to defend themselves, and informs the court about the case.

In response to the Writ of Summons, each defendant files an **Appearance**. An Appearance is a simple document that tells the other parties and the court that the defendant intends to defend the action, and identifies the lawyer acting for that defendant.

In response to the Statement of Claim, each defendant files a **Statement of Defence**, which tells the plaintiff, other parties and the court why that defendant says it is not liable, based on the facts in the Statement of Claim and any further facts that the defendant alleges are true in the Statement of Defence.

If a defendant says that other parties are liable for the plaintiff's problem, it can make those parties participate

in the litigation by preparing and serving on them a **Third Party Notice**. A Third Party Notice informs the new party and the court why the defendant says that the new party (the third party) should be held liable to the plaintiff or that defendant. The third parties then must file an Appearance and a Statement of Defence in response to the Third Party Notice.

When these documents have been prepared and exchanged, the parties begin a number of processes by which the facts are discovered.

### Collecting and Exchanging Documents

Each party—the plaintiff, the defendant(s) and any third parties—must collect all documents that have any relevance to the claims and defences, and give them to its respective lawyer. Each lawyer then prepares a list of the documents which, in the lawyer's opinion, should be disclosed, and gives the list to the other parties. The other parties can then ask to see and get copies of all of the documents on the list, or only those which are of particular interest. This way, each party has the opportunity to review the evidence that might be produced by every other party. In residential construction disputes the relevant documents may easily number in the hundreds.

### Examinations for Discovery

Another process designed to ensure a complete exchange of all information is called **examinations for discovery**. This is a formal process in which a lawyer for one party asks questions of another party under oath before the trial. This typically takes place in a lawyer's office and may be attended by the lawyers and each of the clients involved in the action. The party being examined usually has a lawyer present to ensure that the questions asked are relevant and appropriate. The questions and answers are recorded by a court reporter, who then prepares a transcript, which can be used in the trial. Examinations for discovery of all parties may take days and extend over a long period of time.

### Interlocutory Applications

Before a trial, there can be issues that need to be resolved in order for the parties to prepare for the trial, and on which the lawyers cannot agree. These issues

often concern procedure. They are called **interlocutory** because they arise before a trial.

When this happens, the parties go to court and have a judge or master of the court determine what should occur. An application to the court for the settling of an issue before trial is called an **interlocutory application**.

The nature and number of interlocutory applications differ in each case.

### Expert Reports

During the preparation for a trial, many facts cannot be determined by the parties without expert opinions—especially when matters are technical and beyond the knowledge of an ordinary person.

The rules of court contain specific provisions for expert reports: they must be provided in a specific form and exchanged between the parties in a certain time frame. If these requirements are not met, you may not be able to rely on the expert evidence you have obtained.

### Setting a Trial Date

A trial date can be set when the parties have completed their Statements of Defence. This is normally arranged for convenient times by the parties' lawyers. However, a plaintiff can unilaterally set a trial date through the court registry if the defendants are not cooperating.

When a trial is expected to be long (i.e., four weeks or longer), the court will usually assign a **case management judge** to oversee the litigation process for that case. The trial and most interlocutory applications are then heard by the case management judge, and the trial date takes into account the case management judge's schedule.

### Settlement

The fact that a court action has commenced does not rule out attempting to settle the dispute in other ways. The parties can reach a settlement at any time before or after a judgment is granted. The rules of court include a number of procedures designed to assist the parties in reaching a settlement.

Any party can deliver formal offers of settlement to the other parties at any time before the judgment is granted. There may be consequences for parties not accepting settlement offers.

Often—especially when a case management judge is appointed—the court will arrange a settlement conference in which the parties can attempt to settle the case before a judge (not the case management judge). Obtaining the views of a judge before a trial can be very useful.

The parties can also arrange and participate in mediation and/or arbitration while preparing for a trial, in an attempt to settle the case.

In addition, if a formal settlement offer is made during the trial, the parties may ask the judge for an adjournment while they negotiate the settlement.

## THE TRIAL

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The trial includes several distinct stages.

The plaintiff's case is presented first. The plaintiff's lawyer usually:

- makes an opening statement outlining the case that will be presented and the issues to be decided by the court
- tells the court what witnesses will be called and what their general evidence will be
- calls witnesses and examines them under oath.

Each of the other parties has an opportunity to cross-examine each witness, including expert witnesses.

Once all of the plaintiff's witnesses have been called and the defendants have cross-examined them, the defendants' cases are presented. Typically, the defendants' lawyers also begin with an opening statement and then call their witnesses. The plaintiff's lawyer can cross-examine each witness.

When all of the parties have presented their evidence, each is given an opportunity to make closing arguments, which usually include a review of the evidence

and a submission concerning the applicable law. The lawyers try to convince the court to grant judgment in favour of their client.

The judge then renders a decision, either orally immediately after the closing arguments, or, more commonly, in writing at a later date. Typically, the decision will say:

- who was successful
- what compensation the successful party is entitled to, and
- who will pay the costs of the legal action.

### Appeals

After the parties receive the judgment, they have 30 days to file a **Notice of Appeal**. If a party fails to file a Notice of Appeal in the 30-day time limit, special permission of the Court of Appeal is required.

Usually, a party cannot appeal the judge's findings of fact. In other words, when a judge decides that certain facts are true, a party cannot appeal this decision even if it thinks those facts are false. Appeals usually concern the manner in which the law is applied to the facts.

If a party appeals, the order from the first judge is still effective. For example, if the judge ruled that a defendant must pay \$100,000 to the plaintiff, the plaintiff can still collect the \$100,000 from the defendant, unless the defendant obtains an order from the Court of Appeal that the payment need not be made until the outcome of the appeal is known.

### LITIGATION STEP BY STEP

1. After discovering a problem for which another person or group of people may be responsible, take whatever emergency action is necessary, but will not invalidate any existing home warranty, to avoid further damage. Then seek legal advice before undertaking any further repairs. If no emergency action is needed, seek legal advice before undertaking any repairs.
2. When consulting a lawyer, take all relevant documents and the names and addresses of as many of the involved parties as possible. Be prepared to describe the problem as clearly as possible, and to explain why you think the other party or parties are responsible.
3. The lawyer will advise you on whether there is a valid cause of action against other parties. If there is, the lawyer then guides the process of discovering the facts. This process could include reviewing your documents, interviewing the parties involved, and seeking expert advice. While discovering the facts, the lawyer also assesses the legal issues.
4. When the lawyer understands the facts and legal issues, he or she commences the action by filing the Writ of Summons and Statement of Claim with the court and serving them on the defendants. The action must be commenced within the relevant limitation period (two to six years for residential construction disputes, depending on the specific facts).
5. Each defendant files an Appearance in response to the Writ of Summons, and a Statement of Defence in response to the Statement of Claim. If a defendant believes someone else is responsible for the problem, the defendant makes that party participate in the litigation by serving on the party a Third Party Notice. The third party then files an Appearance and a Statement of Defence in response to the Third Party Notice.
6. The lawyer for each party makes a list of all relevant documents in that party's possession and which in the lawyer's opinion should be disclosed, and gives the list to all other parties. The other parties can then request copies of the documents they wish to see.
7. The lawyers set a trial date.

8. Any party can deliver formal offers to settle to other parties any time before the judgment is granted. Parties can also participate in mediation and/or arbitration at any time before the trial. In addition, if a formal settlement offer is made during the trial, the parties may ask the judge for an adjournment while they negotiate the settlement.
9. At the trial, the plaintiff's case is presented first, with the plaintiff's lawyer introducing the case and examining witnesses, and the defendants' lawyers cross-examining the witnesses. The defendants' lawyers make their opening statements and present their witnesses, who are then cross-examined by the plaintiff's lawyer. When all parties have presented their evidence, each makes a closing argument. The judge renders the decision.
10. The parties have 30 days to appeal the judge's decision—specifically the judge's application of the law to the facts—by filing a Notice of Appeal.

## GLOSSARY

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**Action**—A lawsuit brought against another party in the Supreme Court of B.C.

**Agreement to mediate**—A legal agreement describing the mediation process, and signed by all parties involved in the mediation.

**Appearance**—A document filed by the defendant(s) in response to the plaintiff's Writ of Summons.

**Arbitration**—A process in which parties present evidence and arguments to a neutral third party (the arbitrator), who has the power to make a binding decision.

**Arbitration agreement**—A document setting out the details of an arbitration process and signed by all parties.

**Arbitrator**—A neutral and independent third party who hears evidence and arguments from the parties involved in a dispute, and settles the dispute by making a binding decision.

**Cause of action**—A factual situation that entitles one party to claim against another party in court.

**Consent order**—In mediation, a settlement agreement that has been put into the form of a court order and signed by a judge.

**Defendant**—In litigation, the person alleged by a plaintiff to be responsible for a problem.

**Examinations for discovery**—In litigation, a process by which each party examines each other party under oath before the trial.

**Interests**—The needs, desires and concerns of each party in a dispute.

**Interlocutory applications**—In litigation, application to the court by a party for the settling of an issue (usually concerning procedure) before a trial.

**Limitation period**—The period of time within which a cause of action can be commenced.

**Litigation**—The traditional court process, in which a judge decides the matter in dispute.

**Mediation**—A collaborative process for resolving disputes facilitated by a neutral third party with no decision-making power.

**Mediator**—A person specially trained to help people work together to reach a resolution to a dispute that is acceptable to everyone involved. Mediators are neutral

and unbiased. They do not have the power to make decisions or impose a resolution. Their role is to ensure that the discussion is focused, organized and respectful.

**Negotiation**—Any form of direct or indirect communication between opposing parties in a dispute, without the assistance of a neutral third party, to discuss steps they could take to resolve a dispute between them.

**Notice of Appeal**—In litigation, a document filed by any party indicating a desire to appeal the judge's application of the law to the facts of the dispute.

**Notice to Mediate (Residential Construction)**

**Regulation**—A B.C. government regulation under which any party to a Supreme Court action (a lawsuit) relating to a residential construction dispute can compel the other parties to participate in a mediation session before the trial.

**Plaintiff**—In litigation, a person who has a problem for which someone else may be responsible, and who has commenced an action in court.

**Pleadings**—Documents filed in a lawsuit (e.g., Writ of Summons, Statement of Claim, Statement of Defence).

**Position**—Something a party to a dispute has decided on as a way to serve its interests.

**Pre-mediation conference**—Under the Notice to Mediate (Residential Construction) Regulation, a meeting convened by the mediator to consider all organizational details of the mediation with the parties involved.

**Settlement agreement**—In mediation, the written document or signed agreement setting out the terms of settlement agreed to.

**Statement of Claim**—One of two documents filed with the court and served on the defendant(s) by the plaintiff to commence an action.

**Statement of Defence**—A document filed by the defendant(s) in response to the plaintiff's Statement of Claim.

**Third Party Notice**—A document filed with the court by a defendant and served on a person alleged by the defendant to be responsible for a plaintiff's problem.

**Writ of Summons**—One of two documents filed with the court and served on the defendant(s) by the plaintiff to commence an action.

## RESOURCES

### ACTS AND REGULATIONS

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#### *Homeowner Protection Act*

Copies available from:

- Licensing and Consumer Services  
Branch of BC Housing  
(604) 646-7050 or 1-800-407-7757
- Crown Publications, Victoria  
(250) 386-4636
- the Queen's Printer  
1-800-663-6105

Or view on:

- [www.bchousing.org](http://www.bchousing.org)

#### **Notice to Mediate**

##### **(Residential Construction)**

##### **Regulation (includes all forms)**

Copies available from:

- Licensing and Consumer Services  
Branch of BC Housing  
(604) 646-7050 or 1-800-407-7757
- Crown Publications, Victoria  
(250) 386-4636
- the Queen's Printer  
1-800-663-6105

Or view on:

- [www.bchousing.org](http://www.bchousing.org)

#### *Commercial Arbitration Act*

Copies available from:

- Crown Publications, Victoria  
(250) 386-4636
- the Queen's Printer  
1-800-663-6105

Or view on:

- the Queen's Printer Web site  
([www.qp.gov.bc.ca/bcstats/96055\\_01.htm](http://www.qp.gov.bc.ca/bcstats/96055_01.htm))

### GOVERNMENT AGENCIES

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#### **Licensing and Consumer Services**

Branch of BC Housing

203-4555 Kingsway

Burnaby, BC V5H 4T8

Tel: (604) 646-7050 or

1-800-407-7757

[www.bchousing.org](http://www.bchousing.org)

[Licensinginfo@bchousing.org](mailto:Licensinginfo@bchousing.org)

#### **Dispute Resolution Office**

Ministry of Attorney General

P.O. Box 9280, Stn Prov Govt

Victoria, BC V8W 9J7

Tel: (250) 356-8147

Web site: [www.ag.gov.bc.ca](http://www.ag.gov.bc.ca)

E-mail: [dispute.resolution.office@ag.gov.bc.ca](mailto:dispute.resolution.office@ag.gov.bc.ca)

#### **B.C. Mediator Roster Society**

c/o Dispute Resolution Office

Ministry of Attorney General

P.O. Box 9280, Stn Prov Govt

Victoria, BC V8W 9J7

Tel: (250) 356-8147

Web site: [www.mediator-roster.bc.ca](http://www.mediator-roster.bc.ca)

E-mail: [mediators@mediator-roster.bc.ca](mailto:mediators@mediator-roster.bc.ca)

### OTHER AGENCIES AND ORGANIZATIONS

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#### **Alternate Dispute Resolution Centre**

1390-13401 108 Ave.

Surrey, BC V3T 5T3

Tel: (604) 589-9111

Web site: [www.adrc.com](http://www.adrc.com)

#### **B.C. Arbitration and Mediation Institute**

Tel: 1-877-332-2264

Web site: [www.amibc.org](http://www.amibc.org)

##### *Vancouver branch:*

1628 West 7th Avenue

Vancouver, BC V6J 1S5

Tel: (604) 736-6614

##### *Vancouver Island branch:*

Box 8309

Victoria, BC V8W 3R9

Tel: (250) 384-3630 or

(250) 380-8389

##### *Interior branch:*

1441 Mount Dufferin Dr.

Kamloops, BC V2E 1A1

Tel: (250) 374-1594

#### **B.C. International Commercial Arbitration Centre**

Suite 1140, 1090 West Georgia

Vancouver, BC V6E 3V7

Tel: (604) 684-2821 or

1-877-684-2821

Web site: [www.bcicac.com](http://www.bcicac.com)

E-mail: [info@bcicac.com](mailto:info@bcicac.com)

#### **Canadian Bar Association, B.C. Branch, Lawyer Referral Service**

Tel: (604) 687-3221 or 1-800-663-1919

#### **Canadian Dispute Resolution Corp.**

330-10362 King George Hwy.

Surrey, BC V3T 2W5

Tel: (604) 582-9545

#### **Dispute Resolution Centre**

108-1218 Wharf St.

Victoria, BC V8W 1T8

Tel: (250) 383-4412

Web site: [www.disputeresolution.bc.ca](http://www.disputeresolution.bc.ca)

#### **Mediation Development Association of B.C.**

6-704 6th St.

New Westminster, BC V3L 3C5

Tel: (604) 524-4552 or 1-800-663-7053

#### **Mediation Referral Services**

70 Prideaux St.

Nanaimo, BC V9R 2M5

Tel: (250) 390-0960

### PUBLICATIONS

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#### **Dispute Resolution Office Information Bulletins are available from:**

Dispute Resolution Office

Ministry of Attorney General

P.O. Box 9280, Stn Prov Govt

Victoria, BC V8W 9J7

Tel: (250) 356-8147

Web site: [www.ag.gov.bc.ca/public/public.htm](http://www.ag.gov.bc.ca/public/public.htm)

#### *Managing Major Repairs: A Condominium Owner's Manual*

BC Housing, B.C. Ministry of

Municipal Affairs and Canada

Mortgage and Housing Corporation,

1999. (Copies are available from

BC Housing and the Canada Mortgage

and Housing Corporation.)

#### *Getting to Yes: Negotiating Agreement Without Giving In. Second edition.*

Roger Fisher, William Ury, and Bruce

Patton. New York: Houghton Mifflin

Company, 1991.

### COURSES

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#### **Justice Institute of B.C.**

Centre for Conflict Resolution

Justice Institute of B.C.

715 McBride Boulevard

New Westminster, BC V3L 5T4

Tel: (604) 525-5422

Web site: [www.jibc.bc.ca](http://www.jibc.bc.ca)

#### **University of Victoria**

Institute for Dispute Resolution

University of Victoria

PO Box 2400, STN CSC

Victoria, BC V8W 3H7

Tel: (250) 721-8777



203 – 4555 Kingsway  
Burnaby, BC V5H 4T8  
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