

Alternative Dispute Resolution

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Legal disputes can occur between parties who have personal, professional, business or commercial relationships, or between parties who are involved in momentary events (such as motor vehicle accidents).

Resolution or Determination of Legal Disputes

There are two ways that a legal dispute can be ended:

- (a) The dispute can be determined by a decision that is binding on the parties (usually made by a judge or arbitrator); or
- (b) The dispute can be resolved by agreement of the parties.

Objectives of the Parties

A party to a legal dispute may have the objective of ending the dispute:

- (a) Efficiently;
- (b) Economically;
- (c) Promptly; and
- (d) Justly, in the sense that the dispute is determined or resolved on the basis of the legal rights of the parties; or
- (e) Fairly, in the sense that all the interests of the parties are recognized and balanced.

Of course, it would be naïve to think that all parties to a legal dispute have the objective of ending the dispute efficiently, economically, promptly, and justly or fairly. A party to the dispute may initially have the objective of winning at all costs or prolonging the dispute. Those objectives can make the resolution of the dispute by agreement of the parties difficult, though not necessarily impossible.

Interests and Positions of the Parties

The interests of the parties to a dispute have been defined as their “needs, wants, fears, or concerns which will be considered in forming the agreement”.¹ The parties to a legal dispute may simply want to resolve the dispute on the basis of what they perceive to be their legal rights. However, they may have concerns that go beyond those rights. For example, they may be concerned about:

¹ *Negotiation Skills*, Justice Institute of British Columbia, 1991

- (a) Maintaining or even improving their personal, professional, business or commercial relationships;
- (b) Increasing their independence;
- (c) Protecting or even enhancing their personal, professional and business reputations;
- (d) Improving their financial opportunities; or
- (e) Maintaining or even improving their personal or financial security.

Positions have been defined as “the solutions which each party perceives will satisfy their interests.”²

Management of Disputes

Effective management of legal disputes requires:

- (a) Consideration of the potential for disputes to arise out of contractual relationships;
- (b) Contractual provisions for resolution (by agreement) or determination (by binding decision) of potential disputes, where those provisions would likely result in efficient and economical resolution or determination of the disputes on mutually acceptable basis;
- (c) Early recognition of existing disputes;
- (d) Thorough but efficient investigation of the facts that underlie the dispute;
- (e) Objective assessment of the rights of the parties to the dispute;
- (f) Consideration of the interests of the parties that go beyond their legal rights;
- (g) Consideration of whether the dispute should be resolved by agreement or determined by a binding decision; and
- (h) Selection of the most effective process to resolve or determine the dispute.

Reasons to Resolve Legal Disputes by Agreement

Usually there are compelling reasons to resolve a legal dispute by agreement, if only to avoid:

² *Negotiation Skills*, Justice Institute of British Columbia, 1991

- (a) The expenditure of time and money on litigation or arbitration; and
- (b) Negative effects on the relationship of the parties, or their reputations, caused by:
 - (i) The adversarial strategies and methods of litigation and arbitration; and
 - (ii) The inevitable result of one of the parties being "the winner" and the other being "the loser" as a result of the binding decision of a judge or arbitrator.

Reasons to Have Legal Disputes Determined by Binding Decision

One of the parties to a legal dispute may simply be unwilling to resolve the dispute by agreement, for strategic reasons relating to the particular dispute or related disputes.

Even if all the parties to a legal dispute are willing to resolve the dispute by agreement through an appropriate process, they may not be able to do so because of differing perceptions of what is just or fair.

A legal dispute may arise out of recurring commercial transactions. A party to the transactions may want the dispute to be determined by the decision of a judge to set a legal precedent that will govern the transactions.

Processes for Determination of Disputes

By legislation, judges have the jurisdiction to make binding decisions to determine many types of disputes (for example, disputes arising from interpretation of contracts or wills, or from breaches of common law or fiduciary duties). Those decisions are made in litigation between the parties to the dispute.

Where the determination of a dispute by judge would depend entirely on the application of law to facts that are not in dispute, the parties might agree to be bound by the opinion of a neutral lawyer who has expertise in the applicable area of law.

By legislation, administrative tribunals have jurisdiction to make binding decisions to determine other types of disputes (for example, disputes relating to the development of real property, workers compensation, or human rights).

Parties may agree that disputes between them will be determined by the binding decision of an arbitrator. Contracts often include provisions for the arbitration of disputes arising out of the contracts (for example, collective bargaining agreements, unanimous shareholder agreements, or construction or supply contracts). Parties may also agree to arbitrate a dispute after the dispute occurs.

Processes for Resolution of Disputes

The processes that can be used to resolve a dispute by agreement of the parties include:

- (a) Negotiation;
- (b) Facilitation;
- (c) Neutral evaluation;
- (d) Private mediation; and
- (e) Judicial dispute resolution by:
 - (i) Mini-trial; or
 - (ii) Judicial mediation.

Negotiation

In a negotiation, parties communicate with each other directly or through their respective representatives (often lawyers), ideally with a mutual commitment to agree on a resolution of the dispute on the basis of what is just or fair (or both). Lawyers can often assist their clients to achieve a resolution of a legal dispute by providing objective assessments of their rights on the basis of relevant facts and applicable law.

Facilitation

In facilitation, a neutral party obtains information from each party to the dispute individually, and then conveys that information to the other parties to the dispute. A facilitator may be able to help manage emotions that could be an impediment to a just or fair resolution of a dispute. A facilitator may also be able to help the parties to avoid becoming entrenched in their positions.

Neutral Evaluation

In a neutral evaluation of a legal dispute, a neutral lawyer provides the parties to the dispute and their lawyers with an objective assessment of evidence (if the parties do not agree on relevant facts) and a legal opinion (if the parties do not agree on the applicable law). The neutral lawyer's assessment of the evidence and legal opinion are not binding on the parties to the dispute. However, the neutral lawyer can often assist the parties to resolve their dispute by providing a realistic view of the strengths and weaknesses of their positions (on the facts and the law).

Mediation

In a mediation, a neutral party (the mediator) assists the parties to the dispute in communicating effectively with each other, directly or through their lawyers, to resolve their dispute by agreement. Mediation is usually a voluntary process.

All communications in a mediation are “without prejudice” to the legal rights of the parties to the dispute, in the sense that no reference to those communications can be made in a process for the determination of the dispute by a binding decision.

A mediator will often encourage all the parties to the dispute to make realistic assessments of their legal rights, express their own interests, and consider the interest of other parties to the dispute. By doing so, the mediator can often assist the parties to resolve their dispute by agreement.

Judicial Dispute Resolution

In Alberta, the parties to civil actions (litigants) in the Court of Queen’s Bench can voluntarily attend with their lawyers before a judge of that court for a mini-trial or judicial mediation. All communications made for the purposes of mini-trials and judicial mediations are kept confidential by the judges who conduct them; and are “without prejudice” to the legal rights of the litigants, in the sense that no reference to those communications can be made at trial.

Mini-Trial

In a judicial mini-trial, the lawyers for the litigants make submissions to a judge on the relevant facts (usually on the basis of agreed facts, discovery evidence, and expert reports if there are issues on which expert evidence is required) and on the applicable law. Those submissions are usually made in writing before the mini-trial and summarized orally in the presence of the litigants at the mini-trial. The judge gives a confidential and non-binding opinion of how the dispute between the litigants would likely be determined at trial. Often, the opinion will assist the litigants to resolve their dispute by agreement.

Judicial Mediation

A judicial mediation is conducted by a judge. Prior to the mediation, the lawyers for the litigants usually make written submissions to the judge. The submissions usually include brief summaries of the relevant facts and the applicable law. At the mediation, the judge will usually give the litigants an opportunity to express their interests. Often, the judge will give an indication of the strengths and weaknesses of the positions of the litigants (on the facts and the law) without giving an opinion as to how the dispute between the litigants would likely be determined at trial. The judge may also give some indication of how the interests of the parties could be considered by them in resolving the dispute. Most judicial mediations result in resolution of the dispute by agreement.

Selection of Process to Resolve a Dispute

The selection of the process that will most likely result in a resolution of a dispute by agreement of the parties will depend on the impediment to resolution. If the only impediment is a lack of understanding of the legal rights of the parties, a resolution of the dispute may result from objective assessment of those rights by lawyers

representing the parties in negotiations, or by a neutral evaluator, or by a judge in a mini-trial. If there are other impediments to resolution, a mediation to explore the interests of the parties may be more effective.

Approaches to Dispute Resolution

Positional

In the positional approach to dispute resolution, the parties make statements of their positions and counter-positions. Often, the parties become entrenched in their positions, without fully expressing their own interests or considering the interests of other parties to the dispute. This can result in a “win/lose” situation, or a compromise that is not really satisfactory to any of the parties.

Collaborative

In the collaborative approach to dispute resolution, the parties:

- (a) Explore their interests;
- (b) Attempt to identify common interests;
- (c) Apply objective criteria;
- (d) Communicate assertively and emphatically;
- (e) Try to be creative in resolving the dispute; and
- (f) Look for a “win/win” resolution.

Selection of Process to Determine a Dispute

Where the parties have an interest in keeping their dispute confidential, they may decide to have the dispute determined by arbitration (rather than by litigation).

Where the parties have a need for a public forum, they may choose to have their dispute determined by litigation.

Efficient, Economical and Prompt Determination of Disputes

If a dispute cannot be resolved by agreement of the parties, it may be in their mutual best interest to at least agree as to the steps to be taken to have the dispute determined by a binding decision of a judge or arbitrator in an efficient, economical, and prompt manner.

Experience of Weir Bowen LLP in Resolving Disputes

Weir Bowen LLP has lawyers who have the training, skill and experience to advise parties to legal disputes as to what process will likely result in resolution of the dispute, and to represent them effectively in any process that they choose to use.

Weir Bowen LLP also has lawyers who have the training, skill and experience to act as facilitators, neutral evaluators, mediators and arbitrators.