

PEO MOVES to HIGHLIGHT BENEFITS of FEES MEDIATION

By Michael Mastromatteo



PEO HAS DEVELOPED a new website page to alert members to the possible benefits of using the Fees Mediation Committee (FMC) as a way of settling fees-related disputes with clients.

Although mediation of disputes between engineering practitioners and clients has been available under provisions of the *Professional Engineers Act* (PEA) since 1984, it wasn't until 2009 that the FMC conducted its first arbitration session between a client and an engineering firm. The dispute involved payment for a construction project that was never completed due to scheduling, documentation and logistical problems. In May 2012, the FMC held the first-ever mediation session under the PEA.

PEO is now stepping up the process by establishing a roster of professional engineers trained in mediation and arbitration.

Seen as a form of alternative dispute resolution, fees mediation by the FMC allows parties to avoid use of binding arbitration or the courts to settle disputes involving engineering fees. Some of the other benefits to practitioners include access to mediation services and the use of rooms at no cost to the engineer or client.

The outcomes of FMC processes are confidential but, in general, successful mediation allows parties to draft a settlement agreement between them. FMC mediation decisions, however, are not binding on the parties.

In the event an FMC mediation hearing is unsuccessful, the parties still have recourse to the courts. However, even an unsuccessful mediation hearing enables each party to gain a better understanding of the issues involved, allowing the matter to proceed more efficiently at the court stage.

In some cases, parties unable to reach agreement through mediation by the FMC can pursue binding arbitration under a different panel of the committee.

In these situations, both parties must agree to binding arbitration and there is no appeal of the resulting final decision.

Sal Guerriero, P.Eng., LLM, manager of PEO's tribunals office, suggests the FMC mediation and arbitration processes have a number of advantages over the Ontario government roster's mandatory mediation sessions and the courts, respectively. The FMC does not charge the parties for mediation sessions, which usually last an entire day, and it provides mediators with engineering experience. In addition, the use of expert witnesses in FMC arbitration is usually not required.

As well, PEO defrays the cost of the mediation and arbitration rooms and, in the case of mediation, the break-out room for any private discussions with the mediator.

The cost for mediation under the Ontario government's mediation roster, or from private mediators, can be as much as \$1,200 for a three-hour session.

PEO encourages engineering providers and their clients to consider using mandatory mediation and/or arbitration clauses that refer to the FMC in their retainer agreements as a means of resolving disputes and preserving the client-engineer relationship.

For disputes within the \$25,000 monetary limits of small claims court, the use in professional retainer agreements of mediation clauses that refer expressly to the FMC process can be an innovative way to avoid matters proceeding to the court (since small claims court does not have a mandatory mediation rule).

Because the process relies on being able to reach a consensus, the FMC agrees to conduct a session only if the parties have agreed to mediation. As well, the mediator appointed by the FMC cannot act like an arbitrator and cannot impose a ruling over the dispute in mediation.

Guerriero pointed out that FMC work supports the provisions of the PEA and is in keeping with expectations of the Ontario government's *Commercial Mediation Act, 2010*. That legislation anticipates possible enforcement of mediation settlement decisions and provides parties involved in a dispute with more confidence in the appointment of mediators, and the conduct and confidentiality of the overall process.

In arbitration, the decision of the FMC is binding on the parties. However, a party may have to file the decision in court to have it enforced.

The use of a mandatory mediation clause in professional retainer agreements makes it certain at the outset that a matter cannot proceed to court unless a mediation session is first attempted by both parties. Use of arbitration clauses can avoid the matter proceeding on the merits before a court of law altogether.

The PEO webpage, outlining the details and benefits of the FMC, is at www.peo.on.ca/Tribunals/FeesMediation.html.