

Alternate Dispute Resolution : Impact in Commercial Disputes

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I have certainly enjoyed the discussions and comments from our American colleagues who have made presentations at this conference. It is always encouraging to hear of the serious study and analysis being given to the use of Alternate Dispute Resolution (ADR) in legal systems. I am hopeful that similar studies can take place in the Canadian context soon.

We value the initiatives being taken by our American colleagues. We also have the delightful and even perhaps smug opportunity to benefit from and take advantage of these innovative studies and projects thus avoiding some of the problems encountered.

I am also not surprised at some of the results that have come from studies in the use of ADR as part of the judicial process. For some time I have commented publicly that I was concerned that these results could be expected but my observations were based more upon intuition than fact.

I will be speaking to you today as a lawyer who advises the private and public sector on the design and evaluation of effective conflict management systems. A principal focus of my consulting practice is to help parties find better and more effective ways of dealing with conflict and resolving disputes. In the last 12 or 13 years that I have been working in this area I have discovered a growing interest in finding ways to deal with conflict more effectively. The cost of dealing with unresolved conflict is very significant. The issue of effective conflict management has been focussed upon particularly in the commercial sector as companies seek ways "to improve their bottom line".

Simply stated, ADR, outside of the judicial system, offers real opportunities for commercial parties to resolve conflicts and disputes without the necessity of resorting to the courts. But why should this be perceived by business as a desirable result — given the fact that Canadian business people and Canadian citizens value our courts? (As an aside, I know sometimes we feel, because we are being challenged and talked about in the press, that the legal system in Canada is under great attack. I know many members of the Bench feel that way. However, I believe that by and large Canadians are very proud of their judicial system.)

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Why are businesses looking for an approach to dealing with conflict that allows them to say "we don't necessarily have to go to court to resolve this dispute" rather than "we must go to court to resolve this dispute"? It is because litigation has failed to respond to the specific needs and interests of business. Business grows easily impatient and will bypass those institutions that do not serve it well.

In what way does litigation not serve the interests of business well? First, I think that business is frustrated with the fact that in order to process the issues in a dispute, the legal system redefines the ingredients of the dispute into its own constructs. The controversial issues that the disputing parties are dealing with are recast into jurisprudential issues understood best by lawyers and judges. To our business clients, the framing of the legal issues often bears little or no resemblance to the facts giving rise to the dispute. To this extent the framing of their dispute for purposes of resolution in the judicial system is often seen as irrelevant — albeit necessary and inevitable in order to allow the issue to be brought to closure.

As an aside, but to give you a further example of why business often sees dealing with lawyers as a necessary exercise but often irrelevant to their day-to-day activities, I refer to the fact that lawyers often prepare contract documents for their clients without reference to or knowledge of how the parties plan to deal with each other on a daily basis. The preparation of the contract document is often seen as some sort of disassociated activity. I am amazed at the number of times that business people will tell me that they have been told by their lawyers that they must have certain provisions in their contract but at the same time these parties do not see these provisions as having any impact on how they actually behave in their contractual dealings.

When do people look at their contract documents? They look at parts of them when they enter into them. They may look at them when they get into trouble. They seldom look at them in the course of their relationship. When they negotiate their terms they normally focus on the critical issues of price, quantity, quality, delivery, etc. but seldom if ever indulge in a discussion of the remaining detail of the private law they are agreeing will govern their relationships. They often have disputes and conflicts but it is only when they feel they can't resolve the issue that they come back to the contract and then realize that they have been operating with complete disregard for the rules they have set. Then they go to their lawyers and their lawyers try to fit — often force — the facts into the provisions of the contract. From a business person's perspective the whole exercise takes on an artificial life of its own.

I work in the construction law area which is rife with conflict. Here is a perfect example of the point I was just making. The *Ron Engineering*¹ decision has established legal constructs that govern the tendering relationship. Construction lawyers advise their clients on the legal constructs of tendering law, what the clients can and cannot do and how they must deal with each other when awarding a contract. But after that, by and large, it is business as usual. The legal constructs of the law are often ignored because the cost of doing business in accordance with those legal constructs cannot be borne. Our clients thank us for telling them the risks they are assuming and then they weigh those risks and

1. *R. (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111.

make business decisions on how they will act. Business people are aware of the workings of the legal system but they often don't see it as being particularly relevant to what they do from day-to-day.

Another concern which I believe business people have with the judicial system is loss of control. Business people are very independent; they are entrepreneurs; they are used to taking risks, to making things happen the way they want them to. When they take their disputes to lawyers they often feel that they have totally lost control over the matter. If the dispute goes to court, they have no control over the process, who the players are, the procedures that will be used, or the results of the process. It is a very, very frustrating exercise for business people who are used to running their own affairs. They are also overwhelmed by the process. They become frustrated with the detail of the process. To borrow a recent advertising phrase, they ask "Where's the meat?"

Another area of concern is the limited nature of the remedies available in the courts. So long as the judicial system is only able to provide remedies in terms of giving me money, or not giving me money or requiring me to do something, or requiring me not to do something, litigation will be of limited value to commercial interests. Business people are used to entering into very creative business relationships. Creative resolution of disputes is simply not available in a courtroom context.

The adversarial nature of judicial proceedings, although exciting for barristers, is often very harmful to business. Only very sophisticated businesses are able to continue a productive business relationship while they are at the same time engaged in difficult litigation. Most small businesses are simply incapable of managing in these circumstances because they have small operations and all their employees are seriously engaged in or affected by the ongoing litigation.

In addition there is very little privacy for a business engaged in litigation. For many businesses engaged in a highly competitive environment, protection of property rights is a critical issue.

The last thing that I must mention is the cost of litigation. I believe that too many lawyers, when advising their clients on the issues of comparable costs of processes, focus only on the legal cost of the process. They say, "Our fees are going to be this much, our experts are going to cost this much...." Many litigators fail to take into account or even appreciate that the real costs of litigation are the costs of lost business opportunities and of manpower dedicated to a reconstruction of history. Businesses are always focussing on the future and how they are going to continue to be profitable. In litigation, they are spending money in non-profitable activity relating to past events.

Under all of these circumstances, business people are actively looking for a better way to deal with conflict and disputes with their employees and with their clients and customers.

If the legal profession remains blind to these concerns or unwilling to respond to them, I fear that the legal profession, including the courts, will lose its relevance in the resolution of commercial disputes. Every day I see business people searching for new approaches to minimize unnecessary conflict in their relationships, for ways to use

inevitable conflict in a constructive and positive way to further the mutual interests of the parties and a way to resolve disputes as efficiently and cost-effectively as possible without destruction of their business relationship.

There are three places where I believe we will be seeing the most innovation in addressing commercial concerns.

The first place is the actual working relationship between the parties. Business people are saying "we have to learn to work together in a less adversarial environment. Understanding and accepting that our respective interests may be different, how can we work together more effectively?"

In the context of construction law, parties to a construction project are promoting "partnering relationships" to develop a more effective working relationship. All the parties to a construction project — owner, contractor, subcontractors, design consultants, etc. — meet together for a day or two and a partnering facilitator, which is a role that I often play in that context, will assist these parties to develop an effective working team, with common purpose, action plans, communication protocols and informal dispute resolution system. They move from an adversarial context, which generates so many of the conflicts that turn into major disputes in this area, and they start focussing on how they can work together more effectively to satisfy each of their individual needs. Partnered projects have a very successful track record with very few unresolved issues on completion. The partnering relationship recognizes that the causes of many disputes are often failed, inadequate or non-existent communications. Participants in a partnering relationship are looking at ways to avoid these unnecessary disputes and to work together to address any potential problems occurring on the project.

The second area of change is in the language and terms of commercial contracts. Commercial parties are reconsidering the approach they use to their contractual relationships. Lawyers have often felt that the best way to negotiate a contract on behalf of a client was to take the hardest position they possibly could take on the issues, and depending on their negotiating weight in that relationship, to draft a contract which benefited their client most. Today I see many commercial parties (unfortunately, with their lawyers following reluctantly in the background) promoting a more balanced approach to the allocation of risks and benefits under a contract. This approach often minimizes conflict in the relationship. Experience shows that if commercial parties go into an unbalanced contractual relationship, the party at a disadvantage will often spend much of its energy trying to overcome the disadvantages and re-balance the relationship. If parties enter into a contract feeling that they are being treated fairly and reasonably by each other, they will go a long way to accommodate each other's needs as the circumstances and conditions of the contract changes.

The third area of innovation — which focusses specifically on the issue of ADR being considered at this conference — is the increased use of specific conflict or dispute management systems incorporated into contract documents. These systems are not those proposed by litigation counsel after a dispute occurs. Rather I am speaking of processes or systems developed by parties who have said "let's anticipate and plan for conflict, let's put it into our contract documents and that is how we will deal with it when the time comes". It is almost impossible, or at least very difficult, to negotiate a process to resolve

a dispute when it occurs. On the other hand, it is relatively easy to negotiate that process or system at the beginning of a relationship when everybody is feeling very confident and happy about the relationship.

The conflict management systems that I am seeing in agreements (and which I am certainly promoting) focus significantly on the kinds of processes that would work most effectively in a particular relationship and that emphasize a highly collaborative working relationship between the parties. There is an increased emphasis on negotiation without legal counsel. These are internal discussions, followed by some sort of neutral — assisted processes that will be particularly effective in that relationship. For example, you may have an obligation to negotiate followed by a non-binding process like mediation, neutral evaluation or fact-finding. For example, the tunnel between Britain and France had a dispute resolution panel consisting of engineers, whose job it was to resolve any technical issues which arose. Another example, B.C. Hydro has negotiation followed by a referee to address construction issues. These processes are set out in some detail right in the contract documents themselves. If and when a dispute occurs, the process to resolve that dispute is certain and accessible.

When advising my clients, I often refer to my "theory of the yellow brick road". I advise my clients to avoid having to argue about process — rather they should always be able to focus their attention on the substantive issue before them. If a dispute resolution process is negotiated into the contract document and a dispute occurs, the parties will take the first step and will be aware of the process pathway, the "yellow-brick road", but they will not be focussing on each step as they go. They will simply be aware of its presence in their peripheral vision.

In the conflict or dispute resolution systems being adopted in contracts today, most emphasize first the collaborative nature of the relationship that they have by promoting a way for the parties to resolve the dispute by agreement. Secondly, the systems offer processes to give the parties neutral assistance to help them to overcome the obstacles they have in reaching agreement. But finally, an absolutely essential element of every effective conflict management system is an accessible process for final adjudication if the parties are not able to reach agreement.

Unfortunately, many people in the business community do not see the courts as an accessible place of final adjudication in commercial disputes any longer. That is the reason why we have had a growing interest in commercial arbitration in Canada. We are way behind the Americans in that respect. For example, in the context of construction law, since the 1920's the American construction industry has had reference to arbitration in its standard form documents. It is only since 1994 that we have had reference to an arbitration process that requires people to go into that process in the standard form documents in Canada. I believe that part of the reason why Canadians have been slow to adopt arbitration in commercial contracts is because, as I stated earlier, Canadians have always placed great value on their judicial system. But in recent history in several Canadian jurisdictions, the courts have not been able to respond to the commercial needs — to have commercial issues dealt with quickly, meaningfully and in a cost-effective way.

When conflict or dispute management systems are developed, the options for enforceable final adjudication are arbitration (and I include the concept of the private

court in this category), the courts, and in some cases administrative tribunals established by legislation. But why is accessible final adjudication important? It is important because the parties need to see that in the context of their commercial relationship, there is no value in strategic delay in resolving the dispute. If final adjudication is not easily accessible, an essential element of the conflict or dispute resolution system, required to encourage people to resolve disputes quickly and get on with their business, is missing.

Litigation is often used as a tool to delay the resolution of a dispute. That is why I often recommend arbitration with specified arbitration rules to provide an immediately accessible forum for final adjudication. Let me give you an example of how that can work. In one of my former lives I was the Executive Director of the B.C. International Commercial Arbitration Centre. One of the very first contracts that incorporated arbitration under the Centre's rules was negotiated between a Canadian company and an Asian company. This particular commercial arrangement fell apart almost as soon as it was put together and about two months after the parties negotiated the agreement I received an urgent call from a lawyer representing a Canadian lawyer saying, "what do we do now, the Asian party is refusing to co-operate and get on with this agreement²?" I said "I understand that you had an arbitration clause that referred you to the Centre's rules". They said "yes", and I said "You may find it helpful to know the following. If you issue a notice of arbitration and the Asian party chooses not to appear and participate in the process then under the Centre's rules, the Centre will appoint an arbitrator. If the Asian company chooses not to participate in the pleadings or to lead any evidence before the arbitrator, the arbitrator may make an award based upon the evidence heard. The award is enforceable in Canada against any assets of the Asian company in Canada and in the Asian country if that country is a party to the *New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards*".³ I was advised that after a conversation between the lawyers, the Asian company came to the negotiation table and the dispute was resolved without resort to arbitration.

Unless there is an accessible forum for final adjudication, efforts the parties have made to try to reach collaborative agreements may not be effective. In my view Canadian businesses will turn to the courts for final resolution of disputes only so long as the courts remain relevant and accessible.

The other reason why an effective conflict or dispute resolution system needs an accessible forum for final adjudication is because there should always be an increased cost to parties if they don't resolve a dispute at an earlier stage. The cost of going to the next stage in the system should always be greater because this cost will require the parties to look at the issues seriously sooner than they might otherwise do.

What then is the role of lawyers in light of these recent commercial developments? I have to be honest with you and say that lawyers have been slow to get

2. For the rules of the British Columbia International Commercial Arbitration Centre (BCICAC), visit its website at <http://www.bcicac.com/cfm/index.cfm>.

3. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, Can. T.S. 1986 No. 43, 330 U.N.T.S. 3, Schedule to the *United Nations Foreign Arbitral Awards Act*, R.S.C. 1985 (2d Supp.), c. 16.

the message. I think that there may be many reasons for this but time does not permit going into its details. However it is important to state that if lawyers fail to respond to the evolving needs of our commercial clients then non-lawyer firms will quickly and easily fill the void. There is good reason to believe that services in conflict management and dispute resolution issues — a mainstay of the legal system — are being eroded away. The less lawyers are looked to for provision of these services, the greater the impact as well on the judicial system. Non-lawyers have no standing in our courts. Non-lawyers will find other arenas in which to provide their services.

What is the role of the courts in these developments? First of all, I think the courts will not be abandoned as a place of final adjudication if they quickly address and resolve many of their own systemic weaknesses. The courts must make their adjudicative process more relevant, effective, efficient and accessible. It is my personal view that the courts will not be a better forum for adjudication by providing ADR services. Although there are many judges who have vast experience in and personal aptitude for providing ADR services, I am of the view that the resources of the court could be used more appropriately by ensuring that final adjudication in the courts are accessible to all Canadians — whether they be charged with a criminal offence or are suing a party for breach of a commercial contract. Our courts have judges who are experts in adjudication. Parties come before the courts because of that expertise.

I remember ten years ago when ADR proponents were inclined to say, "What we really have to tell people is that ADR is cheaper and faster than the courts!" At that time I said and have continued to say that it is a very weak argument for ADR to advocate its value based upon the struggle of the courts to become more efficient in their operations. Courts are in a time of evolution. They are faced with the challenges of modernization in a time of shrinking resources. They are struggling to maintain their relevance in the face of increased public demands.

If ADR processes are accessed outside of the courts I believe that more people will be able to resolve their disputes without the necessity of drawing upon judicial resources. I do not consider this to be a bad thing or a threat to the courts. Quite the contrary. I would hope that fewer minor commercial matters before the courts would permit the courts to be available to litigants who need the courts to address significant or important commercial cases in a timely and efficient manner.

There are other important ways the courts will be able to assist these commercial developments. The first way is to find ways to support these informal ADR processes that are being utilized. I have seen some cases already where parties are seeking the assistance of the courts to require a party to negotiate in good faith when it has agreed that it will do so. I have also seen some interesting cases considering the kinds of confidentiality obligations which are considered to be part of ADR processes, particularly if the parties have failed to articulate those obligations when embarking on the processes. Many times I think the courts are going to be asked to assist in the appointment of neutrals — both mediators and arbitrators — if the parties are unable to reach agreement. The courts have been and will continue to be asked to provide assistance in arbitrations that are taking place, to rule on challenges and jurisdiction and to make legal rulings on questions where the arbitrators or the parties would request that assistance. The courts can have a very supportive and helpful role in the effective use of ADR processes.

I also think that there will be a need to find meaningful and useful responses to some of the troubling issues which are just beginning to be identified in this area and again this is a place where courts could provide invaluable assistance. Some of these issues were articulated in the papers that were delivered by our American colleagues. For example, if we have arbitration agreements in standard form documents which are not negotiated but simply presented do we have the requisite agreement to oust the jurisdiction of the court? Should this kind of agreement be enforced? If we have dispute resolution bodies set up in an industry, can that body be considered to be providing a neutral and independent process or could a party argue successfully that there has been a denial of natural justice because the process is set up and controlled by one of the parties or by an industry to which that party belongs? If we have mandatory arbitration in legislation, is there an arguable constitutional issue? If you have a dispute between two parties who have an arbitration agreement and you have third parties which are not privy to that agreement but are parties to the dispute, what is the proper way to address the issue of forum?

The introduction or use of ADR processes is fraught with difficulty, partly because we have a legal system that does not yet have a lot of experience with these processes. We have legal counsel who have little understanding of how these processes work well and what kinds of supportive infrastructure they require to work well. We also have a certain level of discomfort between the legal system and those operating outside the legal system as each sector tries to come to grips with the overlapping areas of interest and expertise.

I think we are going to be in for some very interesting times in the next ten or twenty years as many of these issues are addressed and resolved in the Canadian commercial and legal context.

Thank you very much for the opportunity to attend your conference, to hear all the excellent speakers and to participate in your deliberations.