

# PROFESSIONS / LAW

## MEDIATION

### Green team looks outside courtroom to settle environmental disputes

BY BRANDY RAY

In the late 1990s, the stage was set for a long court battle when three copper-melting operations purchased by Wolverine Tube Canada Inc. of London, Ont., were found to be contaminated by toxic chemicals.

At issue was whether the vendor, Toronto-based Noranda Inc., had properly disclosed pollution on its properties in Vancouver, Montreal and Fergus, Ont.

But before the trial began, a judge convened a pretrial conference. Within two weeks, the dispute was settled.

These days, such quick resolution of environmental disputes is the exception rather than the rule in Canada. And that's a situation the recently formed, Canadian Centre for Environmental Arbitration and Mediation (CCEAM) hopes to change.

CCEAM—a roster of 14 environmental lawyers based in British Columbia, Ontario, Alberta, Quebec

and the Maritimes—aims to take disputes out of the courtroom and on to the negotiating table by offering the mediation and arbitration services of its members, all veterans of environmental law.

Traditionally, environmental disputes have been fought in court, with experts on each side pitted against one another, and a judge—often not as conversant in environmental law as the lawyers fighting the case—responsible for adjudicating matters that involve thousands of pages of documents and complex legislation.

Often, the result is a drawn-out and expensive battle.

But CCEAM member Gray Taylor, with Toronto law firm Davies Ward Phillips & Vineberg LLP, says reaching settlements outside the courtroom has the potential to reduce legal costs by more than 90 per cent and settlement time to weeks from years.

The copper-melting contamination dispute is a case in point, says Mr. Taylor, who was part of the

Wolverine legal team.

By assembling the warring parties in one room and laying the issues on the table, the case was settled in 14 days, rather than the expected two years or more had it gone to court, and legal fees came to less than \$100,000, versus the more than \$2-million it might have cost, Mr. Taylor says.

Paul Cassidy, a CCEAM co-founder, senior environmental lawyer and partner with Blake Cassels & Graydon LLP in Vancouver, says time and money is saved primarily by avoiding lengthy witness and trial preparation, and the need to draft lengthy court briefs.

Mr. Cassidy says there are several arbitration institutes and mediation services in Canada but none that have extensive experience focusing on contentious environmental disputes.

Further, most retired judges offering mediation or arbitration services have little experience with environmental law, Environmental disputes, such as fights over who

has responsibility to clean up a contaminated site or disputes over the proposed location of an industrial facility, are not like garden-variety legal disputes, where traditional mediation or arbitration tactics can be employed.

The onset of mediation in environmental disputes is long overdue in Canada, says Randy Allment, an environmental lawyer with Seattle law firm Williams Kastner & Gibbs PLLC, who notes that mandatory mediation and arbitration has been used to settle disputes in the United States for more than 10 years.

The American system was spearheaded by judges "who felt parties should sit down and work out a problem rather than spend two to four weeks at trial," he says.

"The norm back in the old days was up to 10 years in court for a complicated environmental dispute. Now, these cases rarely go to court. Mediation often has them solved within a year." Pat Murphy, an environmental lawyer at Imperial Oil Ltd. in Toronto, says media-

tion has proven to be an effective tool for the resolution of environmental matters his company has faced over the years, including a late-1990s dispute near Toronto that saw residential properties contaminated by oil and gas residue from a neighbouring service station.

A settlement in principle was reached in 18 months; had it gone to court, Mr. Murphy says it would have taken up to four years.

CCEAM, which became operational on Jan. 1, offers arbitration and mediation services that cover a broad range of environmental conflicts, including disputes regarding site contamination, liability, land use, environmental assessments, insurance coverage, interpretation of environmental indemnities, in purchase and sale agreements, First Nations issues and regulatory compliance.

A key advantage of CCEAM is that its members need little time to educate themselves on the applicable law, cutting costs in an arbitration

or mediation, Mr. Cassidy says.

CCEAM acts solely as a referral source for its member lawyers. CCEAM's lawyers set their own fees based on experience and expertise, typically, between \$350 and \$500 an hour, depending on the number of participants, the nature of the dispute and the length of time needed for the mediation or arbitration, Mr. Cassidy says.

Still, not everyone is enamoured of mediation, Mr. Taylor says.

"To some, the word mediator sounds weak. We can say a settlement is better than fighting a court case but some won't like that because they feel a client has come to them for some punch and they get a mediated settlement they will have let their client down," he says.

"We recognize that there is some education required here. It is CCEAM's goal to make people aware of the strength and value of this process."

Special to The Globe and Mail