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MEDIATION AND ARBITRATION – WHAT IS THE DIFFERENCE (AND WILL EITHER SOLVE THE TEACHERS STRIKE)?

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INTRODUCTION

One thing has become clear in the teachers' dispute between the BC government and the BC Teachers Federation: there is a great deal of confusion amongst the public about how mediation and arbitration work. The media is not immune from this confusion either. For example, one media outlet was reporting that formal mediation between the two parties had clearly not commenced, citing the fact that mediator Vince Ready was merely shuttling back and forth between the parties, who were not bargaining "face to face". Now, it may be that formal mediation had not commenced, but the fact that the mediator was engaged only in shuttle diplomacy would not be evidence of this. (More likely the parties had not signed a formal mediation agreement and had not formally agreed to engage in a mediation process.) Anyone with mediation experience will know that shuttle diplomacy between parties who are not meeting face to face is standard fare in the fluid process of mediation.

Other media reports have failed to distinguish properly between the basics of arbitration and mediation. The confusion has even arisen – embarrassingly – during media interviews with key players and pundits. The discussion below will shed some light on the key differences.

MEDIATION

Mediation is a process where parties to a dispute work with an independent mediator in an effort to reach an agreement. No one gives evidence under oath and a mediator has no decision making powers, except sometimes about the process itself. Mediation is almost always "confidential", which means that what is said at mediation and the positions taken cannot be shared outside of the mediation, including in legal proceedings involving the same dispute. Confidentiality includes agreement that the mediator cannot be subpoenaed to give evidence in subsequent proceedings. Typically the parties must also commit in writing to attend in good faith with a genuine intention to resolve the matter.

The process is fluid. If the parties do not resolve a dispute in the time allotted, but have made headway, they will often carry on, with all of the communication still being channeled through the mediator.

Generally mediation starts with the parties exchanging their "wish-lists" and supporting argument. Following this "opening" session, there is often little to be gained (and more likely much to lose) by having the parties sitting in the same room. It is counter-intuitive and counter-productive that adversaries (who maybe cannot stand the sight of each other) should remain in the same room. Shuttle diplomacy may be the only effective means to exchange offers.

If agreement is reached, the mediator, with input from the parties, will draft Minutes of Settlement. The Minutes, even if in point form, should be signed on the spot to avoid the specter of one side experiencing "settlor's remorse" and trying to back out down the road.

The chief feature of mediation is that the parties control their destiny. They craft an agreement both sides can live with and do not risk having one imposed on them. If both sides are unhappy with the agreement reached, so the adage goes, the process has worked well. Our civil justice system puts great faith in mediation, and has made mandatory mediation processes available at both the Provincial and Supreme Court.

Mediation is a waste of time where there is no hope of getting movement from one or both sides. Ugh – sound familiar?

ARBITRATION

Arbitration is a very different beast. It is not dissimilar to a trial, with the arbitrator acting as judge. Sometimes arbitration takes place before a three person arbitration panel, one member chosen by each side and the third agreed to according to some kind of process (or imposed upon the parties if they cannot agree). A three person arbitration panel should create a greater sense of fairness, if not more fairness in fact, and ensure a latitude of viewpoints in the decision-making process.

At arbitration, each side has an opportunity to call evidence, and witnesses are cross-examined under oath as they would be at trial. In the teachers' dispute, the government takes the position that they cannot meet the teachers' demands due to fiscal constraints. At arbitration, the government should be permitted to call evidence on such budgetary concerns, and the union would be permitted to cross-examine on the issue. Similarly, the union would be in a position to call evidence to demonstrate that what they seek is fair and reasonable, again subject to cross examination from the other side. Arbitration is fluid in the sense that the parties can to some extent craft their own rules of procedure and evidence, but otherwise the process is

rigid, like a trial.

In the union sector, arbitration is frequently mandatory for disputes arising under collective agreements. Arbitration can be mandatory in business disputes too, if there is a contractual clause to that effect. Otherwise, parties are open to agree to take disputes to arbitration rather than the courts, under British Columbia's Arbitration Act. The primary reasons for doing so are cost, speed of resolution, and the opportunity to select a decision-maker with certain expertise.

In the current dispute, arbitration is frequently referred to as "binding" arbitration. The addition of the word binding is not really necessary. The binding nature of the process will be assumed unless we are specifically talking about a "non-binding" process. Non-binding arbitration amounts to little more than seeking a third party opinion on the dispute, after what is really akin to a mock hearing. This would be a waste of time in the teachers' dispute.

Framing the issue(s) for arbitration can be a thorny exercise, and there can be no arbitration if the parties cannot agree on the issues to be put to the panel. For example, what if some issues are the subject of a court action that is about to be heard on appeal? Ouch – sound familiar?

CONCLUSION

Back to the teachers' dispute, where until this past weekend mediation looked like a dead-end, and many were of the view that the combatants needed arbitration. Arbitration would be a nice short cut to a resolution where neither side is going to get what they really want, no matter the process. The parties might be concerned that the arbitrator's decision would simply come down at a mid-point between the two extreme positions, but this is a simplistic concern. We can be confident that a well-chosen arbitrator, or panel, with the benefit of appropriate evidence and argument, would be fully capable of a nuanced analysis of the issues. However, now that the parties are talking again, with an experienced mediator, they ought to be given a last chance to craft their own solution.