

Homeowner Protection Act

**NOTICE TO MEDIATE
(RESIDENTIAL CONSTRUCTION) REGULATION**

Contents

- 1 Definitions
- 2 Delivery of Notice to Mediate
- 3 Appointment of mediator
- 4 Selection of mediator if participants are unable to agree
- 5 Pre-mediation conference
- 6 Attendance at pre-mediation conference and mediation session
- 7 Exemption from pre-mediation conference and mediation session
- 8 Applications to court
- 9 Scheduling of mediation session
- 10 Pre-mediation disclosure of information
- 11 Fee declaration
- 12 Conduct of a mediation
- 13 Declaration of Default
- 14 Effect of a Declaration of Default
- 15 Confidentiality and compellability
- 16 Concluding a mediation

FORMS 1 TO 5

Definitions

1 In this regulation:

“**deliver**” has the same meaning as in the Rules of Court;

“**government body**” has the same meaning as in the *Financial Administration Act* and includes the government of British Columbia or of any other province, the government of Canada, the government of any municipality or regional district in Canada and any body created or controlled by any of those governments;

“**insurer**” means an insurer, as defined in the *Financial Institutions Act*, that has provided a policy of insurance to a party in a residential construction action in relation to matters or property in issue in that action, and includes a surety of such a party if a claim has been made on a surety bond related to the matters in issue in that action;

“**mediation**” means a collaborative process in which 2 or more parties meet and attempt, with the assistance of a mediator, to resolve issues in dispute between them;

“**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;

“**mediation session**” means a meeting between 2 or more parties to a residential construction action during which they are engaged in mediation;

“**party**”, in respect of a residential construction action, includes an insurer of a party of record to the action;

“**participant**” means a party to a residential construction action who has not been exempted, under section 7 (2) (b) or 8 (c), from attending the mediation session;

“**residential construction**” means the construction, renovation or repair of a building, or a portion of a building, that is intended for residential occupancy, and includes a new home as defined by the *Homeowner Protection Act*;

“**residential construction action**” means an action commenced in the Supreme Court arising out of or in connection with residential construction;

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

“**strata corporation**” has the same meaning as in the *Condominium Act*.

Delivery of Notice to Mediate

- 2 (1) Any party to a residential construction action may initiate mediation in that action by delivering a Notice to Mediate in Form 1 to
 - (a) every other party to the action, and
 - (b) the Dispute Resolution Office in the Ministry of the Attorney General.
- (2) A Notice to Mediate may be delivered under subsection (1) at any time after the action has been commenced and, unless the court otherwise orders or the parties otherwise consent, no later than 180 days before the date set for the commencement of the trial.
- (3) Unless the court otherwise orders, not more than one mediation may be initiated under this regulation in relation to any residential construction action.

Appointment of mediator

- 3 Within 21 days after the Notice to Mediate has been delivered to all parties, the participants must, directly or with the assistance of an independent, neutral person or organization, jointly appoint a mutually acceptable mediator.

Selection of mediator if participants are unable to agree

- 4 (1) If the participants do not jointly appoint a mutually acceptable mediator within the time required by section 3, any participant may apply to a roster organization for an appointment of a mediator under this section.
- (2) The following procedure applies if an application to a roster organization is made under subsection (1):
 - (a) the roster organization must, within 7 days after receiving the application, communicate to all participants an identical list of possible mediators

- containing at least 6 names;
- (b) each participant must, within 10 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 deemed to have accepted all of the names;
 - (d) within 7 days after the expiry of the 10 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, whether or not the selected mediator was included on the original list provided under paragraph (a), taking into account
 - (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, and
 - (vi) any other consideration likely to result in the selection of an impartial, competent and effective mediator.
- (3) Promptly after a roster organization selects the mediator under this section, the roster organization must notify the participants in writing of that selection.
- (4) The mediator selected by a roster organization is deemed to be appointed by the participants effective the date of the notice sent under subsection (3).
- (5) If the mediator selected by the roster organization under subsection (2) (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 days after receiving that notice, select a new mediator in accordance with subsection (2) (d).

Pre-mediation conference

- 5**
- (1) Within 60 days after his or her appointment, the mediator must hold a pre-mediation conference unless the pre-mediation conference is waived by agreement of all of the participants and that agreement is confirmed by the mediator in writing.
 - (2) At a pre-mediation conference, the mediator must endeavour to have the participants consider all organizational matters including the following:
 - (a) whether the pleadings are final and complete;
 - (b) the issues that are to be dealt with during the mediation process;

- (c) pre-mediation disclosure of documents;
 - (d) exchange of documents;
 - (e) obtaining and exchanging expert reports;
 - (f) preparation of any summary documentation for the purpose of organizing facts or issues;
 - (g) scheduling;
 - (h) time limits;
 - (i) providing a Statement of Facts and Issues to the mediator before the mediation.
- (3) The mediator must give notice of the pre-mediation conference to all parties.

**Attendance at pre-mediation conference
and mediation session**

- 6** (1) Unless relieved of the obligation to attend under section 7,
- (a) each party who receives notice under section 5 (3) must attend the pre-mediation conference, and
 - (b) each party must attend a mediation session in relation to the action.
- (2) Despite subsection (1), a party referred to in that subsection may
- (a) attend a pre-mediation conference by counsel, or
 - (b) attend one or both of a pre-mediation conference and a mediation session by representative if
 - (i) the party is under legal disability and the representative is that party's guardian ad litem,
 - (ii) the party is not an individual, or
 - (iii) the party is a resident of a jurisdiction other than British Columbia and will not be in British Columbia at the time of the pre-mediation conference or the mediation session, as the case may be.
- (3) A party or representative who attends a pre-mediation conference or a mediation session may be accompanied by counsel.
- (4) Any other person may attend a pre-mediation conference or a mediation session if that attendance is with the consent of all participants.
- (5) A representative who attends a mediation session in the place of a party referred to in subsection (2) (b) (i), (ii) or (iii) must be familiar with all relevant facts on which the party, on whose behalf the representative attends, intends to rely and must
- (a) if the party on whose behalf the representative attends is a government body or a strata corporation, have access, at the earliest practicable opportunity, to a person who has, or to a group of persons who collectively have, full authority to settle on behalf of that party, or
 - (b) in any other case, have full authority to settle, or have immediate access,

during the mediation, to a person who has full authority to settle, on behalf of the party on whose behalf the representative attends.

Exemption from pre-mediation conference and mediation session

- 7 (1) Parties to a residential construction action need not attend a pre-mediation conference or a mediation session if all of the parties to the action have already been involved in a mediation session in relation to the matters in issue in that action.
- (2) A party need not attend a pre-mediation conference or a mediation session if
- (a) the party is exempted from attending the pre-mediation conference or the mediation session, as the case may be, under section 8 (c), or
 - (b) the participants agree that the party need not attend the pre-mediation conference or the mediation session, as the case may be, and that agreement is confirmed by the mediator in writing.

Applications to court

- 8 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 appropriate,
 - (b) the mediation be adjourned for the period or on the terms and conditions that the court considers appropriate, or
 - (c) one or more of the parties is exempt from attending one or both of a pre-mediation conference and a mediation session if in the court's opinion it is materially impracticable or unfair to require the party to attend.

Scheduling of mediation session

- 9 (1) A mediation session must occur within 150 days after the appointment of the mediator 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.
- (2) On an application under subsection (1) (b) for an order that a mediation session occur later than 150 days after the appointment of the mediator, the court
- (a) must take into account all of the circumstances, including
 - (i) whether a party intends to bring a motion for summary judgment or for a special case,
 - (ii) whether the mediation will be more likely to succeed if it is postponed to allow the participants to acquire more information, and
 - (iii) any other circumstances the court considers appropriate, and
 - (b) may make an order referred to in section 8.

Pre-mediation disclosure of information

- 10** (1) At least 14 days before a mediation session is to be held, each participant must, if requested to do so by the mediator, deliver to the mediator a Statement of Facts and Issues in Form 2 setting out
- (a) the facts on which the participant intends to rely, and
 - (b) the matters in issue in the action.
- (2) Promptly after receipt of all of the Statements of Facts and Issues required to be delivered under subsection (1), the mediator must send each participant's Statement to each of the other participants.

Fee declaration

- 11** (1) Before or at the pre-mediation conference to be held in relation to a residential construction action, the participants must complete a fee declaration in accordance with subsection (2).
- (2) A fee declaration under subsection (1) 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 to by the participants.
- (3) A fee declaration completed under this section is binding on the participants.
- (4) Despite subsection (3), nothing in subsection (2) or in the fee declaration under this section precludes there being included in the costs awarded to a party in the residential construction action an amount to compensate the party for the share of the cost of the mediation that that party paid under the declaration.

Conduct of a mediation

- 12** The mediator may conduct the mediation in any manner he or she considers appropriate to assist the participants to reach a resolution that is timely, fair and cost-effective.

Declaration of Default

- 13** Any participant may file with the court a Declaration of Default in Form 4 respecting any other participant who fails to comply with a provision of this regulation.

Effect of a Declaration of Default

- 14** (1) If a Declaration of Default is filed, the court may, on application made on notice to the participant in respect of whom the Declaration of Default is filed, do any one or more of the following unless that participant satisfies the court that the default did not occur or that there is a reasonable excuse for the default:
- (a) adjourn the application and order that a mediation session occur, on any

- terms the court considers appropriate;
 - (b) adjourn the application and order that the defaulting participant attend one or both of a pre-mediation conference and a mediation session;
 - (c) adjourn the application and order that the defaulting participant file a Statement of Facts and Issues;
 - (d) stay the action until the defaulting participant attends mediation;
 - (e) dismiss the proceeding or strike out the statement of defence and grant judgment;
 - (f) make any order it considers appropriate with respect to costs.
- (2) The court may consider the existence of a Declaration of Default in making any order about costs, whether that order is made following final disposition of the action or otherwise.

Confidentiality and compellability

- 15**
- (1) A person must not disclose, or be compelled to disclose, in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding, oral or written information acquired or an opinion formed, including, without limitation,
 - (a) any document made for the mediation, or
 - (b) any offer or admission made in anticipation of, during or in connection with a mediation session.
 - (2) Nothing in this section precludes a party 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 that are otherwise producible or compellable in those proceedings.

Concluding a mediation

- 16**
- (1) A mediation is concluded when
 - (a) all issues are resolved,
 - (b) the mediator determines that the process will not be productive and so advises the participants, or
 - (c) the mediation session is completed and there is no agreement to continue.
 - (2) When a mediation is concluded, the mediator must deliver a Certificate of Completed Mediation in Form 5 to each of the participants who requests one or to their counsel.

FORM 1

Section 2 (1)

No.

..... Registry

In the Supreme Court of British Columbia

Between

, Plaintiff(s)

and

, Defendant(s)

NOTICE TO MEDIATE

TO:

AND TO: The Dispute Resolution Office
Ministry of Attorney General
P.O. Box 9280, Stn. Provincial Government
Victoria, BC V8W 9J7 (facsimile: (250) 387-1189)

TAKE NOTICE that this claim is to be mediated in accordance with the Notice to Mediate (Residential Construction) Regulation (B.C. Reg. 152/99).

WITHIN 21 DAYS after delivery of this Notice to all parties, the parties who have not been exempted from attending the mediation session must jointly appoint a mutually acceptable mediator. Otherwise, any of those parties may apply to a designated roster organization for appointment of a mediator.

Dated at, British Columbia,[date]

.....

Party [or party's solicitor]

Party delivering this Notice:

FORM 2

Section 10 (1)

No.

..... Registry

In the Supreme Court of British Columbia

Between

, Plaintiff(s)

and

, Defendant(s)

STATEMENT OF FACTS AND ISSUES

THESE ARE THE FACTS on which I intend to rely in this mediation:
[Set out a brief summary of the facts in numbered paragraphs]

1.

2.

THESE ARE THE MATTERS IN ISSUE in this mediation:
[Set out a brief summary of the issues in numbered paragraphs]

1.

2.

This mediation takes place under the Notice to Mediate (Residential Construction) Regulation (B.C. Reg. 152/99).

Dated at, British Columbia,[date]

.....
Party [or party's solicitor]

FORM 3

Section 11 (2)

No.

..... Registry

In the Supreme Court of British Columbia

Between

....., Plaintiff(s)

and

....., Defendant(s)

MEDIATION FEE DECLARATION

WHEREAS:

- (a) we, or our representatives, are participating in a mediation under the Notice to Mediate (Residential Construction) Regulation (B.C. Reg. 152/99);
- (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:

In equal shares OR As follows:

WE MAKE THIS DECLARATION under section 11 (2) of the Notice to Mediate (Residential

Construction) Regulation (B.C. Reg. 152/99).

Dated at, British Columbia,[date]

.....
Party [or party's solicitor]

.....
Party [or party's solicitor]

FORM 4

Section 13

No.

..... Registry

In the Supreme Court of British Columbia

Between

, Plaintiff(s)

and

, Defendant(s)

DECLARATION OF DEFAULT

I DECLARE THAT has failed to comply with section of the Notice to Mediate (Residential Construction) Regulation (B.C. Reg. 152/99).

THE CIRCUMSTANCES OF THE DEFAULT are as follows:
[Set out the circumstances in numbered paragraphs]

Dated at, British Columbia,[date]

.....
Party [or party's solicitor]

FORM 5

Section 16 (2)

No.

..... Registry

In the Supreme Court of British Columbia

Between

, Plaintiff(s)

and

, Defendant(s)

CERTIFICATE OF COMPLETED MEDIATION

THIS IS TO CERTIFY THAT has concluded a mediation session in this matter in accordance with the Notice to Mediate (Residential Construction) Regulation (B.C. Reg. 152/99) and that

- all issues are resolved
- some issues are resolved
- the process will not be productive and I have so advised the parties
- the mediation session is completed and there is no agreement to continue

Dated at, British Columbia,[date]

.....

Mediator

Name:

Address:
.....

[Provisions of the *Homeowner Protection Act*, S.B.C. 1998, c. 31, relevant to the enactment of this regulation: section 29]