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ALTERNATIVE DISPUTE RESOLUTION

Mediation lets parties ‘run the show’

Cost

Control over selection of the mediator, as well as the length of the mediation, allows the parties to control their costs. When engaged prior to litigation, or at the early stages of litigation, mediation can offer extreme cost savings.

Depending on preparation time and the mediator’s hourly rate, a standard mediation generally costs between $1000 and $4000. Costs are not only measurable in dollars and cents, but also in relation to personal or company time expended, the emotional cost component of any conflict and the preservation of relationships.

While litigation lawyers are typically incorporating mediation into their practises, channelling into mediation generally occurs following the filing of pleadings, preparation of affidavits of records and very often, following discoveries. At this point, the cost savings offered by mediation are not fully realized. With a very high likelihood for successful resolution through mediation, even prior to the filing of pleadings, the ethical obligation to clients should require the discussion of mediation

as an initial option for proceeding
to resolve a conflict.
Communication

The mediation brings all parties
of interest together in the same

room, hearing the same things,
without continual filtering through
the litigation process or the
screening and regurgitation of
information through counsel. The
informal setting of mediation
encourages direct, honest and
detailed communication.

The mediator facilitates the
communication between the parties
and will often use a four-step
process in which the parties communicate
what is important to
them and why, prior to moving
toward a resolution. Often the parties
will eagerly advance toward
the discussion of options for resolution.
The mediator's role is to
ensure that all of the relevant information
has been communicated
prior to the parties entertaining
possible resolutions, as a resolution
based on incomplete information
will likely fall flat. The key in
mediation is the promotion of
understanding between the parties,
as opposed to agreement. Agreement
is not necessary to reach a
resolution.

David Stark is a member of the
Law Society of Alberta, and has a
mediation based practice. He frequently
lectures on the benefits of
mediation and negotiation.

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By David Stark
and Salima Stanley-Bhanji

Understanding the differences between standard litigation and mediation assists lawyers in choosing the best approach for their clients. Control, cost and communication form the bases for these differences.

Control

While litigation is conducted by a prescribed set of rules, often subject to different interpretations and outside the control of the parties, the mediation process puts control back in the hands of the parties. Where control over the ultimate decision is exercised by a judge or tribunal in litigation, in mediation the parties not only control the decision, but also control the process by which it is reached. The opportunity for control over the process by the parties often starts with the selection of the mediator by the parties, who could not, of course, select the judge.

While the mediator seeks to provide a framework for the process, it is ultimately the parties that direct the process substantively. While only “relevant” and “material” issues, by legal defini

tion, are discussed in the litigation context, the mediation context enables the parties to discuss anything that is relevant or material to them personally. These underlying issues are most often untouched by the litigation process. Once discussed and understood by the parties in the mediation process, they often pave the way for a mutual resolution.

Control of the resolution by the parties is most characteristic of mediation. The mediator has no power to impose a settlement – rather the parties themselves, with counsel, craft a deal. Where there is conflicting or no case law to indicate a result with any certainty, or where the certainty of outcome is obscured for any other reason and obtaining a precedent is not important, directing litigation into mediation provides a method of risk management.

The parties also choose when to mediate, how long for, where the mediation will occur and the structure of the process, such as whether a pre-mediation conference will be necessary. The parties can set their own timelines for production of documents and expert

reports. The parties also ensure the confidentiality of their documents, which is seldom preserved in the court process.

But the control exerted by the parties can also be a detriment where there is a lack of will to resolve a dispute. Part of the mediator's role is to ensure that the parties enter the mediation process voluntarily and to secure each party's commitment to the process at the commencement of the mediation.

COMMENTARY:
ADR in labour law
overburdened by complex technicalities

By Lawrie Cherniack

The current practice of labour law doesn't resolve disputes, but actually exacerbates them.

Alternative dispute resolution in labour law was implemented

years before any other area of the law even considered such a system. Most active labour lawyers rarely go to court. They appear before labour boards and arbitration boards.

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Mediation and arbitration of disputes involving
Estates, Wills, Trusts and
Business and Real Estate Succession.

While continuing our own Estate and Trust law practices,
we collectively bring our more than 50 years of
experience in Estate and Trust Succession to the
dispute resolution table.

In the early years arbitrators
were available at very short notice
to render speedy decisions. Many
of the disputes were handled at a
“shop-floor” level. Laypeople
appeared before them. The unions
and employers trusted these experienced
arbitrators to conduct fair
hearings and to protect the rights
of individuals and the parties.

Today’s trends differ. Res judicata
may not technically apply, but
labour law has become overburdened
by its own complex and
often unwritten formalities, traditions
and technicalities. It is difficult
to get quick dates; in some
jurisdictions, court dates are available
more readily

lems instead of finding their own
solutions.

ADR in labour law has thus
become simply an alternative to
the courts for ending disputes
through adjudication. It’s no
longer about resolving disputes.

In today's world unions and
employers (whether public or private)
have a major mutual interest
in the long-term survival of the
enterprise. Good workplace
morale is therefore vitally important.
Labour law, unfortunately,
ignores workplace morale.

Most of the workplace problems
labour lawyers see – whether
discharge or discipline, innocent
absenteeism, competence, harassment
or seniority – really come
down to manifestations of some
form of stress or misunderstandings.
Adjudication of these disputes
can't resolve the underlying

Lawrie Cherniack

work habits, stress leaves, feelings
of entitlement or estrangement.
Externalized stress leads to harassment,
persecution complexes and
acting-out. Either way, major conflicts
arise at the

than labour
board or arbitration
board dates.

Moreover,

"Adjudicators rarely deal with the real issues."

workplace.

Many disputes
are caused by
clashes of sincere

now only specialists
– whether lawyers or
laypeople – successfully appear
before the adjudicators. The hearings
take place in a rarefied atmosphere.
Collective agreements are
so complex that they have become
unintelligible to many people.

Ordinary employees, union or
management, reasonably feel out
of place. They look to the law specialists
for solutions to their prob

problems. In many cases it exacerbates
them.

Adjudicators rarely deal with
the real issues. Those issues usually
arose a few years before the
matter being adjudicated. Often,
these are a matter of misperception
or lack of communication that created
an ongoing resentment, which
in turn gradually grew into stress.
Internalized stress leads to poor

people who confidently,
but mistakenly, believe that
their perceptions and/or their
memories are accurate.

A speedy resolution of minor
disputes can prevent more complex
disputes. Moreover, it can
foster resolution of other disputes.

It’s time to concentrate on dispute
resolution. Labour law can

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