COMPELLING RELUCTANT PARTIES TO MEDIATE

FLAG, November 29, 2017
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INTRODUCTION

The impartial adjudication of legal claims it a cornerstone of democratic society. Access to the enforcement of a right is fundamental to the very existence of that right. However, the adversary system of justice provides opportunities for contentiousness and gamesmanship. Delay and expense are endemic to our legal system. Increased caseloads, (unrestrained) tactical manoeuvring by lawyers and increases in the cost of litigation has made the courtroom inaccessible to most citizens. Fortunately, courts resolve only a small fraction of the disputes that are brought to their attention and lawsuits form a small percentage of all disputes which could conceivably be brought before a court. In North America, only three to five percent of civil cases filed with courts proceed to trial.[1]

The focus of this paper is the set of tools available to family law litigants and courts in British Columbia who wish to facilitate mediation as a dispute resolution alternative in family law cases. This paper will review the mandatory mediation provisions under the *Notice to Mediate (*Family*) Regulation*, BC Reg 296/2007, (*Law and Equity Act*), the provisions of the *Family Law Act* [SBC 2011] Chapter 25 which provide courts discretion to compel parties to attend mediation and caselaw addressing mandatory mediation and ancillary issues.

NOTICE TO MEDIATE (FAMILY) REGULATION

Legislative Background

There are several regulations presently in force in British Columbia which offer parties to litigation the opportunity to compel the adversarial party to attend a mediation of the issues in the proceeding, including:

Education Mediation Regulation, BC Reg 250/2000 , (*School Act*)

Notice to Mediate Regulation, BC Reg 127/98, (*Insurance (*Vehicle*) Act*)

*Notice to Mediate (*General*) Regulation*, BC Reg 4/2001, (*Law and Equity Act*)

*Notice to Mediate (*Residential Construction*) Regulation*, BC Reg 152/99, (*Homeowner Protection Act*)

*Notice to Mediate (*Family*) Regulation*, BC Reg 296/2007, (*Law and Equity Act*)

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[1] George W. Adams, Q.C., *Mediating Justice: Legal Dispute Negotiations,* 2ed (Canada: CCH Canadian Limited, 2011) pgs 1-12.

The *Notice to Mediate (*Family*) Regulation* was the most recently enacted of the various "mandatory mediation" regulations in B.C. The *Notice to Mediate (*Family*) Regulation* came into effect province-wide on March 30, 2012 (though a pilot project resulted in the regulation coming into effect in certain parts of B.C. previously). Other mandatory mediation regulations were implemented in consultation between the Supreme Court judiciary, the CBABC, the Law Society of B.C., the Trial Lawyers Association and other groups with an interest in civil justice reform. These had proven quite successful. According to the Attorney General's website, from 2002 to 2012, about 37,000 motor vehicle actions were mediated. An average of 78% of these mediations resolved each year.[2]

In correspondence between our office and the Dispute Resolution Office (of the Attorney General of B.C., the "DRO"), it was indicted that there is a lack of information available regarding the total number of mediations initiated and settled under the mandatory mediation regulations. The lack of reliable data may stem from the manner in which the mandatory mediation regulations are designed to operate. For example, under the family law mandatory mediation regulations, the notice to mediate process requires minimal oversight from the designated provincial roster organization under the regulation, "Mediate B.C.", which is only engaged when the parties are unable to select a mediator by mutual agreement, at which point the parties are at liberty to apply to mediate B.C. for the selection of a mediator. Additionally, there is no provision under the family mandatory mediation regulations requiring the parties deliver a certificate of completion of mediation to Mediate B.C. or the DRO specifying the result.

In January 2004, the DRO released a consultation paper in anticipation of the eventual enactment of mandatory mediation regulations specifically for family law cases.[3] At that time, there were three successfully implemented mandatory mediation regulations in British Columbia. The DRO indicated that the mandatory mediation regulations then in place were unique to B.C., in that they were party-driven and parties were compelled to participate in mediation, but not compelled to settle. The DRO indicated that during consultation on the *Notice to Mediate* (General) *Regulation*, many people suggested the mandatory mediation process would be very useful in family matters. In fact, the CBABC Provincial Council passed a resolution supporting the expansion of the Notice to Mediate to "appropriate family matters."

There were several issues identified by the DRO in its consultation paper as being family law mediation specific, including:

- The nature of the dispute resolution process to which people would be referred.
- Timing of the mediation session.
- How mediation services could be provided to people of modest means.
- Access to independent legal advice (ILA).

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[2] Justice Branch - https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/mediation/notice-to-mediate/notice-to-mediate-motor-vehicle-regulation - Accessed November 27, 2017

[3] Ministry of Attorney General. (2004). Notice to Mediate (Family) Consultation Paper. Victoria: Province of British Columbia.

With respect to the process, the DRO noted that in non-family matters, the service of a notice to mediate resulted in a requirement that the parties participate in a mediation session before proceeding to court. However, in the family law context, many people expressed concerns about compelling parties to attend mediation in cases involving violence, abuse or significant power imbalances between the parties. As a result, the DRO recommended that a two-step process be implemented under which, after parties first learn about mediation, a highly trained mediator assesses the case to determine if it is appropriate to proceed to mediation. As a result of this recommendation, the *Notice to Mediate* (Family) *Regulation* differs from other mandatory mediation regulations in requiring that the parties each meet separately with the mediator in order to undertake a pre-mediation meeting where the mediator is required to screen he case for power imbalances, domestic violence and abuse and assess whether mediation is appropriate in the circumstances. The mediator is also to discuss with each participant the importance of independent legal advice and endeavour to have the participant consider procedural matters applicable to the case: s. 12-13 of the *Notice to Mediate* (Family) *Regulation*.

The DRO was also cognizant of the interplay between a mandatory mediation and the other mandatory case resolution processes in family law cases, specifically the Judicial Case Conference ("JCC"). The DRO intended the mandatory mediation process to complement, and not interfere, with the timing and conduct of the JCC. In their paper, the DRO stated it was "confident" that the majority, possibly a substantial majority, of cases would resolve at mediation. It therefore contemplated that, if the mediation occurred before the JCC, the parties would likely not require a JCC as the case would settle.

Further, even if the case did not settle at mediation and the parties were forced to attend the JCC, the DRO nevertheless believed this was just, timely and cost-efficient. The DRO anticipated that the failed mediation would serve to, at least, focus the issues and allow the presiding judge or master at the JCC to more effectively comment on the possible outcome of the case, in a way that a mediator cannot. It would also allow the JCC to more effectively focus on case-management should a trial be necessary.

In respect of the issue of mediation affordability, the DRO paper noted that the other mandatory mediation regulations in B.C. stated that mediation costs were to be equally shared by the parties, subject to any agreement otherwise. It was also noted that in some jurisdictions, mediation services were provided at no cost to the parties. However, in the result, the DRO recommended that the family law mandatory mediation regulations provide for a presumptive equal sharing of fees, on consideration that mediation is likely a more economical dispute resolution mechanism than litigation. Further, even if unsuccessful, mediation would likely serve to improve the efficiency of the litigation process, in the DRO's estimation. Therefore, it was recommended that the mediation fees be shared equally, which recommendation is reflected in the present Regulation: s. 30 of the *Notice to Mediate* (Family) *Regulation*.

Finally, the DRO discussed concerns raised by the CBABC's Equality Committee regarding the importance of independent legal advice in the context of mediations. The Equality Committee recommended that the victim of an abusive relationship should only proceed with mediation with legal counsel present, who could ensure an appropriate, safe and fair forum for their client. However, practitioners (both lawyers and mediators) who were consulted in respect of the Regulation were not in favor of any restrictions requiring the process to be limited to represented

litigants, particularly given the increasing number of unrepresented litigants in the Supreme Court. The DRO noted that concerns about unrepresented parties could be addressed, to some extent, during screening. At present there is no requirement that a party be represented in mediation under the *Notice to Mediate* (Family) *Regulation*.

Statutory Framework

Section 2 of the *Notice to Mediate* (Family) *Regulation* (hereafter referred to as the "Regulation") states that the Regulation applies to family law proceedings (defined as any proceeding in which relief is sought under the *Family Law Act* [SBC 2011] Chapter 25 *("FLA")* or *Divorce Act ("DA")*: s.1).

Section 2 of the Regulation states that any party to a family law proceeding may initiate mediation in that proceeding by serving a notice to mediate (Form 1) on every other party in the proceeding. Section 4 provides that no more than one mediation may be initiated under the Regulation.

"Mediation" is defined in s. 1 as "a collaborative process in which two or more parties meet and attempt, with the assistance of a mediator, to resolve issues in dispute between them."

"Mediation session" is defined as "means a meeting between two or more parties to a family law proceeding during which they are engaged in mediation": s. 1.

A notice to mediate may be served no earlier than 90 days after the filing of the first response to family claim in the family law case and no later than 90 days before the date of trial: s. 5.

Under s. 6, both parties have an obligation to appoint a mediator within 14 days of service of the notice to mediate upon all parties. Failing a mutual appointment, sections 7 and 8 provide a detailed process by which the "roster organization" (Mediate B.C.) must select a mediator for the parties, as well as considerations which apply upon such a selection.

As discussed, the mediator is required to hold a pre-mediation session separately with each party, a requirement that is unique to the Regulation. During the pre-mediation session, there are prescribed topics to be canvassed between the mediator and the party: ss. 12-13.

At the pre-mediation session, the parties are required to review and sign the agreement to mediate with the mediator, which document is to include the following prescribed information (ss. 13-14):

1. information about the mediation process;

2. information about the fees and disbursements the mediator will charge; and

3. a statement that the mediator has discussed with the participants that it is important for them to obtain independent legal advice.

The parties are required to attend the pre-mediation session and sign the agreement to mediate before the mediation session: s. 16.

Certain exemptions apply to relieve parties of the obligation to mediate. Section 22 provides that the parties are not required to attend a pre-mediation meeting or a mediation session if all of the parties to the proceeding have already been involved in a mediation session in relation to the matters in issue in that proceeding. The section specifies that a JCC is not a mediation session for the purposes of the exemption.

Section 23 further provides that parties are exempted from attending a pre-mediation meeting or a mediation session if there are protection orders (including peace bonds) in place, if the mediator advises the participants that mediation is not appropriate or that the mediation process will not be productive, if the parties agree not to mediate, or if the parties are exempted by court order. Interestingly, where there is a protection order in place, the Regulation states that all parties are exempted from the requirement to mediate, rather than just the protected party.

A mediation session must be scheduled within 60 days after the appointment of the mediator but not later than 14 days before the date of trial, unless otherwise agreed or ordered: s. 24.

Section 25 provides judicial supervision of the mediation processes. It allows the court to make the following orders, on application:

1. the mediation proceed on the terms and conditions, if any, and at the time or times, that the court considers appropriate;

2. the mediation be adjourned to a later date on the terms and conditions that the court considers appropriate; or

3. one or more of the parties is exempt from participating in the mediation process if, in the court's opinion, it is impracticable or materially unfair to require the party to attend.

   [emphasis added]

In deferring mediation, a court is required to have regard to all of the circumstances including (s. 26):

1. whether the mediation will be more likely to succeed if it is postponed to allow the participants to acquire more information; and

2. any other circumstances the court considers appropriate.

At least 14 days before the mediation session is to be held in relation to a proceeding, each participant must deliver to the mediator a statement of facts and issues in Form 2 setting out the factual and legal basis for the participant's claim or opposition to the relief sought in the proceeding: s. 27.

As discussed, the fees of the mediation are to be equally shared. However, the Regulation permits an award to subsequently be made to a party of that party’s share of the fees incurred in respect of the mediation: ss. 30-32.

A mediation or a pre-mediation meeting may be conducted in any manner the mediator feels is appropriate "to assist the participants to reach a resolution that is timely, fair and cost-effective": s. 33.

In the event a party defaults with respect to an obligation under the Regulation without reasonable excuse, a party may make application to the court for any of the following relief (s. 35(1)):

(a) adjourn the application and make an order, on any terms the court considers appropriate, that

 i. a pre-mediation meeting occur, or

 ii. a mediation session occur;

(b) adjourn the application and make an order that a participant attend one or both of a pre-mediation meeting and a mediation session;

(c) adjourn the application and make an order that a participant deliver a Statement of Facts and Issues to the mediator;

(d) stay the action until the participant in respect of whom the allegation is filed attends one or both of a pre-mediation meeting and a mediation session;

(e) make any order it considers appropriate with respect to costs.

Further, a court may consider defaults in making any costs order, whether such an order is made on the final disposition of the case or otherwise: s. 36.

If the court considers that public disclosure of the default allegation, and related affidavits, would be a hardship on a participant, the court may order that the allegation of default be sealed along with the related affidavits and make any other orders appropriate to preserve the documents' confidentiality: s. 35(2).

Section 37-38 of the Regulation address confidentiality and compellability. Section 37(1) restricts the disclosure in any court proceeding of the following documents, subject to certain exceptions (discussed below):

(a) any information acquired during or in connection with a pre-mediation meeting or a mediation session;

(b) any opinion disclosed in anticipation of, during or in connection with a pre-mediation meeting or a mediation session; and

(c) any document, offer or admission made in anticipation of, during or in connection with a pre-mediation meeting or a mediation session.

Express exceptions to the confidentiality rule in 37(1) include:

1. any information, opinion, document, offer or admission that all of the participants agree in writing may be disclosed: s. 37(2)(a);

2. any fee declaration, agreement to mediate or settlement document made in anticipation of, during or in connection with a pre-mediation meeting or a mediation session: s. 37(2)(b);

3. any information that does not identify the participants or the action and that is disclosed for research or statistical purposes only: s. 37(2)(c);

4. any act or failure to act of another participant that is alleged, for the purpose of section 34, to constitute a failure to comply with the Regulation: s. 37(3); and

5. any information or records produced in the course of the mediation that are otherwise producible or compellable in a proceeding: s. 38.

Mediation is concluded only when all issues are resolved or a mediation session has completed with no agreement to continue: s. 39.

FAMILY LAW ACT

It is possible that the Regulation will be the most commonly used tool of a family law litigant who wishes to engage in mediation with a reluctant party. However, tools also exist under the *FLA* which will assist litigants and courts to ensure the just, timely and cost-effective resolution of family law cases.

Legislative Background

There is no shortage of commentary and authority supporting that the legislative intent behind the *FLA* was the promotion of out-of-court settlement of family law cases. The authors do not intend to review such pronouncements. The FLAG is no doubt familiar with, for instance, the "White Paper on *Family Relations Act* Reform" (the "White Paper"), which was produced by the Attorney General's office to elicit input and discussion into reforming the *Family Relations Act.* Key themes of reform identified in the White Paper include: "not making court a presumptive starting point," and providing a "broader range of dispute resolution options."

Similarly, the legislative debates leading up to the enactment of the *FLA* are replete with discussions between members of parliament regarding the advisability of alternative dispute resolution in respect of family law issues, including mediation.

Statutory Framework

<u>Resolution Out of Court Preferred</u>

Part 2 Division 1 of the *FLA* is entitled, "Resolution Out of Court Preferred." It states at s. 4:

> **4** The purposes of this Part are as follows:

> (a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;
>
> (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;
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> (c) to encourage parents and guardians to
>
> > (i) resolve conflict other than through court intervention, and
> >
> > (ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.
>
> [emphasis added]

According to s. 1, "family dispute resolution" includes mediation.

S. 6 provides that 2 or more persons may make agreements:

1. to resolve a family law dispute; or
2. respecting a matter that may be the subject of a family law dispute in the future, the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, or the implementation of an agreement or order.

S. 6 further provides that an agreement respecting a family law dispute is binding on the parties whether or not there is consideration, the agreement has been made with the involvement of a family dispute resolution professional, or the agreement is filed with a court.

Court-Ordered Mediation

There are several provisions in the *FLA* which a court may avail itself of in order to compel parties to attend mediation.

S. 61(2) provides that, on application, if a court is satisfied that an applicant has been wrongfully denied parenting time or contact with a child by a child's guardian, the court on application may order, amongst many other things, that the parties participate in family dispute resolution.

S. 61(3) permits a court to allocate the costs of family dispute resolution among the parties. S. 63 also provides authority to the court or order mediation and allocate costs where a person with contact repeatedly fails to exercise that contact.

Additionally, there is authority under s. 89 of the *FLA* for the court to make interim distributions of property for the purposes of funding family dispute resolution, or obtaining evidence to be used in the course of family dispute resolution.

Section 222 of the *FLA* provides this court with jurisdiction to make a variety of conduct orders for one of the following purposes:

(a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;

(b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;

(c) to prevent misuse of the court process;

(d) to facilitate arrangements pending final determination of a family law dispute.

Under s. 223 of the *FLA,* the court has authority to dismiss all or part of a party's application or to adjourn a proceeding while the parties attempt to resolve one or more issues before the court or a party complies with an order made under Division. There is also authority under s. 223 for the court to order that all further applications be heard by the presiding judge or master.

Under s. 224, the court has authority to compel parties to participate in family dispute resolution and to allocate the fees relating to family dispute resolution.

Further, s. 227 provides broad discretion to a court to "do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222."

In short there is discretion for the court under the *FLA* to make orders compelling reluctant parties to attend mediation.

Litigants considering utilizing the *FLA* to compel mediation should consider relying on the applicable portions of Part 10 Division 5 ("Conduct Orders"; sections 222-228) so that the court may supervise the implementation of any order to mediate made under that Division, including by making enforcement orders under s. 228 ("Enforcing Orders Respecting Conduct"). This supervisory jurisdiction may mirror, or be more comprehensive than, the supervisory powers granted to courts under the Regulations and reviewed above.

CASELAW

If, after careful consideration of the circumstances of a case, the lawyer is of the opinion that:

(a) mediation would be a useful mode of family dispute resolution in a case; and

(b) the disclosure in the case, and the narrowing or clarification of issues, has progressed to the extent necessary to facilitate mediation, or, the lawyer anticipates that the case will/can be ready for mediation at a date certain,

then it may be appropriate to recommend mediation to the client and, if instructions are received, to canvass mediation with the other side.

In the event that the other party is reluctant, then the lawyer may consider the application of the *Notice to Mediate* (Family) *Regulation*, and, with instructions, take the required steps under that Regulation to compel the participation of the other party.

However, in the event that the case falls into one of the exemptions set out under the Regulation, or the other party applies to be exempted, it may be necessary to seek an order that the parties participate in mediation, either under the Regulation or the *FLA*. It may also be necessary to bring an application for directions in respect of the mediation to ensure the efficacy of the mediation process, if the case is one involving unique circumstances.

There have been relatively few cases in B.C. where mandatory mediation has been at issue, perhaps a testament to the efficacy of the mandatory mediation regulations. However, the reported decisions appear to accord with the stated legislative trend of encouraging of out of court resolution of disputes.

Executive Inn Inc. v. Tan, **2008 BCSC 953; aff'd 2008 BCCA 93**

This was an action commenced in British Columbia involving a dispute over the management of a strata hotel. Most of the defendant lot owners were residents of Singapore. In chambers, Madam Justice Dickson heard an application by the plaintiffs for a declaration that the Notices to Mediate served in the proceeding (under the *Notice to Mediate* (General) *Regulation* B.C. Reg. 4/2001 (the "General Regulation")) were valid, as well as a cross application by the defendants seeking an exemption from the requirements of the General Regulation.

In the result, the application was granted and the cross application was dismissed. Dickson J. reviewed some of the procedural history leading up to the application. She noted that there had been prior attempts at settlement which did not succeed. However, she noted that the Notices of Mediate at issue in the application were the first to be delivered in the proceedings. She noted that the prior settlement attempts occurred at a significantly earlier stage in the litigation process, that a professional mediator was not involved at that time and that many of the individual defendants were not personally engaged in the prior settlement discussions: para 8.

Following the delivery of the Notices to Mediate, counsel for the plaintiffs and counsel for the defendants each submitted lists of preferred mediators to the roster organization, and eventually Mr. George Sloan was selected as mediator: para 10.

The issues to be determined were summarized by Dickson J. as follows (para 13):

(a) Were the Notices to Mediate delivered within the time limits prescribed in the General Regulation? If not, should the court exercise its discretion and permit the delivery of the Notices to Mediate outside of the prescribed time limits?

(b) If mediation under the General Regulation is to proceed, what order should be made regarding its conduct and, in particular, its location and who must personally attend?

Dickson J. provided some of the legislative history leading to the passage of the General Regulation, and noted that the mandatory mediation regulations in B.C. have proven effective:

> [14] The Notice to Mediate process applies to most, but not all, non−family civil actions commenced in the Supreme Court of British Columbia. It enables any party to compel the others to attend a mandatory mediation session. Since its introduction in 1998 the process and its efficacy have been the subject of considerable consultation and evaluation. Those efforts led to

> passage of the Regulation, which came into force on February 15, 2001: BC Dispute Resolution Office Bulletin, June 2002.
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> [15] In some jurisdictions mandatory mediation takes the form of a blanket mechanism to compel all actions into mediation. In British Columbia, however, the mandatory mediation process is party driven. Despite this distinction, research shows that settlement rates in all forms of mediation are high, averaging 75 percent. Settlement rates and party satisfaction do not appear to be significantly different between voluntary and mandatory mediation: see Strategic Use of the Notice to Mediate Process by M. Jerry McHale, Q.C., Continuing Legal Education Civil Litigation Conference, February 2003.
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> [emphasis added]

In paragraphs 16-20, Dickson J. proceeded to cover the statutory framework and provisions of the General Regulations in depth.

With respect to the first issue, the plaintiffs acknowledged that the Notices to Mediate were technically delivered out of time, but submitted that strict compliance with the time limits was "unnecessary to achieve the goals of the mandatory mediation scheme": para 21. The plaintiffs further submitted that, "the court has a broad discretion, pursuant to the [General] Regulation, to permit delivery of the Notices to Mediate outside of the prescribed time limits and direct the conduct of the mediation in a manner appropriate to the relevant circumstances of the case": para 22. The plaintiffs argued that the case was well suited for mediation given its, "complexity, trial length, and the prospect of ongoing business relationships between the parties": para 21.

In contrast, the defendants submitted there was no discretion to permit the late delivery of Notices and, if there was discretion, then the court should decline to exercise it in the circumstances given, "there [was] no prospect of settlement and mandatory mediation would be a waste of time, effort and money": para 24.

Dickson J. undertook a statutory interpretation exercise and determined that, "failure to comply strictly with the prescribed time limit for delivery does not necessarily invalidate a Notice to Mediate": para 26. She noted that s. 5 (which is numbered identically in the Family Regulation) prescribed time limits for delivery, but also began with the preamble: "Unless the court otherwise orders."

Dickson J. set out the legal test for applications of this nature, stating, "In my view, in exercising its discretion the court should consider whether, in all of the circumstances, expansion or abridgement of the time for delivery of a Notice to Mediate would allow sufficient time for the mediation process to unfold fairly prior to trial": para 27. On a review of the circumstances, Dickson J. found that it was just to exercise her discretion in favour of the plaintiffs. She noted that while the Notices to Mediate were not delivered sufficiently in advance of the "date of trial" so as to conform with the General Regulations, there had subsequently been adjournments which moved the date of trial far enough away to satisfy the prescribed notice period at the date of the hearing: para 28.

Dickson J. also rejected the defendants' submissions regarding the likelihood of success in any mediation. She stated:

> [29] Although the defendants are pessimistic regarding the prospect of settlement and apparently hostile towards the plaintiffs, there is, in my view, good reason for a mediation to proceed. As noted, settlement rates in all forms of mediation, including mandatory mediation, are high. Pessimism and hostility on the part of parties compelled to attend a mediation are often predictable and, in and of themselves, may not justify exemption from the mandatory mediation process, especially in a commercial case of this kind.
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> [30] In this case, despite the defendants' pessimism and hostility, I am satisfied that mediation holds a reasonable prospect of advancing this complex litigation and contributing to the potential savings of significant fees, expenses and judicial resources, which is in the best interests of all concerned. This is particularly so given the relatively advanced stage of the litigation and the fact that a professional mediator will, for the first time, be involved. In my opinion, it would not be materially impracticable or unfair to require the defendants to attend.
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> [Emphasis added]

In paragraphs 37-41 Dickson J. addressed an issue related to the location of the mediation. The defendants submitted that the General Regulation contemplated mediations taking place in B.C., and that non-residents would be permitted to attend such mediations by representative. Dickson J. accepted that this was the presumed state of affairs under the General Regulation, but she did not accept that the court was limited in its discretion to order that the mediation proceed on terms and in the manner it deemed appropriate. She found that the provisions of the General Regulation were to be read together in a purposive fashion, taking into account the General Regulation's underlying goals:

> [38] The goals of the Regulation include contributing to the prospect of resolving litigation by means of mandatory mediation in a manner that is timely, cost-effective, and fair in the circumstances of the case. In some cases, an out-of-province mediation attended personally by all parties may be required in order to achieve this goal. In my view, given the Regulation's goals and the breadth of its language, the discretion conferred by s. 23(a) is sufficiently broad for such an order to be made.
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> [39] In this case, I am satisfied that it is appropriate for the Mediation to be conducted in Singapore and for all defendants who are natural persons and not legally or otherwise disabled to be required to attend. The vast majority of the defendants reside in or near Singapore and neighbouring Malaysia and, as evidenced by their position regarding discovery venue, it would be less expensive and more convenient for them to attend a mediation in Singapore, rather than in Vancouver, if their personal participation is required. That is particularly true in certain cases, given the plaintiffs' counsel's offer to remain to conduct the outstanding examinations for discovery if the Mediation in Singapore does not succeed.
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> [40] Taking into account the history of this matter, including the failure of previous settlement attempts that did not involve personal contact between all of the parties or the assistance of a professional mediator, in my view the prospect of success of the Mediation will be significantly enhanced by the defendants' personal engagement and participation.
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> [41] Taking into account the trial date of May 12, 2008, I order that the Mediation proceed by no later than March 14, 2008, on a date agreed by all parties or ordered by the court. I also grant leave to apply for directions in the event that they are required.

[emphasis added]

The defendants subsequently appealed (*Executive Inn Inc. v. Tan*, 2008 BCCA 93), but were unsuccessful.

Hall J.A., writing for the Court of Appeal, cited passages from the affidavit of one of the affiants in the case which set out the background of the interactions between the parties and which supported that any previous interactions were disjointed and difficult, due to the inability of the parties to have face-to-face communications with one another regarding their interests: para 5. Hall J.A. went on to cite at length from the reasons of Dickson J.

Hall J.A. proceeded to set out the argument of the appellants. The appellants submitted that the proper construction of the General Regulation led to the conclusion that the orders made at first instance were invalid, because the court could not order that mediation occur outside British Columbia: para 8. The appellants further argued that while the court was provided some discretion under s. 23 of the General Regulation to provide directions, this discretion could not reasonably extend as far as ordering that mediation take place in Singapore and ordering that parties not resident in Singapore had attend in person: para 9.

The respondents on the other hand submitted that the order was valid, and that s. 23 should be interpreted as a type of general discretionary or override provision. Interpreted as a whole, they submitted that a judge could order parties to attend in person whether mediation is held in British Columbia or elsewhere and that s. 23 should be seen as endowing the court with a broad jurisdiction to make any necessary orders to ensure that a mediation process is efficacious: para 10.

The court rejected the submissions of the appellants. It accepted that in the general course, the provisions of the General Regulation regarding location and attendance would be applicable upon delivery of a Notice to Mediate. However, s. 23 applied in situations where a court has been requested to intervene and give directions. Hall J.A. acknowledged that the discretion under s. 23(a) seemed to be very broadly couched: para 14. Hall J.A. continued on to note the benefits of mediation generally, remarking that, "mediation processes have become more common and utilized, presumably to attempt to resolve litigious proceedings short of a full trial process. It is perceived that access to justice can thus be enhanced and the costs of litigation ameliorated by this and similar methodologies": para 15.

Hall J.A. concluded at para 17:

> It is important to note that mediation undertaken pursuant to the Regulation is in the context of ongoing litigation. <u>The mediation is an adjunct of a proceeding for which the court is responsible</u>. I consider that s. 23 was enacted to ensure that a court in an appropriate case would be endowed with a broad power to make orders to ensure the efficacy of the mediation process. <u>In the majority of cases, I would expect that the mediation process would proceed, as most do, without the necessity for any intervention by the court. However, in cases where the intervention of the court is thought requisite, s. 23 endows the court with a broad jurisdiction to make the orders necessary to ensure the mediation process is both effective and fair</u>. I consider s. 23 might be described as in the nature of a broad discretionary provision, designed to be utilized only when necessary to assist in the mediation process. As I noted earlier, I should think the large majority of mediation

> proceedings would carry forward without the necessity of court intervention. I do not consider that in making the order she did, the chambers judge exceeded her jurisdiction. I would sustain the order and dismiss this appeal.
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> [emphasis added]

The *Executive Inn* cases are potentially useful ones for any party seeking orders related to mediation, including in the family law context. The judicial recognition of the efficacy of mediation may prove compelling, and may assist a court that is considering whether or not to exercise its own discretion in respect of mediation.

The defendant's argument that mediation was pointless given the level of hostility between the parties and their disinterest in settlement appeared compelling on its face. Such arguments are predictable and could be anticipated in the family law context as well. Dickson J.'s reasons rejecting that argument are therefore potentially useful in family law cases involving high conflict but where a litigant believes that mediation with the assistance of a qualified and experienced mediator is a just and cost-efficient alternative to full litigation of the issues. See also *Serban v. Serban*, 2016 BCSC 2419 at paras 54-57.

Further, the discussion at both levels of court in respect of the purpose and intention of the General Regulation may be persuasive in family law cases where the Regulation or the *FLA* provisions set out above dealing with mediation are at issue.

***Matsqui First Nation v. Canada (Attorney General)*, 2015 BCSC 1409**

This was a case in which the plaintiff first nation alleged that the Department of Fisheries and Oceans infringed its domestic salmon fishing right. Trial was set for 30 days. Remedies sought in the suit included a declaration that the Matsqui have an aboriginal right to fish for salmon for domestic purposes within a certain specified area along the Fraser River and a declaration that the decisions by the Crown to deny licences and not to permit the Matsqui to fish at certain times during the 2010 fishing season constituted an unjustifiable infringement of their aboriginal rights.

The plaintiff subsequently served upon the crown a notice to mediate under the General Regulation, in response to which the Crown brought an application seeking an exemption from the obligation to mediate. The Crown argued that the case raised important issues that required resolution in court and which therefore made mediation impracticable. Further, the Crown advised that, apart from the "need" for a judicial precedent in the case, it did not have the authority to resolve claims "involving the definition of a constitutional right or the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." The Crown advised that any such claims for declaratory relief required approval at the highest levels of government, and that such authority was non-existent given the federal elections then underway: para 10.

After setting out the parties' positions, Mr. Justice Kent went on to consider the legal test for exemption from mediation. It is worth quoting at length from his judgment in that regard:

[11] British Columbia appears to be unique among the provinces in imposing the standard of "material impracticability or unfairness" as the basis for exempting parties from mandatory mediation. The standard has received very little judicial consideration. In *Executive Inn Inc. v Tan*, 2008 BCCA 93 (CanLII), it was observed that "s. 23, was enacted to ensure that a court in an appropriate case would be endowed with a broad power to make orders to ensure the efficacy of the mediation process." In that case, the court upheld the lower court's rejection of an exemption application based on a combination of challenging international logistics, deep pessimism as to outcome, and outright hostility between the parties. In the lower court decision, indexed at 2008 BCSC 953 (CanLII), the court had observed, "… settlement rates in all forms of mediation, including mandatory mediation, are high. Pessimism and hostility on the part of parties compelled to attend a mediation are often predictable and, in and of themselves, may not justify exemption from the mandatory mediation process ...."

[12] In Alberta, R. 4.16 (1) of that province's Rules of Court imposes a "responsibility" on parties to litigation to undertake "good faith participation" in alternative dispute resolution processes. The rule allows the court to exempt parties from such alternative dispute resolution only in certain prescribed circumstances, including:

- prior unsuccessful attempts at alternative dispute resolution;
- unlikelihood of settlement, having regard to the nature of the claim;
- likely futility of the process;
- the necessity or desirability of a court decision; or
- other compelling reasons.

[13] The Alberta courts have observed with respect to these rules that:

- the party seeking an exemption from mediation has the onus of establishing that the exemption should be granted; and
- the threshold for obtaining an exemption is high and the rule is to be used sparingly.

(See *IBM Canada Limited v. Kossovan*, 2011 ABQB 621 (CanLII) at paras. 29 and 31.)

[14] Arguably, all of the grounds articulated in the Alberta rule are subsumed into the BC exemption standard of "material impracticability". Crown counsel also refers to the provincial government's website which hosts the Regulation and which itself sets out various circumstances making mandatory mediation inappropriate, namely:

- a legal precedent is needed to govern similar cases in the future;
- an issue of law, public policy, or interpretation needs to be clarified on the record;
- public access or participation in the decisional resolution is desirable; people who are not parties to the dispute might be prejudiced by the outcome;
- the dispute is over a decision where a statutory decision-maker had no discretion, i.e., no negotiable issue;

> - the constitutional validity of an act or law is challenged;
> - the case is genuinely frivolous or opportunistic;
> - parties acting in bad faith; or
> - there is a fear of violence between the parties and the mediation would not be safe.
>
> [15] Here the Crown relies on the first three bulleted grounds.
>
> [emphasis added]

After setting out the test for exemption, Mr. Justice Kent endorsed (at length) comments from the Alberta Queen's Bench (*IBM Canada Limited v. Kossovan*, 2011 ABQB 621) highlighting the benefits of the mediation process and the surprising success with which qualified and experienced mediators are often able to assist adverse parties to reach compromises that all parties can live with, allowing them to move forward: para 16.

Mr. Justice Kent concluded his judgment with an articulation of his own experiences and belief in the utility of the mediation process. He stated:

> [17] I agree that settlement of the claims in this case may confront formidable obstacles. However, after participating in dozens of mediations in more than 30 years of practice at the bar before joining the bench, I agree with and endorse the observations made in the *Kossovan* case.
>
> [18] The beauty of mediation lies in its confidentiality and flexibility. With the assistance of a skilled mediator, the parties are free to speak to each other directly and to frankly express their concerns and interests without fear of prejudicing the litigation should the matter not settle. That is to be encouraged. Empathy and apology can and often does play a powerful role. Seemingly intractable positions become less so. The legal issues framed in the pleadings frequently do not reflect the real interests or concerns motivating the litigants. Creative remedies not available to the court can be forged to bridge differences. Important relationships can be repaired.
>
> [19] In this case, the Matsqui seek declaratory relief respecting a perceived aboriginal right protected and preserved by the Constitution. This is not the sort of remedy that is readily available in a mediation process. They undoubtedly know this, yet they have initiated the mediation nonetheless. Presumably they believe there is some basis for settling the claim available. It may have little to do with the formal legal relief sought in the litigation. One cannot help but ask what do the parties have to lose by confidentially exchanging and explaining perspectives and interests? If nothing else, perhaps some accommodations and efficiencies may be reached regarding evidence or other trial process that may reduce mutual inconvenience and cost. At best, some sort of creative resolution in principle may emerge, albeit subject to later ratification by superiors if necessary. At worst, the case will simply proceed to trial in a couple months' time with an interim "loss" of one or two days' effort.
>
> [emphasis added]

Mr. Justice Kent's decision in *Matsqui* is a powerful judicial endorsement of the utility of the mediation process, and may be a useful authority to any court considering whether or not to facilitate mediation in a particular case.

The judgment may also offer guidance as to the legal test to be applied on an application to be exempted from the mandatory mediation provisions of the Regulation.

***Kertcher v Kertcher*, 2016 BCSC 1718**

In this case, Mr. Justice Ball heard an application seeking the sale of two properties, the division of the proceeds, the disclosure of financial information and penalties for non-disclosure.

The parties previously attended a mediation session with Ms. Carol Hickman, Q.C., by agreement. At that session (and with the assistance and recommendations of Ms. Hickman), the parties agreed to make further financial disclosure to one another in anticipation of attending a second mediation session so as to reach a comprehensive settlement. As time progressed, the financial disclosure remained unproduced. It was in these circumstances that the applicant brought the application at bar.

Ball J. stated:

> [7] Mediation and other forms of alternate dispute resolution are greatly encouraged in family matters because disposition of family disputes often occurs more quickly with less cost to the parties and to the justice system as a whole. Further, because parties fashion solutions to the problems they face with the help of an experienced mediator, parties are more satisfied with the solutions they reach. As discussed below, the FLA (section 4) specifically sets out principles in support of alternate dispute resolution in family matters.

Ball J. declined to make any substantive orders on the application, except for the sale of one of the two properties because that was agreed to by both parties. A prohibitive factor stressed by Ball J. in the case was the incomplete state of the evidence, which Ball J. noted was the fault of both parties as neither had made the necessary and required disclosure in the case: paras 18, 27-35.

As such, Ball J. made extensive orders respecting disclosure and mediation, pursuant to s. 224(1)(a) of the *FLA*, with a view to resolving the issues in the case through the use of the parties' previous mediator, Ms. Hickman. The orders made are set out in the judgment and may be a useful for future courts attempting to fashion orders of a similar nature after deciding to exercise their discretion under s. 224 of the *FLA* (para 37):

> (a) The parties shall complete the disclosure of their financial records as agreed before the mediator, Carol Hickman, Q.C., and, for greater particularity, the petitioner shall within ninety days from the date hereof, complete the books and financial records of the company from 2010 to 2016 in accordance with generally accepted accounting principles, accompanied by copies of complete banking records of the company, and file all outstanding personal and corporate income tax returns required to date with the Canada Revenue Agency. Within seven days of filing of the tax returns aforesaid, the petitioner shall provide copies of the same documents to Ms. Hickman

in accordance with the mediation retainer agreement, and within the same time frame provide copies of the said documents to the respondent.

(b) The petitioner shall also provide to Ms. Hickman and the respondent, within the said ninety days, copies of documents relating to the purchase of recreational real estate in Washington State.

(c) The respondent shall provide to Ms. Hickman, within ninety days hereof, a statement commencing on January 1, 2015, setting out any income or benefits and related expenses including goods and services received from any activity, including but not limited to blogging, and international homestay students, together with any supporting documents in the possession of the respondent. The respondent shall at the same time, provide a copy of the said documents to the petitioner.

(d) The respondent shall also provide to Ms. Hickman a statement, within ninety days hereof, detailing all of the payments of family debt made by the respondent since separation, including payments on the mortgage, property taxes, insurance premiums, and credit card debt. I note that the family credit card debt in the approximate amount of $20,000 has been paid solely by the respondent since separation without contribution from the petitioner. The respondent shall at the same time, provide a copy of the said documents to the petitioner.

(e) Within seven days after the delivery of all their respective documents to Ms. Hickman, both parties shall schedule 2 one-day mediation sessions ("the mediation") with Ms. Hickman on the earliest dates available for the parties and Ms. Hickman. The purpose of these mediation sessions shall be to address any issues in dispute between the parties still outstanding in this file including but not limited to the sale of the home and the timing of the purchase thereof by the respondent. The sale of the rental property shall be dealt with below and should no longer be of concern except as to the apportionment of the proceeds of sale of the rental property, which shall be addressed in the mediation.

(f) In addition to the documents aforesaid, both parties, based on the completed disclosure of their respective financial information, shall prepare and file with the Court updated Form F-8 Financial Statements together with all required attachments. Filing of Form F-8s by the parties shall occur within 21 days after delivery of the documents aforesaid to Ms. Hickman.

(g) If either of the parties fails to comply with the time periods noted above, without an acceptable excuse, the court may after such failure entertain an application pursuant to section 213 of the FLA to impose a fine of up to $5,000.

(h) A copy of this Order shall be provided by the Supreme Court Registry to Carol Hickman, Q.C., forthwith after entry.

Mr. Justice Ball seized himself of the issue of the division of family property and warned the parties that failure to comply with the disclosure provisions in his order may result in fines should future hearings be required: paras 35-37.

This case is useful as it is the only reported decision the authors have been able to locate (using CanLII) which has considered the discretion of the court under s. 224 to compel reluctant parties to attend mediation. It is also a useful case for parties who are struggling to obtain adequate disclosure upon which to negotiate a settlement.

***C.C.R. v. T.A.R.*, 2014 BCSC 620**

This is a cautionary tale for litigants considering attending mediation without legal counsel, or participating in mediation with an unrepresented party.

In this case the mother (defendant) served the father (plaintiff) with a notice to mediate under the Regulation. The facts of the case and a summary of the legal dispute were succinctly summarized by Mr. Justice Punnett thus:

> [2] The most contentious issue on this application deals with the relationship between the mediation process and the enforceability of any subsequent agreement. Put briefly, plaintiff's counsel did not attend the mediation session, but had a clause inserted making the agreement subject to his review and confirmation. After he reviewed it and provided his client with advice, the plaintiff refused to confirm the agreement. The defendant says that this behaviour undermined the statutory policy in favour of out-of-court resolution and that as such the "subject to review" clause should be ignored and the agreement enforced. The plaintiff, on the other hand, says that his right to independent legal advice prior to completing any agreement must be respected. He says that as there was no confirmation, there is no binding agreement.

Mr. Justice Punnett provided further details regarding the sequence of events leading up to mediation. After a mediator was appointed by the roster organization under the Regulation, counsel for the mother asked counsel for the father to confirm he and his client would attend the mediation. Counsel to the father responded saying, "I forwarded your letter to my client, with a recommendation that he call the mediator … I do not attend mediations." Counsel for the father eventually confirmed that his client would attend the mediation.

Counsel for the mother requested that the father attend mediation with his last three tax returns and notices of assessment, which the father failed to bring. At the conclusion of the mediation the parties executed the minutes of settlement ("Minutes") that was the subject of the application. The Minutes purported to resolve all outstanding issues between the parties, with the exception of child support. The defendant was content with the Minutes and sought their enforcement. However, the Minutes included the following provision: "This agreement is subject to [the plaintiff] receiving legal advice and Russell S. Tretiak [defendant's counsel] receiving confirmation of this agreement by Friday, June 28, 2013 at 2:00 p.m."

The plaintiff subsequently received legal advice and did not confirm the Minutes.

Punnett J. set out the parties' respective positions on the application. The plaintiff stated that the Minutes were not binding based on a plain reading of the clause in question. The plaintiff also addressed the defendant's position regarding policy considerations, saying that the clause in question reflected his right to receive independent legal advice prior to finalizing any agreement. Interestingly, the plaintiff stated that he was still amenable to the enforcement of the division of property clauses in the Minutes, but not the clauses regarding parenting time. He stated that the two issues are not to be linked: paras 24-27.

The defendant was understandably displeased with the plaintiff's position. She stated that he, "'chose to evade the mandatory mediation process' by attending [mediation] without his counsel and requiring the insertion of para. 26": para 28. The defendant relied on the *FLA* provisions supporting out of court dispute resolution of family law cases and submitted that permitting the clause in question to operate in the circumstances undermined the effectiveness of the mediation process. She also stated that she was not aware before the mediation that the plaintiff would insist on insertion of the clause in question, and had she been aware she would have taken alternative steps, such as applying to court under s. 25 for directions. The defendant disagreed with the enforcement of the property issues to the exclusion of the parenting issues and took the position that the Minutes either stood or fell as a whole.

Punnett J. focused his reasons on the plain language of the clause. He found that, "What occurred in this instance is not contrary to the *FLA*, the Rules or the Regulation. The Agreement was clearly made subject to legal advice and confirmation of acceptance": para 38. Punnett J. was also not persuaded that it was against public policy to hold the parties to the plain language of the Minutes, which language facilitated the plaintiff's receipt of independent legal advice prior to the finalization of the settlement: para 39.

Punnett J. made the following remarks, which serve as a useful set of best practices for family law mediation:

> [40] That being said, the process in this case was not ideal. In the interests of avoiding similar situations in the future, <u>I intend to make a number of comments about best practices in family law mediation</u>.
>
> [41] In my view the dynamics of mediation are such that <u>attendance by counsel is to be encouraged</u>. Counsel is unlikely to send their client off to court alone; given that mediation is intended, under the FLA, to bring final resolution to the issues, counsel should treat these dispute resolution processes as equally significant. <u>The efficiency of mediation is undermined where counsel is absent from the mediation. While they can clearly give advice to their client respecting the proposed resolution, they do not have the benefit of experiencing the mediation process or seeing how the result was achieved</u>. It may be that the Regulation should require counsel attend where the parties are represented -- that would certainly have mitigated the difficulties that arose in this matter -- but that is a decision for the legislature, not the courts. However, even if Mr. MacGregor had attended the plaintiff would still be entitled to delay confirming a settlement in order to have time to fully consider it.
>
> [42] <u>If it is not possible for counsel to attend in person, every effort should be made to have counsel available by telephone</u>. If Mr. MacGregor had been available to his client for discussion throughout the process the outcome may have been different. I note, however, that under the Regulation the party who issues the notice to mediate has a large degree of control over the process. <u>As such they should attempt, where possible, to set the mediation for a date that is amenable to the other party and to counsel</u>.
>
> [43] While it is always open to a party at mediation to state that they simply cannot agree, it frustrates the purpose and increases the expense to the parties if they purport to agree and then subsequently do not. In this case the plaintiff asserted his right to legal advice in an unusual manner: he signed the agreement, but included a "subject to advice" clause in its terms. I suspect

> that the status of the Agreement would have been clearer to both parties if the plaintiff had simply withheld his signature until such time as he was able to review the settlement with his counsel.
>
> [44] Finally, parties should make their expectations and any potential conditions clear prior to the mediation process itself. This will allow the other party time to consider their own position and, if necessary, to seek directions in advance from the court.
>
> [emphasis added]

Mr. Justice Punnett agreed with the defendant that the plaintiff should not be allowed to "pick and choose" the portions of the Minutes he wished to enforce. He declined to enforce the property division provisions to the exclusion of the remainder of the Minutes.

The remarks of Mr. Justice Punnett are useful for family law practitioners who are faced with clients or opposing parties with limited financial resources and who are considering mediating without the presence of counsel.

CONCLUDING REMARKS

There is a strong legislative and judicial preference for alternative dispute resolution processes in the family law context. As with mediation, courts are exhibiting more and more deference to dispute resolution processes like parenting coordination and family law arbitration. There are significant tools available to litigants and judges who wish to pursue a mediated resolution of family law cases. The authors expect the caselaw to develop in coming years as more situations arise which are out of the "normal course" of the *Notice to Mediate* (Family) *Regulations*, and which require special guidance and directions from courts, which are tasked with the high-level supervision of this "party-driven" process.

Mediate BC Blog

Exploring Conflict Resolution

The legal consequences of a refusal to mediate

Our special guest blogger today is Brian Gibbard, experienced lawyer and mediator and a member of the Board of Directors of Mediate BC Society. He recently published an article in Briefly!, the newsletter published by the Law Courts Centre (thank you Dom) and kindly agreed to allow us to reproduce it here:

Preparing for Trial : Mediation and the Consequences of a Refusal to Mediate

In the last issue of Briefly we looked at the steps necessary to prepare your plaintiff-client for trial. One of the steps in many litigated files is mediation. Mediation may be voluntary, in which case the parties are agreed it is a good idea, or by a Notice to Mediate in which one party requires a mediation.

Whether it is voluntary or conducted under a Notice, the steps you take to prepare your client for trial are also the steps you need to take to prepare your client for mediation. There is no substitute for preparation. To achieve your goals of obtaining adequate compensation for your client and having him satisfied with the result you and the plaintiff need to be well prepared for what you will face at mediation.

What happens if one side comes to mediate and the other does not participate in a meaningful way? Some recent case law has come out from Ontario and the UK on this topic.

English courts have encouraged the use of mediation to resolve litigation and have shown a willingness to penalize parties who do not participate in mediation when invited. Parties successful at trial who refused mediation have received reduced costs which otherwise would have been ordered; similarly parties who were ordered to pay costs have had them increased as a result of a refusal to mediate.

In Dunnett v Railtrack [2002] EWCA Civ 302 the court refused to order costs to a victorious party who refused mediation.

In Halsey v Morton Keynes NHS Trust [2004] EWCA 3006 Civ 576 the English Court of Appeal set out a list of factors to take into account in determining if a party was reasonable in refusing mediation, including:

- The nature of the dispute
- The merits of the case (ie. the strength of one party's case)
- The extent of any attempts at settlement
- Whether the costs of mediation would have been disproportionately high
- Whether delay associated with mediation would have been prejudicial
- Whether the ADR process had a reasonable prospect of success

The English Court of Appeal in PGF II SA v OMFS Company 1 Limited [2013] EWCA Civ 1288 refused to order costs to the Defendant where it had unreasonably refused to mediate.

In the PGF II Sa case the Court of appeal held:

- silence in the face of an invitation to participate in ADR is on its face unreasonable;
- failure to respond to such an invitation may make a party liable for penalties in costs;
- not providing reasons for refusing to mediate leaves the other side unable to accommodate them;
- depriving a party successful in court of costs may seem harsh but should encourage participation in ADR.

Recently, the Ontario Superior Court had an opportunity to consider a similar situation. In Ross v. Bacchus, 2013 ONSC 7773 the plaintiff was awarded $248,000 in damages by a jury in a six day motor vehicle negligence case.

The defendant had offered to settle the case for $40,000 and made it clear that that was not negotiable. That offer was withdrawn before trial. The plaintiff offered to settle for $94,000 plus prejudgement interest and costs and requested mediation. The defendant countered with $30,000 plus PJI and costs. The Plaintiff countered at $79,065 and costs and PJI.

The Court said:

> *"Counsel for the defendant agreed to brief mediation at limited cost but wrote, " (the insurer) are not interested in settling this case". Mediation took place…but the defendant's insurer stood firm. I infer that it took a six-day trial with all its attendant risks for the sake of $50,000. This is a litigation strategy that the defendant could well afford, but the plaintiff could not. I infer that the insurance company conducted itself this way in the hopes of intimidating the plaintiff and deterring other plaintiffs who have meritorious cases….*
>
> *It is clear to me that the defendant's participation in mediation was a sham…*
>
> *I would award $140,000 in costs, plus $17,000 in disbursements….By reason of the refusal to mediate I augment the award by $60,000 plus HST."*

Note that the trial judge referred several times to provisions in the Ontario Insurance Act which appear to require defendants to attempt expeditious settlement and allow for consequences in costs.

Compare that case with Branco v Alliance Insurance Co. of Canada 2004 CanLII 45036 (ONSC). This was a case stemming from a motor vehicle collision in which the plaintiff recovered modest damages from the defendant. The case was defended in a number of ways including that it did not meet the Ontario "threshold question": that is, that any injury sustained was not disfiguring or resulting in permanent impairment.

The defendant did not deliver an offer to settle prior to trial, and the plaintiff sought increased costs as a result.

The trial judge said:

> *"I am not aware of any obligation on the part of an insurer to deliver an offer to settle prior to trial. In this action…it was reasonable for the defendant to proceed on the basis that it had some possibility of being successful on the "threshold motion" and that… the jury award might be negligible. It was also reasonable not to serve an offer to settle in the face of the plaintiffs' offers…"(which varied up and down considerably).*
>
> *The insurer had every right to make its own assessment of the likely jury award and conduct itself accordingly."*

What these cases do not address is the evidence required to establish them. In British Columbia, all commercial mediations are confidential, and mediators insist on the parties agreeing that the mediators are not compellable witnesses.

The evidentiary issue aside, what the writer takes from these cases is developing case law indicating that some jurisdictions are strongly encouraging the use of mediation before trial. The courts are prepared to punish parties, even when successful at trial,when they unreasonably refuse to mediate. If a party does refuse mediation, it had better be able to show a legitimate reason why.

Where participation is no more than perfunctory, litigants in these jurisdictions may face severe cost consequences.

What will happen in BC remains to be seen.

I am indebted to Barb Cornish of Singleton Urquhart for bringing most of these cases and the issues raised therein to my attention.

Brian Gibbard

Jennifer A. Cooper, Q.C.

April 5th, 2014 at 7:29 am

This is an extremely interesting development! I have been mediating in Manitoba where there is no such concept as a "Notice to Mediate" – in essence compelling parties to at least try. This seems to me to have been an important ingredient in achieving the extent of mediation which B.C. enjoys – at least in family law matters which is my area of focus. It will be of interest to see if this line of cases pushes the envelope further.
Thanks for sharing.
Jennifer

B.C. Reg. 296/2007Deposited September 24, 2007
O.C. 618/2007 effective November 1, 2007

APPENDIX "B" NOTICE TO MEDIATE REGS

Law and Equity Act

NOTICE TO MEDIATE (FAMILY) REGULATION

Note: Check the Cumulative Regulation Bulletin 2012 and 2013
for any non-consolidated amendments to this regulation that may be in effect.

[includes amendments up to B.C. Reg. 373/2012, March 18, 2013]

Definitions

1 In this regulation:

"agreement to mediate" means an agreement referred to in section 14;

"court" means the Supreme Court of British Columbia;

"date of trial" means the date set for trial in a notice of trial filed under the Supreme Court Family Rules;

"deliver" means, in relation to a delivery under this regulation,

(a) personally deliver,

(b) mail by ordinary mail to the mailing address the intended recipient has provided for such deliveries,

(c) transmit by fax to the fax number the intended recipient has provided for such deliveries, or

(d) transmit by email to the email address the intended recipient has provided for such deliveries;

"family law proceeding" means a proceeding in which relief is claimed under the Family Law Act or the Divorce Act (Canada);

"mediation" means a collaborative process in which two or more parties meet and attempt, with the assistance of a mediator, to resolve issues in dispute between them;

"mediation session" means a meeting between two or more parties to a family law proceeding during which they are engaged in mediation;

"mediator" means a neutral and impartial facilitator with no decision making power who assists parties in negotiating a mutually acceptable settlement of issues in dispute between them;

"participant" means a party to a family law proceeding who has not been exempted, under section 23 (c) or section 25 from attending the mediation session;

"pre-mediation meeting" means a meeting referred to in section 13;

"roster organization" means any body designated by the Attorney General to select mediators for the purposes of this regulation;

"serve" has the same meaning as in the Supreme Court Family Rules.

[am. B.C. Regs. 160/2010, s. 1; 66/2012, s. 1; 373/2012, s. 1.]

Application

2 This regulation applies to family law proceedings.

[en. B.C. Reg. 66/2012, s. 2.]

Initiating mediation

3 Subject to sections 2 and 4, any party to a family law proceeding may initiate mediation in that proceeding by servin Notice to Mediate (Family) in Form 1 on every other party to the proceeding.

[en. B.C. Reg. 373/2012, s. 2.]

Not more than one mediation under this regulation in any proceeding

4 Unless the court otherwise orders, not more than one mediation may be initiated under this regulation in relation to a family law proceeding.

When notice to mediate must be served

5 Unless the court otherwise orders, a Notice to Mediate may be served under section 3 no earlier than 90 days after th filing of the first response to family claim in the family law case and no later than 90 days before the date of trial.

[am. B.C. Regs. 160/2010, s. 3; 373/2012, s. 3.]

Appointment of mediator

6 The participants must jointly appoint a mutually acceptable mediator within 14 days after the Notice to Mediate has b served on all parties.

[am. B.C. Reg. 160/2010, s. 4.]

Application to roster organization

7 If the participants do not jointly appoint a mutually acceptable mediator within the time required by section 6, any participant may apply to a roster organization for an appointment of a mediator.

Roster organization's appointment procedure

8 The following procedure applies if an application to a roster organization is made under section 7:

(a) the roster organization must, within 7 days after receiving the application, communicate to all participants an identica containing at least 6 names of possible mediators;

(b) each participant must, within 7 days after receipt of the list referred to in paragraph (a),

(i) delete from the list up to 2 names to which the participant objects,

(ii) number the remaining names on the list in order of preference, and

(iii) deliver the amended list to the roster organization;

(c) if a participant does not deliver the amended list within the time referred to in paragraph (b), the participant is deem have accepted all of the names;

(d) within 7 days after the expiry of the 7 day period referred to in paragraph (b), the roster organization must select the mediator from the remaining names on the list or, if no names remain on that list, from any available mediators, whethe not the selected mediator was included on the original list provided under paragraph (a), taking into account the followin

(i) the order of preference indicated by the participants on the returned lists;

(ii) the need for the mediator to be neutral and independent;

(iii) the qualifications of the mediator;

(iv) the mediator's fees;

(v) the mediator's availability;

(vi) any other consideration likely to result in the selection of an impartial, competent and effective mediator.

Notification of mediator

9 Promptly after a roster organization selects the mediator, the roster organization must notify the participants in writin that selection.

Deemed date of appointment of mediator

10 The mediator selected by a roster organization is deemed to be appointed by the participants on the date that the n
is sent under section 9.

Replacement of appointed mediator

11 If the mediator selected by the roster organization under section 8 (d) is unable or unwilling to act as mediator, the selected mediator or any participant may so notify the roster organization and the roster organization must, within 7 day after receiving that notice, select a new mediator in accordance with section 8 (d).

Separate pre-mediation meetings must be held

12 The mediator must hold a pre-mediation meeting separately with each participant before a mediation session.

Pre-mediation meeting

13 At a pre-mediation meeting with a participant, the mediator must

(a) undertake a screening process for power imbalance, domestic violence and abuse, and assess whether mediation is appropriate in the circumstances determined from that process,

(b) discuss with the participant the importance of independent legal advice, and

(c) endeavour to have the participant consider all organizational matters relating to the mediation including the following

(i) the issues that are to be dealt with during the mediation process;

(ii) pre-mediation disclosure of documents;

(iii) exchange of documents;

(iv) obtaining and exchanging expert reports;

(v) scheduling;

(vi) review and signing of an agreement to mediate.

Agreement to mediate

14 An agreement to mediate referred to in section 13 (c) (vi) must include

(a) information about the mediation process,

(b) information about the fees and disbursements the mediator will charge, and

(c) a statement that the mediator has discussed with the participants that it is important for them to obtain independent advice.

Power of mediator to end process

15 Without limiting any other of the mediator's rights and powers in relation to the mediation process, at any time afte mediator has held a pre-mediation meeting, the mediator may end the mediation process if the mediator, in his or her sc discretion, concludes that

(a) mediation is not appropriate, or

(b) the mediation process will not be productive

and so advises the participants.

Participants must attend pre-mediation meeting and mediation session

16 Unless relieved under section 23 or 25 of the obligation to attend, each participant must

(a) attend a pre-mediation meeting,

(b) before the mediation session, sign an agreement to mediate, and

(c) attend a mediation session in relation to the proceeding.

Attendance by representative

17 Despite section 16 but subject to section 18, a participant referred to in section 16 may attend one or both of a pre-mediation meeting and a mediation session by representative if

(a) the participant is under legal disability and the representative is that participant's litigation guardian, or

(b) the participant is authorized to do so by the court on application.

Qualifications of representative

18 A representative who attends a mediation session in the place of a participant must

(a) be familiar with all of the relevant facts on which the participant, on whose behalf the representative attends, intends rely, and

(b) have full authority to settle, or have access at the earliest practicable opportunity to a person who has full authority t settle, on behalf of that participant.

Participants and representatives may be accompanied by counsel

19 A participant or representative who attends a pre-mediation meeting or a mediation session may be accompanied b counsel.

Other persons may attend with consent

20 Any other person may,

(a) with the consent of the participant with whom a pre-mediation meeting is held, attend the pre-mediation meeting, or

(b) with the consent of all the participants, attend a mediation session.

Attendance by communications medium

21 A person required or entitled to attend a pre-mediation meeting or a mediation session may attend that meeting or mediation session by telephone or other communications medium if authorized to do so by the mediator.

Exemption if previous mediation

22 (1) Parties to a family law proceeding need not attend a pre-mediation meeting or a mediation session if all of the parties to the proceeding have already been involved in a mediation session in relation to the matters in issue in that proceeding.

(2) A judicial case conference is not a mediation session for the purposes of this section.

Other exemptions

23 A party need not attend a pre-mediation meeting or a mediation session if

(a) a party has obtained against another party a protection order, including, without limitation, a protection order under section 183 of the Family Law Act or a peace bond under section 810 of the Criminal Code,

(b) the mediator advises the participants under section 15 that mediation is not appropriate or that the mediation proces not be productive,

(c) the party is exempted from participating in the mediation process under section 25, or

(d) the participants agree that the party need not participate in the mediation process and that agreement is confirmed b the mediator in writing.

[am. B.C. Reg. 373/2012, s. 4.]

Scheduling of mediation session

24 A mediation session must occur within 60 days after the appointment of the mediator but not later than 14 days bef the date of trial unless a later specified date

(a) is agreed on by all participants and that agreement is confirmed by the mediator in writing, or

(b) is ordered by the court.

Applications to court

25 On an application, the court may order that

(a) the mediation proceed on the terms and conditions, if any, and at the time or times, that the court considers appropr

(b) the mediation be adjourned to a later date on the terms and conditions that the court considers appropriate, or

(c) one or more of the parties is exempt from participating in the mediation process if, in the court's opinion, it is impracticable or materially unfair to require the party to attend.

Court may defer mediation session

26 On an application for an order referred to in section 24 (b), the court

(a) must take into account all of the circumstances, including

(i) whether the mediation will be more likely to succeed if it is postponed to allow the participants to acquire more information, and

(ii) any other circumstances the court considers appropriate, and

(b) may make any order referred to in section 25.

Pre-mediation exchange of information

27 At least 14 days before the mediation session is to be held in relation to a proceeding, each participant must deliver the mediator a Statement of Facts and Issues in Form 2 setting out the factual and legal basis for the participant's claim opposition to the relief sought in the proceeding.

Mediator must distribute statements

28 Promptly after receipt of all the Statements of Facts and Issues required to be delivered under section 27, the media must deliver each participant's statement to each of the other participants.

Fee declaration

29 The participants must complete a fee declaration in accordance with section 30, before or at the mediation session.

Form of fee declaration

30 A fee declaration under section 29 must be in Form 3 and must

(a) disclose the cost of the mediation services, and

(b) contain a declaration by the participants that the cost of the mediation will be paid

(i) equally by the participants, or

(ii) on any other specified basis agreed by the participants.

Fee declaration binding

31 A fee declaration completed under this rule is binding on the participants.

Costs may include mediation cost component

32 Despite section 31, nothing in section 30 or in the fee declaration completed under this regulation precludes there b included in the disbursements awarded to a party in the proceeding an amount to compensate the party for the share of cost of the mediation that that party paid under the declaration.

Conduct of a mediation

33 Subject to section 13, the mediator may conduct a pre-mediation meeting and the mediation in any manner he or s considers appropriate to assist the participants to reach a resolution that is timely, fair and cost-effective.

Allegation of default

34 (1) Any participant who is of the opinion that any other participant has failed to comply with a provision of this regulation may make application to the court for an order under section 35.

(2) A participant bringing an application under subsection (1) must do so in accordance with the Supreme Court Family Rules and, without limiting this, must, before making that application, serve on each of the other participants

(a) an Allegation of Default in Form 4 respecting the participant who is alleged to have failed to comply with a provision o this regulation, and

(b) any affidavits in support of the application.

[am. B.C. Regs. 160/2010, s. 5; 66/2012, s. 3.]

Effect of a default

35 (1) On an application referred to in section 34 (1), the court may do any one or more of the following unless the participant in respect of whom the Allegation of Default is filed satisfies the court that the default did not occur or that th is a reasonable excuse for the default:

(a) adjourn the application and make an order, on any terms the court considers appropriate, that

(i) a pre-mediation meeting occur, or

(ii) a mediation session occur;

(b) adjourn the application and make an order that a participant attend one or both of a pre-mediation meeting and a mediation session;

(c) adjourn the application and make an order that a participant deliver a Statement of Facts and Issues to the mediator

(d) stay the action until the participant in respect of whom the allegation is filed attends one or both of a pre-mediation meeting and a mediation session;

(e) make any order it considers appropriate with respect to costs.

(2) If the court considers that public disclosure of the Allegation of Default and related affidavits would be a hardship on participant, the court may

(a) order that the whole or any part of the Allegation of Default and related affidavits be sealed in an envelope and that r person may search the sealed documents without an order of the court, or

(b) make such other order respecting confidentiality of those documents as the court considers appropriate.

Court may consider default in ordering costs

36 The court may consider a default in making any order about costs, whether that order is made following final dispos of the proceeding or otherwise.

Confidentiality and compellability

37 (1) Subject to sections 38 and 40 and subsections (2) and (3) of this section, a person must not disclose, or be compelled to disclose, in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding,

(a) any oral or written information acquired in anticipation of, during or in connection with a pre-mediation meeting or a mediation session,

(b) any opinion disclosed in anticipation of, during or in connection with a pre-mediation meeting or a mediation session,

(c) any document, offer or admission made in anticipation of, during or in connection with a pre-mediation meeting or a mediation session.

(2) Subsection (1) does not apply

(a) in respect of any information, opinion, document, offer or admission that all of the participants agree in writing may b disclosed,

(b) to any fee declaration, agreement to mediate or settlement document made in anticipation of, during or in connectio with a pre-mediation meeting or a mediation session, or

(c) to any information that does not identify the participants or the action and that is disclosed for research or statistical purposes only.

(3) Despite subsection (1), if and only to the extent that it is necessary to do so for the purposes of section 34 or 35, a participant may disclose evidence of any act or failure to act of another participant that is alleged, for the purpose of sect 34, to constitute a failure to comply with a provision of this regulation.

No restriction on otherwise producible information

38 Nothing in this regulation precludes a person from introducing into evidence in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding any information or records produced in the course of the mediation tha otherwise producible or compellable in those proceedings.

Concluding a mediation

39 A mediation is concluded when

(a) all issues are resolved, or

(b) the mediation session is completed and there is no agreement to continue.

Certificate of Conclusion of Mediation

40 When a mediation is concluded, the mediator must deliver a Certificate of Conclusion of Mediation in Form 5 to each the participants who requests one or to their counsel.

[am. B.C. Reg. 373/2012, s. 5.]

Forms 1 to 5

Form 1

[am. B.C. Reg. 160/2010, ss. 6 and 7.]

No. ....

.... Re

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Claima

and

Responde

NOTICE TO MEDIATE

TO:

TAKE NOTICE that a mediation is to be conducted in this proceeding in accordance with the Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007.

The parties who have not been exempted from attending the mediation session must jointly appoint a mutually acceptab mediator within 14 days after service of this Notice.

Otherwise, any of those parties may apply to a designated roster organization for appointment of a mediator.

Dated at ...., British Columbia, on ...., 20.... .

....
Party [or party's soli

Party serving this Notice:

* Information about separation and divorce, including information about the mediation process, is available at the Nanair Family Justice Services Centre, 302-65 Front Street, Nanaimo BC, V9R 5H9, and online at www.ag.gov.bc.ca/justice-acce centre.

* Information about the mediation process, including matters to consider when selecting a mediator, is available online a www.mediatebc.com.

Form 2

[am. B.C. Reg. 160/2010, ss. 7 and 8.]

No. ....

.... Re

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Claima

and

Responde

STATEMENT OF FACTS AND ISSUES

PART I

[To be completed by claimant]

The following relief is sought:

PART II

[To be completed by claimant]

Basis for seeking relief:

[Set out briefly the factual and legal basis for the relief that is sought.]

PART III

[To be completed by respondent]

Basis for opposing relief:

[Set out briefly the factual and legal basis for opposing the relief that is sought.]

This mediation takes place under the Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007.

Dated at ...., British Columbia, on ...., 20.... .

....
Party [or party's soli

Form 3

[am. B.C. Reg. 160/2010, s. 7.]

No. ....

.... Re

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Claima

and

Responde

MEDIATION FEE DECLARATION

WHEREAS:

(a) we, or our representatives, are participating in a mediation under the Notice to Mediate (Family) Regulation, B.C. Re 296/2007;

(b) the mediator will be .... of ...., B.C.

(c) the cost of the mediation services will be $..................... for a completed mediation session, or will be calculated at $..................... per hour plus necessary disbursements, or will be calculated as follows:

WE WILL, subject to any agreement reached during mediation, pay the cost of the mediation services:

1. in equal shares

or

2. as follows:

WE MAKE THIS DECLARATION under section 29 of the Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007.

Dated at ...., British Columbia, on ...., 20.... .

....
Party [or party's soli

....
Party [or party's soli

Form 4

[am. B.C. Reg. 160/2010, s. 7.]

No. ....

.... Re

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Claima

and

Responde

ALLEGATION OF DEFAULT

I ALLEGE THAT .... has failed to comply with section .... of the Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007.

THE CIRCUMSTANCES OF THE DEFAULT are as follows:

[Set out the circumstances in numbered paragraphs]

Dated at ...., British Columbia, on ...., 20.... .

....
Party [or party's soli

Form 5

[am. B.C. Reg. 160/2010, s. 7.]

No. ....

.... Re

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Claima

and

Responde

CERTIFICATE OF CONCLUSION OF MEDIATION

I CERTIFY THAT I, ..., have concluded a mediation session or otherwise end the mediation process in this matter in accordance with the Notice to Mediate (Family) Regulation, B.C. Reg. 296/2007, a that

[ ] all issues are resolved,

[ ] some issues are resolved,

[ ] mediation is not appropriate and I have so advised the parties who have not been exempted from attending the medi session,

[ ] the process will not be productive and I have so advised the parties who have not been exempted from attending the mediation session,

[ ] the mediation session is completed and there is no agreement to continue.

Dated at ...., British Columbia, on ...., 20.... .

....
Med

Name: ....

Address: ....

....

[Provisions relevant to the enactment of this regulation: Law and Equity Act, R.S.B.C. 1996, c. 253, section 68]

APPENDIX "C" PART 10 DIVISION 5 OF FLA

Divisio n 5 — Orders Resp ecting Conduct

Purposes for which orders respecting conduct may be made

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under t Division for one or more of the following purposes:

(a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute

(b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;

(c) to prevent misuse of the court process;

(d) to facilitate arrangements pending final determination of a family law dispute.

Orders respecting case management

223 (1) A court may make an order to do one or more of the following:

(a) dismiss or strike out all or part of the party's claim or application;

(b) adjourn a proceeding while

(i) the parties attempt to resolve one or more issues before the court, or

(ii) a party complies with an order made under this Division;

(c) require that all further applications be heard by the judge or master making the order unless that judge or master di otherwise;

(d) prohibit a party from making an application, without leave of the court, respecting any matter over which a parenting coordinator has authority to act under an agreement or order.

(2) Subsection (1) (d) of this section does not apply to an application made under section 19 [changing or setting aside determinations].

(3) Nothing in this section limits any other order a court may make under an enactment or the common law for the purp of controlling a proceeding before the court.

Orders respecting dispute resolution, counselling and programs

224 (1) A court may make an order to do one or both of the following:

(a) require the parties to participate in family dispute resolution;

(b) require one or more parties or, without the consent of the child's guardian, a child, to attend counselling, specified services or programs.

(2) If the court makes an order under subsection (1), the court may allocate among the parties, or require one party alo pay, the fees relating to the family dispute resolution, counselling, services or programs.

Orders restricting communications

225 Unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when o how communications may be made.

Orders respecting residence

226 A court may make an order to do one or more of the following:

(a) require a party to make payments respecting rent, mortgage, specified utilities, taxes, insurance and other expenses related to a residence;

(b) prohibit a party from terminating specified utilities for a residence;

(c) require a specified person to supervise the removal of personal belongings, by another person, from a residence.

Other orders respecting conduct

227 A court may make an order requiring a party to do one or more of the following:

(a) give security in any form the court directs;

(b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purpose which orders respecting conduct may be made].

Enforcing orders respecting conduct

228 (1) If a party fails to comply with an order made under this Division, the court may do one or more of the following

(a) make a further order under this Division;

(b) draw an inference that is adverse to the party, and make an order based on the inference;

(c) make an order requiring the party to pay

(i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,

(ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or

(iii) a fine not exceeding $5 000;

(d) make any other order the court considers necessary to secure compliance.

(2) If a party fails to comply with an order made under section 225 [orders restricting communications], the court must consider whether it would be appropriate to make an order under Part 9 [Protection from Family Violence].