

THE RANGE OF ALTERNATIVE DISPUTE RESOLUTION OPTIONS

- A COMPARATIVE INTRODUCTION

(An address to the Advocates Society October 27, 1995)

INTRODUCTION

Good morning Ladies and Gentlemen.

There will be a great deal of information provided to you today on how to become effective counsel in an ADR setting. When I thought about what some professionals currently know about this field, it became apparent to me that there are a lot of misconceptions and misnomers.

At a reception not very long ago, I had occasion to be talking with a well-known and reputable commercial real estate leasing broker from Toronto. When we began talking about ADR, he told me that he had recently conducted a mediation between a landlord and tenant. Moreover, he said he had been doing a lot of mediations. When I asked him how he had gone about helping the parties, he said it was pretty a standard procedure. They each made their pitch and the landlord "won", as they usually do. I was silently taken aback. I asked him where he did his mediation training. He said, "what training?" "I have been doing this for a long time." I winced but I hope I didn't shake my head too obviously.

On another occasion, I was in a Western Canadian city in a meeting with a senior partner of a significant law firm. The talk got around to the frustrations of the court system and the advent of alternative dispute resolution mechanisms. He confessed that he knew virtually nothing about these techniques, although he had some familiarity with arbitration. I began to suspect this was true for a lot of lawyers.

He also told me that he probably had little willingness to change, having regard to all the years he had spent in the existing system. But he was a very senior member of the bar and I understood his reluctance to embark on new ventures. I did ask him what was being done in his firm to train lawyers in ADR, and his second confession was more troubling. He was one of the trendsetters for the firm and there was no plan.

Hopefully, by the end of today, and even by the end of this talk, your insights will be greater, your information better, and your goals higher.

THE PAST

The adversarial system of litigation as we know it, has been around for hundreds of years. The techniques we use in court day-in and day-out probably haven't changed much in 150 years. The system has broken down and we all know it. If we listen to our clients, and we should, we will know that their dissatisfaction arises from the interminable delays throughout the court process, the high costs attendant to that process, and, to a lesser extent, the frequent, irretrievable breakdown of relations between the parties to the dispute.

These concerns were recently echoed in a speech by the outgoing president of the Canadian Bar Association. Believing that the justice system is outmoded and overdue for change, he said that it must become "...faster, cheaper, less complicated and more responsive to the modern realities of time and technology". As lawyers, it behooves us to find better ways to resolve disputes. It is time to dispel the myth that litigators are warriors and ADR neutrals are whimps. Let us think

of ADR as an acronym for "another direction to results". After all, clients want results.

It is the function of counsel to explain to clients what their alternatives are, to determine which process is best for their clients, and maybe instead of "judge shopping", select the neutral that is best suited, along with the technique that is best suited to achieve results for your client. In some of these processes, you can even write the terms and set the rules.

The September 5, 1995 Practice Direction for the ADR Pilot Project defines "Alternative Dispute Resolution" as a range of processes designed to aid parties in resolving their disputes outside of a formal judicial proceeding. Let us look at some of these options.

MEDIATION

I looked up the word "mediation" in the 1979 **Encyclopaedia of Words and Phrases, Legal Maxims**. Not surprisingly, there was no entry or definition. Things are changing rapidly. This is very creative stuff, and thinking lawyers will thrive in these areas in the future.

Mediation is a technique whereby a third party neutral assists the disputing parties in their negotiations, trying to reach a settlement that is acceptable to both of them. The mediator may assist in structuring the negotiations along with counsel for the parties. Her early task involves identifying the issues which are really, and I underline "really", in dispute. Unlike the real estate broker I mentioned doing purported mediations, the mediator has no power to impose a decision on the parties. Mediation is a win-win technique, not a win-lose. A mediator is unlike a judge in that he is only a facilitator for achieving an agreement between the parties. The mediator works to open

the minds of each party to the needs of the other. He seeks to dig out the "underlying interests" of the parties rather than concern himself with positions as they may have to take in an adversarial process. Those positions often entrench the parties in different directions, polarize them completely, and avoid getting around to their ultimate underlying interests until the eleventh hour and fifty-ninth minute. In successful mediations, those interests are determined often in the first hour.

Of course, a fundamental principle of mediation is that it is voluntary. That is, the parties agree to mediate in order to resolve their dispute. This is one of the places where counsel will have to become really effective when he or she is initiating the idea of a mediation. This is particularly true if the other counsel is of the age-old warrior mentality. But there are also neutral service providers who can be arranged to step in and attempt to set up the mediation in a fashion that does not entrench the warrior into thinking that the initiator has a losing case and, therefore, she should fight him even more. One advantage of mediation is that by the time the parties sit down at the mediation table, they have already agreed three times. Firstly, they have agreed to a mediation; secondly, they have signed a submission agreement; and thirdly, they have both come to the appointment. Those steps go a long way in setting the tone for a "rights based" as opposed to "a position based" process.

It may pay you to look at the roster of major companies and their law firms which have subscribed to mediation as their primary dispute resolution technique in the United States. Such a list can be found at CPR in New York. Similar efforts are now being made in Canada by many commercial organizations which have joined the Canadian Foundation for Dispute Resolution, centred in Calgary.

Another major advantage of mediation and other ADR techniques, is confidentiality. Unlike the court process, ADR proceedings are normally closed to the public; they are arranged privately and without notice to anyone but counsel and the parties involved. Often, confidentiality is a key consideration with respect to the information parties put before a neutral. They have no reason to feel they have to hold back information because it is going to be published in newspapers and they do not feel threatened that their competitors will gain insights.

Mediation can be a very speedy process. Once the parties agree and set their appointment with the mediator, the matter proceeds. When they arrive, there is no list. They are it. They are not behind other cases and they are the only case on before the mediator for that time slot. There are no delays and the mediator has no other case on his mind. Imagine the cost effectiveness of such a system. And, typically, that cost is shared 50-50 by the parties so there is no edge to be gained such as there is in cost-driven litigation. And costs are not usually wasted since in the private sector, mediations have been effective approximately 83% of the time in the first session. You will hear today, I am sure, that at the ADR Centre, the success level is also very high when you consider that those mediations are not usually initiated by the parties, they are in the court process, and at least one was not necessarily of a mind to mediate.

Mediators can make recommendations, but they don't make decisions for the parties. Typically, a mediator will employ techniques developed through his or her training and experience which will draw out the parties and assist them in the process of their own decision making. The mediator can meet with both together, each separately, and/or with their counsel, together or separately. These flexibilities facilitate successful results.

Often parties have a legitimate dispute in the course of an ongoing relationship, and mediation allows the opportunity for parties to quickly resolve their dispute and go on with their relationship rather than to embark on a long and tangled positional process. Settlement is a win-win situation and this allows for continuation of work together in the future if the parties have reason to do so. This applies to franchise and licensing relationships, supply contracts, workplace conflicts and so on. Counsel can be creative here.

The parties are not forced to try to fit a round peg in a square hole when considering remedies. The remedies may be as imaginative as the parties, their counsel, and the mediator can develop. The ultimate settlement agreement may have nothing to do with legal remedies, but may be effective for the parties nonetheless. Again, results are what your clients want, and these are not necessarily bound to legal rights.

I don't want to dwell too much on the selection process but as we all know, there is very limited selection of judges, if any. In mediation, the neutral is chosen by the parties. They can choose a person who has the specific qualifications necessary to facilitate their particular dispute.

In international matters, no party submits itself to the courts of a foreign country when it selects mediation. There is no unknown legal system. The same considerations apply to selection of a mediator as they would in any other dispute.

There are, therefore, a number of circumstances in which mediation may well be the desired technique; for example, a case in which the facts or law is uncertain so that there is little

predictability of the outcome of a lawsuit. Another example may be a case where parties prefer a solution that is not based only on their legal rights, but on their economic needs and their real interests. There may be cases where, even if a judgment were obtained, it would not be enforceable. Settlement through mediation may reach a manner of resolving the dispute that allows for a fulfilment voluntarily and satisfies both parties. I have mentioned other situations such as continuity of relationships, quick resolution, confidentiality, and lower cost.

There is much more to say about mediation but I want to leave some things for you to discover for yourselves in the future. Let us turn to arbitration.

ARBITRATION

Arbitration is a quasi-judicial procedure for resolving disputes. The arbitrator again is a third party neutral but unlike a mediator, the arbitrator renders a decision which is usually binding. The decision is made on the merits of the case. The arbitrator hears the parties, their evidence, their argument and makes a decision. This is a win-lose situation. But the procedures are less formal than court proceedings much of the time. Therefore, the arbitration process itself is usually much faster than a trial, not to mention that one does not have to wait a long time for a trial date. Like the mediation, arbitration appointments are set between the parties and their counsel on the one hand and the arbitrator on the other, and they proceed when fixed.

Arbitrators' decisions are typically made according to law, and the parties' counsel should take that into account in deciding whether arbitration is the appropriate technique to be

pursued in any particular case. In many cases, arbitration is predetermined as a term of the contract in commercial matters. There are also programmes for arbitration which have been established pursuant to statute such as the Ontario Insurance Commission Arbitration Programme, or by industry corporations such as the Canadian Motor Vehicle Arbitration Plan. Again, as in mediation, the private Arbitrator is chosen by the parties, often for familiarity with the subject matter, or the legal knowledge, or the technical background required. Speed and confidentiality again, are hallmarks in arbitration (with the exception of the Pizza Pizza case).

In Ontario, arbitrations are subject to the **Arbitrations' Act** 1991 unless the application of the statute is excluded in some way by the agreement between the parties.

While awards of arbitrators are usually final and enforceable like a judgment, there are avenues whereby the court may become involved in the arbitral process. I don't want to spend any time diverting to that area, but you should have a look at the 1991 Act, and in particular, section 6 and following.

There are different forms of arbitration. Binding arbitration is very common and in this situation the decision rendered by the arbitrator, binds the parties.

Compare non-binding arbitration in which the process is the same, but the arbitrator makes only an advisory decision which is not binding on the parties.

Incentive arbitration is a form of non-binding arbitration in which the parties agree that if the party that does not accept the recommendation of the arbitrator goes to court and does not

improve its position, it has to pay a penalty which may include the lawyer's fees of the opposing party.

Final offer arbitration is a process in which the parties each make their best offers to the arbitrator who must choose between the two offers but is not allowed to render a different decision.

In bounded arbitration or what some call "high-low" arbitration, the parties agree on a minimum and maximum award. The arbitrator is not informed. If the award made by the arbitrator is within this range, it is binding. If it is lower, then the minimum award is binding, and if it is higher, the maximum award is binding.

Let us now turn to a number of lesser known techniques.

MED-ARB

This technique is a combination of mediation and arbitration. The parties start out by trying to resolve their dispute through mediation but agree in advance that if they are unable to resolve all aspects of their dispute through mediation, the same third party neutral will continue to deal with the matter as an arbitrator. At the end of the arbitral part of the process, the neutral will render a binding decision on all the issues that have not been resolved by the mediation process.

EARLY NEUTRAL EVALUATION

This ADR technique has similarities to Ontario's Pre-Trial system, except it is done very early on. In the U.S., the procedure occurs in some States within a few months after a suit has been filed. When a neutral is brought in to evaluate the claim at an early stage, one can appreciate the consequences very quickly. If the evaluation is favourable to the claimant, the defence has to start thinking about settlement immediately. If the reverse is true, the claimant has to reconsider whether it ought to proceed. Clearly, this is a technique which can be very useful in technical cases where the neutral must, of course, have expertise in the field.

NEUTRAL EVALUATION

In the ADR pilot project in Toronto, neutral evaluation is available. The practice direction defines neutral evaluation as a process in which a judge of the court, or a dispute resolution officer evaluates the relative strengths and weaknesses of the positions advanced by the parties, and the probable outcome at trial, and advises the parties accordingly.

If it is determined in the ADR session that neutral evaluation would be an appropriate step in resolving the dispute, counsel, with the assistance of the mediator, will set out the one or two issues to be referred to the neutral evaluator. The session before a judge or a neutral evaluator lasts approximately 45 minutes. The counsel present the core of the case in the presence of the parties. Afterwards, the neutral evaluator gives an assessment of the strengths and weaknesses of the cases.

If the parties do not reach a settlement, the case is returned to the litigation track.

MINI TRIAL

Another available technique at the ADR pilot project is the mini trial. This is defined in the practice direction as a process in which opposing counsel present their best case to the parties and to a judge of the court who moderates the presentations and renders a non-binding opinion as to the probable resolution of the dispute after trial. One interesting feature of the mini trial is the fact that counsel are presenting the case to the other party as well as to a judge. This is an early opportunity to make an effective presentation to the other party in the case and clever counsel will realize what a great opportunity it is to be able to tune the other party to your client's interests on a more common ground basis than in an adversarial setting.

To divert momentarily, let me say the most common procedure at the ADR Centre is mediation, but you will be hearing a great deal more about this from others. Let me only point out that as of September 1st, eight out of ten cases in the commercial track are being sidelined to the ADR Centre for mediation. This is up from one out of ten originally and then two out of ten. There is definitely a message in this for counsel.

SUMMARY JURY TRIAL

This is a procedure connected to the formal litigation process. It is available once the

case is ready for trial. It is most typically advantageous in large complex matters that are expected to be very lengthy trials. The counsel for the parties present their best cases to a real jury. The jury is not advised that the trial is not a real one. However, the presentation is an abbreviated one so that it lasts only one or two days. There are no outside witnesses called. The business principals with authorization to settle are the parties who attend the trial. A judge presides over the summary jury trial. The jury renders a non-binding verdict. This becomes a starting point for negotiations in order for the parties to achieve settlement without the need for the complex trial.

CONCLUSION

Try to keep in mind that most of these techniques do not have any statutory basis. Without four corners to bind them, the usual limitations of thinking go by the board. Creativity can become the order of the day. But have no doubt. These are the ways of the future; these and others that have yet to be developed. Effective and successful counsel have always been those who combine experience with innovation. The times in which we now live are times for innovation. As we all know, the practice of law has changed more drastically in the last five years than it probably did in five hundred years beforehand. There is little time to waste in developing fresh thinking and applying new techniques. I know you will enjoy and gain much from this day.

Thank you.