

BC CONSTRUCTION SHOW

Legal Reinforcement

Understanding the construction claims process

People often say they will "take it to court" because they think it sounds tough.

Often these same people lack a clear understanding of what that process will ultimately entail.

The risk inherent in such tough talk is that parties can entrench their positions early, believing that if an agreement cannot be achieved they can always take it to court.

What is often missed in such early bullishness is that compromise is almost invariably ultimately going to be required to reach a resolution.

Compromise will often be necessary because the vast majority of construction cases are not conducive to black and white outcomes.

Moreover, the benefits of proceeding through to trial can easily be outweighed by the risks and costs of the trial.

Put simply therefore, there is a significant incentive for parties to

attempt to compromise early on rather than compromise after they have banged their heads against each other for several years.

That is not to say that there is nothing to be gained by seeking resolution through the legal process, especially where early

compromise is not possible because of the personalities involved or the complexities of the issues.

This is in part because the same mechanisms available to help parties prepare for trial also encourage parties to resolve their disputes without it. The litigation process requires parties to disclose all relevant information before trial and trial preparation mechanisms

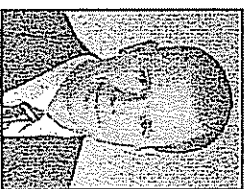
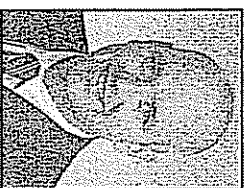
allow parties to assess the strengths and weaknesses of their claims early on.

This in turn enables parties

to make better predictions as to the outcomes at trial and determine how much they should be prepared to compromise.

Trial preparation mechanisms include full document disclosure, pleadings (written summary of the

essential aspects of the claim and defence), demands for particulars (a demand that further particulars of the claim be provided in writing) examinations for discovery (recorded oral evidence under oath), and interrogatories (written questions to the other party that



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must be answered under oath).

All of these mechanisms are aimed at getting as much information to the other side as possible before the trial.

The sharing of this information is primarily aimed at ensuring a fair trial, but also has the effect of allowing the parties to assess their claim and find some reasonable middle ground.

The legal process can also be a valuable accompaniment to a mediation process. Mediation is essentially negotiation aided by a neutral third party (the mediator). The mediator facilitates settlement by helping to close the gap between the parties' positions, but has no authority to render a binding decision.

Often once all the relevant evidence has been disclosed and analyzed within the context of a legal action, mediations can be an effective way of assisting the parties in finding a satisfactory compromise

of their claims.

In summary, you most certainly can opt to "take it to court," run your case through trial and have a judge determine the merits of your position. However, before you aggressively declare your intention to take it to court, you should be mindful of the realities of that choice and seriously consider whether an early compromise is the more rational option.

This topic will be further discussed by us at a B.C. Construction Show seminar, Understanding Construction Claims, on Feb. 12.

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