

ALTERNATIVE DISPUTE RESOLUTION

Mediation lets parties 'run the show'

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



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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.

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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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.

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 than labour board or arbitration board dates.

Moreover, 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.

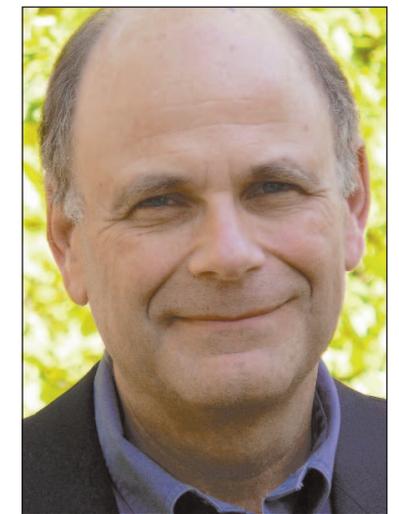
Ordinary employees, union or management, reasonably feel out of place. They look to the law specialists for solutions to their prob-

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



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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 workplace.

Many disputes are caused by clashes of sincere 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

see LABOUR p. 11

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"Adjudicators rarely deal with the *real* issues."

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